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

2018

National Seminar

Teachers Edition
- 2018-

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on the Federal Sentencing Guidelines

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Case Law - TSR and Restitution Answers

CASE LAW: SUPERVISED RELEASE CONDITIONS AND RESTITUTION 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?

Answer:

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

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?

Answer:

Yes. To reduce a restitution obligation, the defendant bears the burden of showing that she made payments or completed legitimate work. Here, as the defendant did not offer any evidence that she provided legitimate work on patients, she will not receive any reduction from

the $150,000 restitution order. *See U.S. v. Smathers*, 879 F.3d 453 (2d Cir. 2018) and *U.S. v. Foster*, 878 F.3d 1297 (11th Cir. 2018).

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.

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

Answer:

No. Forfeiture funds cannot be used to offset restitution. In *U.S. v. Sanjar*, 876 F.3d 725 (5th Cir. 2017), the Fifth Circuit stated: "[r]estitution and forfeiture serve distinct purposes. Restitution is remedial in nature; its goal is to make the victim whole. Forfeiture is punitive; it seeks to disgorge any profits or property an offender obtains from illicit activity." *See also, U.S. v. Arnold*, 878 F.3d 940 (8th Cir. 2017).

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?

Answer:

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a

computer. Imposing a condition involving computer filtering software does not appear to be related to the purposes listed in § 3553(a). *See U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015).

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?

Answer:

Probably not. While a district court can impose "sex offense" supervised release conditions on a defendant whose instant offense is not a sex offense, the conditions must be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant to impose the condition. Here, as the defendant has only one prior sex offense conviction that occurred 15 years ago and no other convictions, this condition would likely be struck down by the appellate court. *See U.S. v. Del Valle-Cruz,* 785 F.3d 48 (1st Cir. 2015) (similar condition reversed because "[t]he defendant has a single eighteen-year-old sex offense on his record. For the prior twelve years, he had stayed out of trouble, and had no criminal convictions other than failure to register as a sex offender.").

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 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?

Answer:

Probably. The difference between this scenario and scenario 5 is that here, while the defendant's prior sex offense was 15 years ago, the defendant was incarcerated for 14 of those years. In *U.S. v. Garcia*, 872 F.3d 52 (1st Cir. 2017), the First Circuit held that conditions requiring sex offender treatment and those restricting contact with minors may be appropriate despite the conviction not being a sex offense ... "where the intervening time between a distant sex offense and the present conviction is marked by substantial criminal activity." *See also*, *U.S. v. Douglas,* 850 F.3d 660 (4th Cir. 2017), *U.S. v. Childress*, 874 F.3d 523 (6th Cir. 2017), and *U.S. v. Ford*, 882 F.3d 1279 (8th Cir. 2018).

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."

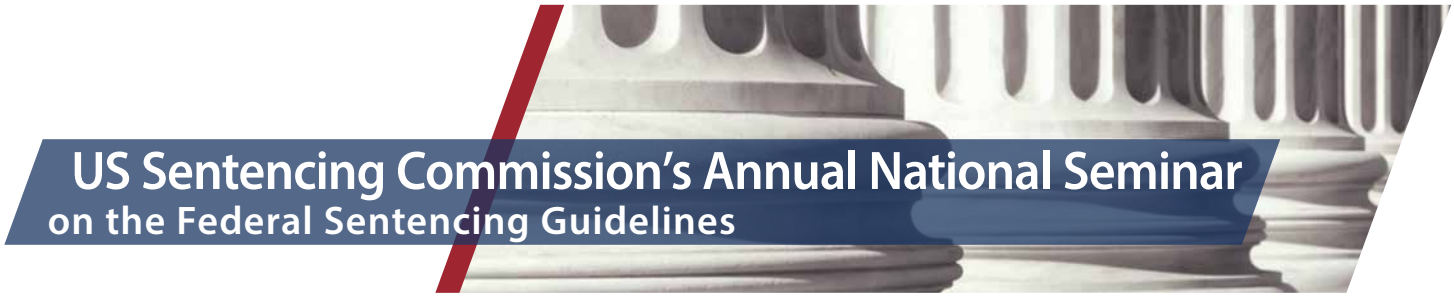
   Is this a reasonable condition?

Answer:

Probably not. A district court is not permitted to delegate to a probation officer whether a defendant must participate in a mental health program—the judge must decide whether treatment is mandatory. In *U.S. v. Franklin*, 838 F.3d 564 (5th Cir. 2016), the Fifth Circuit stated:

> If the district court intends that the therapy be mandatory but leaves a variety of details, including the selection of a therapy provider and schedule to the probation officer, such a condition of probation may be imposed. If, on the other hand, the court intends to leave the issue of the defendant's participation in therapy to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included."

Because the condition in the scenario appears to delegate the decision of treatment to the probation officer, this condition likely would be unreasonable.



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Categorical Answers

CATEGORICAL 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?

Answer:

Yes. If statutory alternatives carry different punishments, then the statute contains elements and is divisible. *See Mathis v. U.S.*, 136 S. Ct. 2243 (2016). This statute contains different penalties because one section carries a penalty of "not less than two years nor more than ten years" and another section carries a penalty of "not less than one nor more than five years. In *U.S. v. Covington*, 880 F.3d 129 (4th Cir. 2018), the Fourth Circuit, examining this statute, stated "[i]t is clear that the West Virginia statute question is divisible in that it lists two separate crimes with different elements and punishments.").

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?

Answer:

No. When determining the minimum conduct required for a conviction, circuit courts have required that "such conduct only include that in which there is a realistic probability, not a theoretical possibility the state statute would apply." *See U.S. v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017). To prove that the conduct is not violent and realistic, a defendant must "point to his own case or other cases in which the . . . courts in fact did apply the statute in the manner for

which he argues." *See U.S. v. Hill*, 890 F.3d 51 (2d Cir. 2018). Here, the defendant would have to show that a defendant had been convicted of Indiana battery with this set of circumstances.

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 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?

