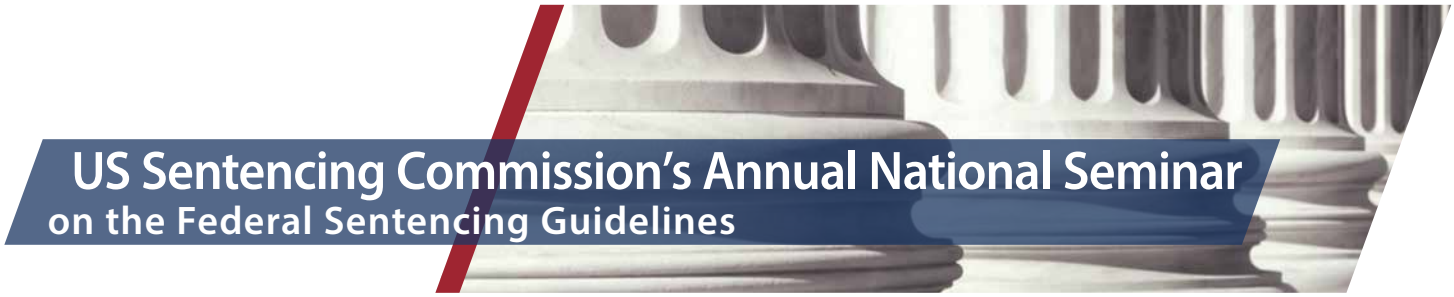
US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2019

National Seminar

Teachers Edition

September 3 - 6, 2019
New Orleans Marriott



US Sentencing Commission's Annual National Seminar
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National Seminar

Table of Contents

US Sentencing Commission's Annual National Seminar
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National Seminar

Case Law - Categorical Approach Answers

September 3 - 6, 2019
New Orleans Marriott

CASE LAW UPDATE - CATEGORICAL SCENARIOS

Scenario 1:

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence?

Answer: Yes, because after *Stokeling*, if a robbery statute requires the defendant to overcome the victim's resistance, the offense has as an element the use, attempted use, or threatened use of physical force against the person.

Scenario 2:

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence?

Answer: No, because the offense involves snatching which, does not involve overcoming the victim's resistance.

Scenario 3:

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: It is a crime of violence. 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. To prove that the conduct is not violent and realistic, circuit courts require the defendant "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." Here, the defendant would have to show that a defendant had been convicted of Indiana battery with this set of circumstances.

Scenario 4:

The defendant has a prior conviction for Oklahoma Pointing a Firearm which provides:

> It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol, or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for any purpose of injuring, either through physical injury or mental or emotional intimidation, or for purposes of whimsy, humor or prank....

Both the government and defendant agree that the statute is not divisible. The defendant argues that pointing a firearm at a person for the purposes of "whimsy, humor, or prank" does not involve the use of force and is not a crime of violence under §4B1.2.

The government argues that the defendant has not located one case where someone was convicted under the "whimsy, humor, or prank" part of the statute, and because the rest of the statute requires threatening the use of force or causing injury, the statute is a crime of violence.

Is the government correct that the defendant must point to a case to show that someone was convicted of pointing a firearm at a person for purposes of whimsy, humor, or prank for the offense to be a crime of violence?

Answer: No. The statute lists means to commit the crime in a non-violent manner. The statute of not divisible, and some means of committing it do not qualify as violent under the force clauses of the Armed Career Criminal Act at the crime of violent definition of USSG § 4B1.2.

Scenario 5:

The defendant was convicted of 21 U.S.C. § 841(b)(1)(A) and has two prior convictions under a South Carolina drug statute (44-53-375(B)) which provides:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base [that is, crack cocaine] ... is guilty of a felony.

The government believes the defendant is a career offender because the offense meets the definition of controlled substance offense at §4B1.2

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

Is the government correct that the South Carolina statute on its face qualifies as a controlled substance offense under §4B1.2 and that the defendant is a career offender?

Answer: No. Because the South Carolina statute includes "purchasing meth or crack" and "controlled substance offense" does not include "purchasing drugs", the offense is not a match under the categorical approach.

Scenario 6

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?

Yes. If statutory alternatives carry different punishments, then the statute is divisible. 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."

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National Seminar

Case Law - Hot Topics

Answers

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Scenario 1:

Defendant pled guilty to Felon in Possession (18 U.S.C. § 922(g)) on 6/1/2019.

Defendant has three prior convictions. He robbed three different victims in New Orleans on 11/24/2010. The first robbery took place on Bourbon St. at 10:00 p.m., the second took place on Royal St. at 10:15 p.m., and the third was at Frenchman St. at 10:45 p.m.

He pled guilty to all three robberies, sentenced on 6/1/2011, and received a six year sentence for each robbery to run concurrently.

The defendant agrees that the robbery offense would qualify as a violent felony under the Armed Career Criminal Act (ACCA), but claims that because these offenses were treated as a single sentence under §4A1.2, he only has one prior violent felony (not the three that are required under the Act).

Assuming the robbery statute is a violent felony, does the ACCA apply?

Answer:

Yes. The ACCA applies "[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another." In determining whether the defendant's offenses were committed on occasions different from one another, the court does not use the single sentence rule at §4A1.2, but must determine if the offenses arise from "separate and distinct criminal episodes" or "if the defendant had the opportunity to engage in another crime after he concluded the first crime." In making this determination, the court must rely only on *Shepard* documents. *See U.S. v. Hennessee