Answer:

No. In this circuit, the generic definition of robbery requires that a defendant take property from a person or person's presence by means of force or putting in fear. The D.C. robbery statute can be violated without force or putting in fear because the statute includes "sudden or stealthy seizure or snatching . . ." Thus, because someone could take a person's property by snatching it from under a table, which would not involve force or fear, the statute does not 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."

CATEGORICAL SCENARIOS

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?

Answer:

No. Under §4B1.2, controlled substance does not include an offer to sell a controlled substance. Because the plain language of this Colorado statute does not require the defendant to distribute a controlled substance under the definition of sell, the Colorado statute is broader than the definition of controlled substance at §4B1.2. Assuming the statute is not divisible, it would not qualify as a controlled substance offense under §4B1.2. *See U.S. v. McKibbon*, 878 F.3d 967 (10th Cir. 2017).

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Criminal History Answers

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~~ 0

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

No. The conviction for armed robbery should not receive any criminal history points.

Section 4A1.2(a)(1) states: "The term 'prior sentence' means any sentence previously imposed upon adjudication of guilt … for conduct **not part of the instant offense**." The armed robbery is relevant conduct to the defendant's instant offense of conviction, felon in possession. When applying §2K2.1 for the instant offense, the four-level increase at subsection (b)(6)(B) is applied based on the armed robbery conduct. This specific offense characteristic applies when the defendant possesses a firearm in connection with another felony offense. In this scenario, the Glock pistol charged in the instant offense is the same firearm that the defendant possessed when he committed the armed robbery in October 2016. As a result, the armed robbery is relevant conduct to the instant offense, and cannot be a "prior sentence" for the purpose of calculating criminal history points under §4A1.1.

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~~ 1
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?

No. The 2016 conviction for sale of heroin should receive one criminal history point.

Application Note 5(C) at the relevant conduct guideline (§1B1.3) discusses when conduct associated with a prior sentence **cannot** be included as relevant conduct. The note states that "offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction."

In this scenario, the sentence for the 2016 heroin sale was imposed on March 27, 2016. The indictment establishes that the offense of conviction occurred from April 29, 2016 through May 30, 2017. The conduct from the 2016 heroin sale cannot be considered to be the same course of conduct or common scheme or plan as the offense of conviction because the sentence was imposed prior to the acts constituting the instant federal offense. As a result, the 2016 heroin sale is a "prior sentence" and should be assigned one criminal history point under §4A1.1(c).

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?

Yes. The criminal history is scored correctly.

Two criminal history points at §4A1.1(d) apply when a defendant commits any part of the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

In this scenario, the defendant was released on bond for a theft offense in April 2017. The defendant committed the instant offense in May and June of 2017. The defendant was not sentenced for the theft offense until July 30, 2017. The defendant was not under a criminal justice sentence at any time during the commission of the instant offense. Therefore, an increase of two criminal history points under §4A1.1(d) is not applied.

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~~ 0

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

No. The DWI conviction should not receive any criminal history points.

Two criminal history points at §4A1.1(d) apply when a defendant commits any part of the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. In this scenario, the defendant has an outstanding warrant for violating the terms of his probation from a 2005 conviction for DWI when he commits the instant offense of embezzlement.

Application Note 4 at §4A1.1 states that for the purpose of §4A1.1(d), "a 'criminal justice sentence' means a sentence **countable** under §4A1.2." Application Note 4 further clarifies that "a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding … shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise **countable**, even if that sentence would have expired absent such warrant." The term **countable** means that the prior sentence (the prior conviction that resulted in the "criminal justice sentence") meets the appropriate criteria set forth in §4A1.2 and therefore is assigned criminal history points under §4A1.1(a), (b) or (c). In order to receive an increase for being under a criminal justice sentence at §4A1.1(d), the prior sentence must also be counted under §4A1.1(a), (b), or (c).

In this scenario, the DWI conviction is outside the applicable ten-year time frame (§4A1.2(e)(2)), and therefore, cannot be assigned criminal history points under §4A1.1(c). As a result, the two criminal history points for status under §4A1.1(d) also cannot be applied.

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?

Yes. The criminal history is scored correctly.

Section 4A1.2(k) provides instruction on prior sentences that involve revocations of probation, parole, mandatory release, or supervised release. Section §4A1.2(k)(1) states that where there is a "prior revocation … add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable." Section 4A1.2(k)(2) lists the circumstances where revocation of probation "may affect the time frame under which certain sentences are counted under §4A1.2(d)(2) and (e)."

The instant offense of robbery occurred on March 7, 2018. Pursuant to §4A1.2(e)(1), a prior sentence with a sentence length of greater than 13 months must be imposed within 15 years of the instant offense, or the defendant must be released from such a sentence within 15 years of the instant offense. The sentence for the prior conviction for second degree murder was imposed in 1989, well beyond the 15-year time frame. The defendant was released from imprisonment in 2001, also outside of the 15-year time frame. However, the defendant violated his terms of parole and the parole was revoked in 2006. According to §4A1.2(k)(1), the original term of imprisonment is added to any term of imprisonment imposed upon revocation. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the defendant's parole revocation in 2006, the date of last release on this second degree murder conviction is in 2008, which is now within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

The original sentence for the felony burglary was imposed November 2006. The defendant was sentenced to three years' custody, with two years suspended, followed by probation. Section 4A1.2(b)(2) provides that "if part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." Therefore, the length of the original sentence imposed in 2006 is one year of imprisonment. Pursuant to §4A1.2(e)(2), for any other prior sentence that is not a term of imprisonment exceeding 13 months, the applicable time frame is the imposition of a sentence within ten years of the defendant's commencement of the instant offense. The imposition of the original sentence in 2006 would be outside of the ten-year time frame. However, the defendant violated his conditions of probation in 2008. The probation was revoked, and the court imposed the two years of custody that were suspended at the time of the original sentencing. According to §4A1.2(k)(1), the original term of imprisonment (one year) is added to any term of imprisonment imposed upon revocation (two years). The length of the sentence for the felony burglary now totals three years imprisonment. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an

adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the revocation of probation for this felony burglary conviction, the date of last release for this defendant is 2010, which is within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

Finally, the prior conviction for driving while license suspended does not receive any criminal history points. Driving while license suspended is an offense that is listed at §4A1.2(c)(1). Section 4A1.2(c)(1) provides a list of offenses that count for criminal history points only if the sentence imposed is a term of probation greater than one year or a term of imprisonment of at least 30 days. The defendant received a $200 fine for this prior conviction, so no criminal history points are assigned.

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~~ 0
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

No. The importation of marijuana conviction should not receive any criminal history points.

The instant offense occurred January 2018. The original eight-month custody sentence for the importation of marijuana conviction was imposed on April 29, 2007. Any prior sentence that is not a term of imprisonment exceeding 13 months has an applicable time frame of imposition of a sentence within ten years of the defendant's commencement of the instant offense. The imposition of eight months incarceration is more than ten years prior to the commission of the instant offense.

This defendant violated the terms of his supervised release in May 2010. He received 30 days of custody. According to §4A1.2(k)(1), the original term of imprisonment (eight months) is added to any term of imprisonment imposed upon revocation (30 days). The length of the sentence for the importation of marijuana now totals nine months custody. Although the time imposed upon revocation brings the release date for this sentence within the ten-year time frame, §4A1.2(k)(2)(C) states that the date of the original sentence is to be used to determine the applicable time frame, not the date of release.

In other words, there are only two circumstances under which the date of last release from incarceration upon revocation of a sentence can be used. The first is in a case involving an adult term of imprisonment totaling more than one year and one month (§4A1.2(k)(2)(A)). The second is in the case of any other confinement sentence for an offense committed prior to the defendant's 18th birthday (§4A1.2(k)(2)(B)). In any other case, the date of the original sentence, not the date of last release from incarceration is to be used (§4A1.2(k)(2)(C)).

As a result, the date of the original sentence for the importation of marijuana conviction is outside the applicable time frame of ten years. Therefore, the prior conviction does not receive any criminal history points.

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?

Yes. The criminal history is scored correctly.

The earliest date of relevant conduct for the instant offense is January 2017. The defendant has two prior felony theft convictions. In 2005, he was sentenced to a term of probation for each theft conviction. The imposition of the original sentences is outside of the applicable ten-year time frame.

In 2007, both terms of probation are revoked based upon the same conduct for the felony robbery offense committed in 2006. For each revocation, a sentence of 15 months custody was imposed. Application Note 11 at §4A1.2 states that in a case where a revocation applies to multiple sentences, and the sentences are counted separately, the term of imprisonment imposed upon revocation can be added to the one sentence that results in the greatest increase in criminal history points.

Therefore, in this scenario, because the revocation applies to multiple sentences that are counted separately, the revocation time is only added to one of the felony theft offenses, not both. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (15 months). The length of the sentence for the felony theft conviction now totals 15 months custody. And, pursuant to §4A1.2(k)(2)(A), the applicable time frame for an adult term of imprisonment totaling more than one year and one month is determined by the date of last release from incarceration on such sentence. Due to the revocation of probation, the date of last release from incarceration for this defendant is 2009, which is within 15 years of the instant offense. Three criminal history points are therefore applied to the first felony theft conviction.

The revocation time is not added to the second felony theft conviction based on the instructions in Application Note 11. Therefore, without the addition of the revocation time, the original sentence imposed is outside of the applicable ten-year time frame. This conviction does not receive any criminal history points.

On January 12, 2007, the court imposed a 15-month sentence on the felony robbery conviction. This sentence is within the applicable 15-year time frame, and receives three criminal history points.

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~~ 0

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

No. The aggravated assault conviction should not receive a criminal history point.

The prior convictions for second degree burglary and aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior sentences are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of 15 months custody on each count to run concurrently with each other. A sentence of 15 months requires application of three criminal history points. These three criminal history points are applied to the "set" of convictions – the three criminal history points apply to both the second degree burglary and aggravated assault as a whole.

Section §4A1.1(e) provides for the addition of one point (maximum of three points total) for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was treated as a single sentence.

"Crime of violence" has the meaning given the term at §4B1.2 (Definition of Terms Used in §4B1.1 – Career Offender). A "crime of violence" is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, or is murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, involves use of explosives. Aggravated assault is enumerated as an offense that qualifies as a "crime of violence." Burglary is not enumerated as a "crime of violence" under §4B1.2 and otherwise would not qualify as a "crime of violence" under this definition.

Application Note 5 at §4A1.1 states that "in a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c)." In other words, there must be multiple convictions for crimes of violence that are treated as a single sentence before additional points can be applied under §4A1.1(e).

In this scenario, only one of the prior convictions that is treated as a single sentence is a crime of violence. Therefore, no additional point can be assigned to the aggravated assault conviction pursuant to §4A1.1(e).

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?

Yes. The criminal history is scored correctly.

The prior convictions for aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior sentences are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of six months custody on one count of aggravated assault to run consecutively to the eight months imposed on the other count of aggravated assault. This total sentence of 14 months requires application of three criminal history points. These three criminal history points are applied to the "set" of convictions – both aggravated assaults as a whole.

Section §4A1.1(e) provides for the addition of one point (maximum of three points total) for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was treated as a single sentence.

"Crime of violence" has the meaning given the term at §4B1.2 (Definition of Terms Used in §4B1.1 – Career Offender). A "crime of violence" is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, or is murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, involves use of explosives. Aggravated assault is enumerated as an offense that qualifies as a "crime of violence."

Application Note 5 at §4A1.1 states that "in a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c)." In other words, there must be multiple convictions for crimes of violence that are treated as a single sentence before additional points can be applied under §4A1.1(e).

In this scenario, the defendant does have multiple convictions for crimes of violence that are treated as a single sentence. However, Application Note 5 also states that points under §4A1.1(e) are added "for each such sentence **that did not result in any additional points under §4A1.1(a), (b), or (c)**."

In this scenario, both of the assault counts contributed to the calculation of criminal history points under §4A1.1(a). The six-month sentence for the second aggravated assault was imposed to run consecutively to the eight-month sentence for the first aggravated assault. The eight- month sentence alone would require application of two criminal history points. The six -month consecutive sentence added an additional criminal history point, because the aggregation of the two sentences increased the number of criminal history points from two to three.

As a result, an additional point cannot be assigned under §4A1.1(e).

US Sentencing Commission's Annual National Seminar
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Economic Crimes
Answers

ECONOMIC CRIMES SCENARIOS

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?**

Answer: $500 x 500 cards. Even though Defendant only sent 250 cards for reencoding, she can be said to have intended a loss on 500 cards, since that's the number of cards she obtained fraudulently. *See* App. Note §3(A)(ii). The fact that she hasn't yet used the fraudulently obtained cards is immaterial. A special rule at §2B1.1 App. Note 3(F)(i) states that the loss for any counterfeit or unauthorized access device is not less than $500 per access device.

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?

Answer: $500 x 100 cards. See answer to Question 1, as well as *U.S. v. Popovski*, 872 F.3d 553 (7th Cir. 2017) and *U.S. v. Moore*, 788 F.3d 693 (7th Cir. 2015).

What restitution is owed?

Answer: Only the amount that was actually taken from the victims - $400. The victim is entitled to cover their actual losses caused by the Defendant's count of conviction.

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?

Answer: Loss under the robbery guideline at §2B1.1(b)(7) will be determined by what Defendant stole. But, as to restitution, we can't know the answer yet. On these facts, the government hasn't shown that

the dye-stained bills were "so badly damaged that they [could not] be replaced." *See U.S. v. Anderson*, 866 F.3d 761 (7th Cir. 2017).

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?

Answer: The answer could be yes, more than 10 victims, or maybe. §2B1.1 App. Note 4(E) says that a victim in an identity theft case includes "any individual whose means of identification was used unlawfully or without authority." The answer depends on whether the court concludes that Defendant "used" the information by selling 98 of the stolen identifiers. On these facts, Defendant knew the stolen identities would be used by others, but whether he himself "used" them when he sold them may be subject to debate, and ultimately will have to be decided by the court.

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?

Answer: It depends on the circuit. Courts have taken different approaches to this type of offense. In *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015) the court, relying on §2B1.1 App. Note 3(A)(v)(II), said that the loss amount should reflect the monetary loss that "the defendant truly caused". In this case, the contracts were performed. The *Martin* court said that in such a case, "it would be unjust to set the loss resulting from [the] fraud as the entire value of the contracts." In contrast, in *United States v. Giovenco*, 773 F.3d 866 (7th Cir. 2014), the court relied on §2B1.1 App. Note 3(F)(v) to conclude that "loss shall include the amount paid for the property, services, or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services." The Eleventh Circuit has also held that loss in these cases is "the entire value of the [] contracts that were diverted to the unintended recipient." *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009).

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

Answer: The government received value since Defendant performed the contract to the agencies' satisfaction. On these facts, there's no actual loss.

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?

Answer: $3,432,776 + $89,011 = the full amount billed to Medicaid and Medi-Cal. A special rule at §2B1.1 App. Note 3(F)(viii) says that in health care fraud offenses, the aggregate dollar amount of the bills submitted to the government health care program is sufficient to establish the amount of intended loss, unless rebutted. But, on these facts, Defendant did not rebut the presumption.

"Because [defendant] failed to provide any evidence that she did not intend for Medicare and Medi-Cal to reimburse her for the full 3.5 million [] the district court did not clearly err in relying upon the total amount billed to determine intended loss. Nor, should we add, do counsel's arguments, unsupported by any evidence at trial or sentencing, that [defendant] was familiar with Medicare's reimbursement practices or that she did not expect to recoup the full billed amount suffice to rebut this presumption." *U.S. v. Walter-Eze*, 869 F.3d 891 (9th Cir. 2017)

What is the restitution amount?

Answer: Only the amount actually paid.

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 restitution is owed to Bank of America?

Answer: None. *See U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017). Bank of America was not entitled to restitution where it "deliberately turned a blind eye to evidence that the applications were patently false."

What is the loss amount?

Answer: Between 1.5 and 3.5 million dollars. *See U.S. v. Tartareanu*, 884 F.3d 741 (7th Cir. 2018)

"It is true, as we explained in our first opinion in this case, that Bank of America did not have clean hands in this scheme and applying the label of 'victim' seems inappropriate. [] We have recently made clear, however, that such a characterization is not relevant to the intended loss calculation.

Our cases have explained that intended loss is the amount that the defendant placed at risk, and neither the text of the Guidelines nor the relevant case law requires the government or the court to identify who, or what entity was at risk."

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 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?**

Answer: Yes. Though there were additional women with other characteristics that arguably made them more vulnerable that the victim mentioned in the question, the court of appeals made fairly broad statements about application of the enhancement. *See U.S. v. Sunmola*, __ F.3d __ (7th Cir. April 16, 2018). "Many of these women had been divorced, abandoned, widowed, or ignored by the men in their lives. [] These women were seeking companionship through online dating, making them particularly susceptible to falling into the vicious strap of a man who deceitfully made them believe they were in

love. Their prior relationships left these women unusually vulnerable to falling for [defendants'] deceitful tactics."

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?

Answer: $22,000. Each defendant is entitled to their own determination of relevant conduct. The analysis as set forth in §1B1.3 turns on the scope of the individual defendant's agreement. Once scope is determined, next determine whether other participants took actions in furtherance of that agreement, and whether those actions were foreseeable. On these facts, Defendant B only agreed to receive certain payments – those payments that Victim 2 sent to Western Union. This was after Victim 2 had already sent Defendant A many payments through other means. Defendant B's relevant conduct is limited to $22,000.

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

Answer: It's doubtful on these facts. Application of specific offense characteristics turns on the Defendant's relevant conduct. Once we establish that Defendant B is responsible for $22,000, yet we also know that Victim 2 sent a total of $310,000 to her nephew, it's hard to conclude that Victim 2's substantial financial hardship, if any, would be attributable to Defendant B's relevant conduct. Of course, this is a fact-intensive inquiry, and the court will have to make findings of fact.

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?

Answer: In this case, there are many victims. *See U.S. v. Myers,* 854 F.3d 341 (6th Cir. 2017).

"When the thefts were revealed, the stolen motor homes were taken away from the secondary victims and returned to the original owners or their insurance companies. Myers therefore can be said to have intended those losses to the secondary victims."

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

Answer: The court stated, "[w]hile []those secondary victims had a claim against the dealers who sold the motor homes to them, the claim may not be filed or filed successfully, and at least in one case had not been filed by the time of Myers sentencing. [] Because of these [sorts of complications that often accompany loss calculations] the Court need only make a reasonable estimate of the loss."

Who is owed restitution?

Answer: Every victim of the Myers' conduct of conviction. Restitution is this case will be complicated, but necessary.

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

Answer: There are likely to be many forms of monetary damages flowing from a case such as this. Victims had their homes stolen. They may have had to make alternate living arrangements, which could have many costs associated. The court will have to make findings as to the losses proximately caused by Myers' offense of conviction.

Will any victim-related enhancements apply?

Answer: Perhaps. With the theft of a home, it's likely that at least some victims suffered a substantial financial hardship. It's possible that in talking to the victims, Myers became aware of circumstances making the some of the victims vulnerable and continued to target them for that reason.

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.

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?

Answer: No. *See U.S. v. White*, 883 F.3d 983 (7th Cir. 2018). "White's guilty plea and his admission in the plea agreement are insufficient because they are too ambiguous on the key point. [] Our broad holdings about the evidentiary force of admissions in a plea agreement do not hold that a general admission in a plea agreement to a conspiracy or scheme spanning a certain time conclusively establishes individual participation during that entire time. [] He admitted that the scheme existed for four years and that he was part of the scheme. He did not admit that he was part of the scheme for the entire four years, and he was not asked whether he was."

See also, U.S. v. Metro, 882 F.3d 431 (3d Cir. 2018) (applying the principle to insider trading at USSG §2B1.4). When the scope of a defendant's involvement in a conspiracy is contested, a district court cannot rely solely on a defendant's guilty plea to the conspiracy charge.

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

Answer: Yes. In *White*, the court said, "we have no signals that might support a finding that any error was harmless. The district court explained [] that White's sentence was below the calculated guideline range to give him credit for a state sentence [] and to account for §3553(a) factors, like his "tough life" and the non-violent nature of his rimes. The judge did not otherwise signal that the guideline loss calculation did not affect the final sentence."

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?

Answer: No. *See U.S. v. Hearns*, 845 F.3d 641 5th Cir. 2017

"The district court did not use the term 'relevant conduct,' but it noted that the nine other transactions were 'foreseeable' to [defendant] as part of the conspiracy, a factor considered in a relevant conduct determination under §1B1.3(a)(B)(iii). [] But the district court 'must still make specific findings as to the scope of that conspiracy.' [] Although a PSR may be considered as evidence by the court when making sentencing determinations, bare assertions made therein are not evidence standing alone." (citations omitted).

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?

Answer: Yes, Delman is responsible for all of the conduct since he ran the scheme and directed the actions of others.

Is it correct as to Defendant Sharp?

Answer: No. This is a relevant conduct question. Sharp agreed to make purchases and nine cards were made in her name. She conducted two transactions. The scope of her agreement is not the same as the scope of the entire conspiracy. The fact that she knew that the others were doing is not the deciding factor. The analysis requires the court to determine the scope of her agreement, then look to the conduct of others that was in furtherance of her agreement and was reasonably foreseeable.

See U.S. v. Presendieu, 880 F.3d 1228 (11th Cir. 2018). "Once a district court makes 'individualized findings concerning the scope of criminal activity undertaken by a particular participant,' it [then] can determine foreseeability. [] Mere awareness that [the defendant is] part of a larger [] scheme is alone insufficient to show that [another defendant's] criminal activity is within the scope of [the defendant's] jointly undertaken criminal activity."

Should Sharp receive a mitigating role adjustment?

Answer: Maybe, on these facts, given her limited role. But, note that erroneously holding her accountable for the entire loss in the jointly undertaken criminal activity would result in the addition of 14 levels. The mitigating role adjustment could result in at most a four-level reduction. The importance of the relevant conduct analysis cannot be overstated!

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Guns and Drugs
Answers

GUIDELINE SCENARIOS - GUNS AND DRUGS

Scenario #1

Defendant Hill pled guilty to the following offenses:

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

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

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

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

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

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

Scenario #2

Defendant 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 - GUNS AND DRUGS

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 Methylone 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?

Answer: The 36.9 grams of cocaine hydrochloride will convert to 7.38 kg of marijuana (1gm=200 gm marijuana). Methylone is not currently listed in the Drug Equivalency Table, thus the court will have to find the most analogous substance per AN 6 of §2D1.1.
NOTE: As of May 1, 2018, the Commission has submitted an amendment to Congress that would adopt a class-based approach to synthetic cathinones (such as Methylone) and would provide a conversion of 1gm= 380 gm of marijuana. Should the court wish to use such a conversion prior to the amendment taking effect, they could vary using 18 U.S.C. § 3553(a).

The SOC for possession of a dangerous weapon will not apply because of the conviction for 18 U.S.C. §924(c). See §2K2.4 App. Note 4.

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

GUIDELINE SCENARIOS - GUNS AND DRUGS

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.

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

Answer: The SOC for possession of a dangerous weapon will not apply because of the conviction for 18 U.S.C. §924(c). See §2K2.4 App. Note 4.

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?

Answer: Yes, the Career Offender Override applies in this case. §4B1.1 instructs that the greater of the offense level from the table or the offense otherwise applicable is to be used. In this case, the offense level otherwise applicable is greater and applies.

Scenario #5

Defendant Emerson was convicted of the following:

GUIDELINE SCENARIOS - GUNS AND DRUGS

- Unlawful Importing, Manufacturing, or Dealing in Firearms in violation of 18 U.S.C. § 922(a)(1)(A) - 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

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?

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

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

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.

GUIDELINE SCENARIOS - GUNS AND DRUGS

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

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

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

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

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

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

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

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

GUIDELINE SCENARIOS - GUNS AND DRUGS

Scenario #7

Defendant Christopher was convicted of the following counts:

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

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

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

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

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

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

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

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

the residence where the drugs were located, although on a different floor of the residence.

Scenario #8

Defendant Wilson was convicted of the following counts:

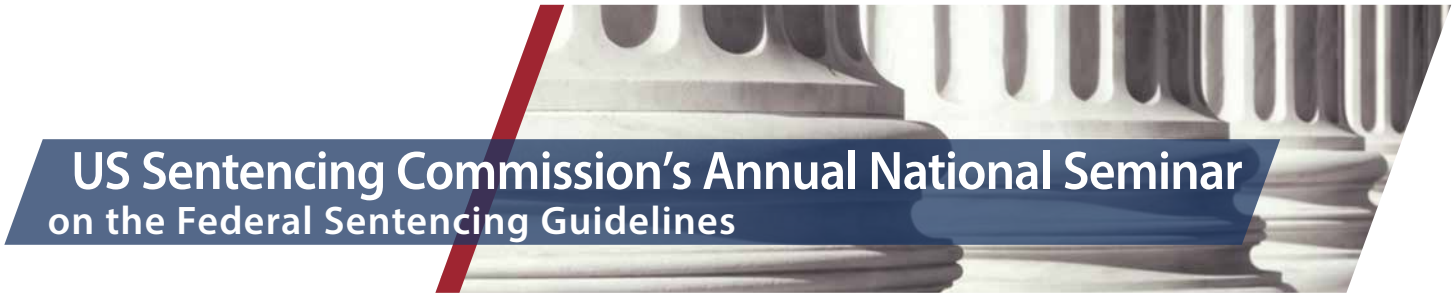
- Possession of a silencer in violation of 18 U.S.C. § 922(g)(1)- Applicable guideline is §2K2.1
- Possession of a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - Applicable guideline is §2D1.1 and
- Possessing a Firearm in Furtherance of a Drug Trafficking 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? Does the SOC for number of firearms at §2K2.1(b)(1) apply in this case?

Answer: Neither the SOC at §2D1.1(b)(1) nor §2K2.1(b)(6)(B) applies in this case because of the conviction for 18 U.S.C. § 924(c). See §2K2.4 App. Note 4. The court, however, is not precluded from giving any other SOCs at §2K2.1 and therefore, the SOC for number of firearms will apply in this case, resulting and an increase of 2 levels.



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Multiple Counts
Answers

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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

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

1. The defendant 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?

These counts group under §3D1.2(d).

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

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?

These counts group under §3D1.2(b).

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

The two counts use the same guideline (§2D2.2). However, that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count.

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim* – the same societal interest (the interests protected by laws governing controlled substances) is harmed. The counts do not involve separate instances of fear and risk of harm, and the counts involve two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Counts involving the same victim and two or more acts connected by a common criminal objective group under §3D1.2(b). As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

*"Victim" is defined in Application Note 2 at §3D1.2. It states that "for an offense in which there are no identifiable victims (*e.g.* drug or immigration offenses where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed."

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?

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

The two counts use the same guideline (§2A2.3). However, that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count.

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same

victim. Five different inmates were the victims of the assaults. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will 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 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?

These counts group under §3D1.2(d).

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

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?

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

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count*. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim Different societal interests are harmed – the interests protected by laws governing firearms and the interests protected by laws governing immigration. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will be assigned under §3D1.4.

* When calculating §2K2.1 for the felon in possession count, the four-level increase at §2K2.1(b)(6)(B) will not apply because the defendant did not possess the firearm "in connection with" the illegal entry. The possession of the firearm is not in furtherance of the illegal reentry offense and did not facilitate the illegal reentry offense.

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?

These counts group under §3D1.2(c).

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

The counts group under §3D1.2(c), because one of the counts contains a specific offense characteristic that embodies the conduct of the other count. When calculating §2K2.1 for the felon in possession count, a four-level increase at §2K2.1(b)(6)(B) will apply because the defendant possessed the Glock pistol "in connection with" the bank robbery. The Glock pistol is relevant conduct to the guns listed in the felon in possession count because possessing the Glock is the same course of conduct/common scheme or plan as the offense of conviction of felon in possession (See §1B1.3(a)(2) and Application Note 5(B).) This specific offense characteristic embodies the conduct of the other count of conviction, the bank robbery.

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

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

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 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?

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

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

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim – the same societal interest (the interests protected by laws governing immigration) is harmed. The counts do not involve separate instances of fear and risk of harm. The counts can be viewed as either involving the same act or transaction or two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Counts involving the same victim and the same act or transaction group under §3D1.2(a). Counts that involve the same victim and two or more acts connected by a common criminal objective group under §3D1.2(b). As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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?

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

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

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

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

The counts group under §3D1.2(c), because one of the counts contains a specific offense characteristic that embodies the conduct of the other count. When calculating §2D1.1 for the two drug counts, an increase at §2D1.1(b)(1) normally would apply because the defendant possessed a firearm during the drug offense. However, because the defendant is also convicted of 18 U.S.C. § 924(c), §2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count group, the felon in possession count group.

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

§2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count of conviction.

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

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?

These counts group under either §3D1.2(a) or (c), depending upon whether the cross reference to §2G2.1 at §2G2.2(c)(1) applies.

If the cross reference to §2G2.1 from §2G2.2(c)(1) does not apply, the counts group under §3D1.2(c) using the following analysis. These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. The counts group under §3D1.2(c) because one count has a specific offense characteristic that embodies the conduct of the other count. When applying §2G2.1, a two-level increase at specific offense characteristic (b)(3) applies, because the defendant "knowingly engaged in distribution" of the images produced. This specific offense characteristic embodies the conduct of the other count, distribution of child pornography. As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

However, if the cross reference at §2G2.2(c)(1) applies, the counts will group under §3D1.2(a) using the following analysis. The counts use the same guideline, §2G2.1 (the production count directly applies §2G2.1 from Appendix A, and the distribution count is cross-referenced to §2G2.1 after application of §2G2.2(c)(1)). However, §2G2.1 is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The two counts

involve the same minor victim and in fact involve the same act of production. The counts do not involve separate instances of fear and risk of harm, because the two guideline calculations are applied based on the same act of production of child pornography. Counts involving the same victim and the same act or transaction group under §3D1.2(a).

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 of 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?

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

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

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim – the post office and the individuals whose mail was stolen. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will be assigned under §3D1.4.

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Relevant Conduct Answers

Relevant Conduct Scenarios

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 Scenarios

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 Scenarios

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?

Answer: Five kilos, if the court finds by a preponderance of the evidence that this is the correct amount. Relevant conduct is not limited by the indictment (or the plea). The indictment tells us the legal parameters; *i.e.*, mandatory minimums and statutory maximums, but does not bind the court for relevant conduct purposes. Finally, relevant conduct must be proven by the preponderance of the evidence; not reasonable doubt.

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

Answer: Yes, Brooks could get this enhancement. The factors for the court to consider under U.S.S.G. §3B1.1 are listed in Application Note 4 including: decision making authority; claim to a larger share of the proceeds; recruitment of accomplices, participation in the planning of the offense; degree of control over others. In this case, Brooks supplied drugs to lower-level members of the conspiracy, he kept a larger share of the drug proceeds, and he was the person who coordinated with the supplier to get the drugs. Therefore, he would be eligible for the aggravating role enhancement

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?

Answer: Five kilos; the same quantity as Brooks. When looking at the acts of others, we look at the scope of Lucas' jointly undertaken activity and what he agreed to do. What did Lucas agree to do? Here, he agreed to work with Brooks to sell drugs. While the two men had different roles in the conspiracy, they worked together during the conspiracy and they had jointly undertaken criminal activity.

Relevant Conduct Scenarios

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

Answer: Yes, Lucas could get this enhancement. The factors for the court to consider under U.S.S.G. §3B1.1 are listed in Application Note 4 including: decision making authority; claim to a larger share of the proceeds; recruitment of accomplices, participation in the planning of the offense; degree of control over others. Lucas recruited others and he directed where the street-level dealers would sell. He also coordinated and planned the offense with Brooks.

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?

Answer: No, Greg will not be liable for the drugs others sold in the conspiracy. Pleading guilty to a conspiracy does not mean a defendant is liable for the all the actions of others in the conspiracy. Further, the fact that Greg knew that others were involved in the conspiracy is not sufficient for relevant conduct purposes. Instead, we look at his individualized undertaking. What did Greg agree to do? In this case, Greg had an agreement with Brooks and Lucas to sell a quantity of drugs. There is no indication that he worked with other low-level drug dealers (other than Celeste whose conduct is addressed below). Greg is liable for the drugs he sold.

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**?

   Answer: The drugs she sold on her own and the drugs Greg sold when she was with him. A defendant is always liable for the acts he or she commits during the offense of conviction, in preparation for the offense, and to avoid detection of the offense. So, Celeste is liable for the drugs she sold. The issue is whether she will also be liable for the drugs Greg sold. To answer that, we look at the scope of the jointly undertaken criminal activity. Here, Celeste joined Greg when he went to sell drugs because Greg was paranoid about getting shot. Whether she was a lookout or was there to call for back-up in the event Greg got hurt, Celeste has taken steps to join Greg's drug activity. Therefore, Celeste will liable for the drugs Greg sold when she was with him.

Relevant Conduct Scenarios

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?

   Answer: Yes, she will. Following the answer above, we know that Celeste's relevant conduct includes the Greg's activity, which includes selling drugs and carrying a weapon. The 2-level enhancement under §2D1.1(b) states that it applies when "a dangerous weapon was possessed." This means that offense, and all relevant conduct, involved the possession of a gun. Personal possession is not required to get this enhancement. Because Greg's conduct involved a gun, and because Greg's conduct was part of Celeste's relevant conduct, the 2-level enhancement will apply.

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?

   Answer: Yes, she is eligible for safety vale. Although she got the enhancement for the gun under §2D1.1(b)(1), she never possessed the gun. The 2-level enhancement under §2D1.1(b)(1) is broader and applies to conduct of conspirators under jointly undertaken criminal activity. Conversely, §5C1.2(a)(2), specifically states that safety valve applies if "the defendant did not . . . possess a firearm or other dangerous weapon." When the guideline uses the term "defendant," the conduct is limited to what the defendant did and does not apply to the actions of co-conspirators. Further, Application Note 4 clarifies that the term "defendant . . . limits the accountability of the defendant to his own conduct . . ." Because Celeste did not personally possess the gun, she can get safety valve.

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?

   Answer: Celeste is not precluded from getting a minor role reduction even though her relevant conduct was limited to her role in the conspiracy. The reduction applies to defendants who are "substantially less culpable than the average participant." Application Note 3B to §3B1.2 further states that "[a] defendant who is accountable under§ 1B1.3 (Relevant Conduct) only for the conduct in which the defendant was

personally involved who performs a limited function in the criminal activity may receive and adjustment under this guideline."

10. **Ellio**t and **Isaac** are sentenced last. **Elliot** and the government have agreed that **Elliott** 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?

Answer: Maybe, more facts are needed. Drugs are a type of offense for which expanded relevant conduct applies. In order to include the drugs that Elliot sold prior to this conspiracy, we have to determine whether prior drugs were part of the same course of conduct, common scheme or plan. That is, were they connected by common victims, common accomplices, common modus operandi? Was there similarity, regularity, temporal proximity between the offense of conviction and the prior drug sales? If the court finds that the prior drugs were part of the same course of conduct or common scheme or plan, that quantity will be added to the drug quantity calculation.

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**?

Answer: The amount of drugs Isaac sold AND the amount of drugs Elliot sold after Isaac entered the conspiracy. Isaac is not liable for the acts of others that occurred prior to Isaac entering the conspiracy, even if he knew about the criminal conduct. Knowledge is not enough for relevant conduct. While it is true that Isaac and Elliot lived together during the entire time of the conspiracy, until 2017, Isaac was working as a truck driver and he did not sell drugs. Isaac entered the conspiracy in 2017 so he is responsible for all drugs he sold after that date. AND, Isaac is also responsible for the drugs that Elliot sold after 2017 as well. Once Isaac entered into the conspiracy, he worked with Elliot and they had a jointly undertaken criminal activity.

US Sentencing Commission's Annual National Seminar
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RICO Offenses
Answers

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 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?

Answer: Prohibited activities in a RICO Conspiracy are defined by statute at 18 U.S.C. § 1961 and include, among other offenses, murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter and dealing a controlled substance or listed chemical. In this case, there are at least two underlying offenses for certain, PWID Oxycodone and Robbery. There is a circuit split regarding the standard of evidence used to determine the underlying offenses in a RICO Conspiracy. The 1st, 2nd, 6th and 7th Circuits use a preponderance of evidence standard while the 11th Circuit requires a beyond a reasonable doubt standard. Regarding Falcon's other activities as part of the Lincoln Park Crew, more information would be needed to establish additional underlying offenses.

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

Answer: No. §2E1.1(a)(2) directs that the combined offense level for the underlying offenses is to be used. That is, apply Chapters Two and Three Parts A, B, C, and D to the underlying offenses and determine a combined offense level, then compare that combined offense level to the 19.

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Sex Offenses
Answers

SEX OFFENSES SCENARIOS – 2018 WORKBOOK ANSWERS

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) (the distribution SOC)?

Answer:

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

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?

Answer:

Yes. Section 2G2.2, Application Note 1 defines pattern of activity as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by a defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same minor; or (C) resulted in a conviction for such conduct. Here, while the defendant abused his step-daughter 30 years before the instant offense and there was no conviction for that conduct, the court can consider this conduct in determining whether to

apply the pattern of activity enhancement. Almost every circuit has permitted a court to consider sexual exploitation that occurred over 15 years prior to the instant offense of conviction. *See, e.g., U.S. v. Alberts*, 859 F.3d 979 (11th Cir. 2017) (conduct occurred over 30 years prior to instant offense).

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 2-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 4-level increase for a minor under 12 under §2G2.1(b)(1)(A).

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

Answer:

Yes – the 2-level enhancement at §2G2.1(b)(1)(B) (minor at least age 12 but less than age 16) applies; not the 4-level enhancement at §2G2.1(b)(1)(A) (minor less than age 12).

Section 2G2.1 (Production) is on the "excluded list" at §3D1.2(d), therefore relevant conduct will not include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)). Thus, the relevant conduct only includes those acts in the production occurring on July 15, 2016 – In this case the production only included the 14-year-old child cited in the indictment. The video of the nine-year-old child produced on July 7 is not relevant conduct, so the enhancement for a "minor under 12" does not apply.

Scenario 4

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

Answer:

Yes, the special instruction at §2G2.1(d)(1) applies. Section 2G2.1, App. Note 7 provides that the special instruction "directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

In this case, while only the 10-year-old minor was cited in the count of conviction, the production also included the additional child in the same video, so the special instruction under §2G2.1(d) will apply to the second child.

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?

Answer:

§2G1.3 has four base offense levels ((a)(1)-(a)(4)), including
(a)(1) - BOL 34, if convicted under § 1591(b)(1), and
(a)(4) – BOL 24 otherwise

Base offense level 34 applies even though the defendant was not convicted under § 1591(b)(1) because the defendant was convicted of a conspiracy offense that establishes that the substantive offense was by force, fraud, or coercion or the child was less than age 14 (pursuant to § 1591(b)(1)). Title 18, Section 1594(c) is Conspiracy to violate 18 U.S.C. § 1591 (Sex trafficking of children by force, fraud, or coercion). Section1B1.3, App. Note 7 provides instructions on determining base offense levels when a factor requires a conviction under a particular statute:

> Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy . . . in respect to that particular statute.

Because § 1594's underlying offense is offense under § 1591(b)(1), base offense level 34 should apply.

But see U.S. v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) (holding that the base offense level for a conviction under § 1594(c) Conspiracy to violate § 1591 is 24).

SEX OFFENSES SCENARIOS – 2018 WORKBOOK ANSWERS

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?

Answer:

No. The minor transported on February 1st is not within the relevant conduct of the offense of conviction (the transportation of the minor on February 5th), so the special instruction at §2G1.3(d)(1) will not apply regarding the prostitution of that minor.

The applicable guideline for the offense of conviction, §2G1.3 (Commercial Sex Acts with Minor; Transportation; Travel) is not on the" included" or "excluded" list at §3D1.2(d). However, because this offense is similar to the offenses covered by §2G1.1 (Commercial Sex Acts with Adults), which is on the "excluded list" at §3D1.2(d)), §2G1.3 should be treated similarly. For offenses on the excluded list, the court may not use "expanded relevant conduct" at §1B1.3(a)(2), so acts in the same course of conduct or common or plan as the offense of conviction will not be used in application. Because the offense of conviction is for the transportation of a minor for prostitution on February 5th, the transportation of the minor on February 1st did not occur "during" the instant offense of conviction conduct, and is not relevant conduct.

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 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?

Answer:

Yes. §4B1.5(b)(2) applies when the offense of conviction is a "covered sex crime," as defined in Application Note 2 [which includes the defendant's instant offense of production of child porn], and the defendant engaged in a "pattern of activity" involving "prohibited sexual conduct."

Pattern of activity is defined at App. Note 4(B) as at least two separate occasions of the defendant engaging in prohibited sexual conduct with a minor. Prohibited sexual conduct is defined at App. Note 4(A), and includes both the production of child pornography, and the commission of a sex act with a minor, which are the acts in which this defendant engaged on

two separate occasions. Although one of the acts occurred during the offense of conviction, that can count as one of the two occasions required under §4B1.5. *See U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2017).

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?

Answer: Yes.

If so, under which grouping rule?

Answer:

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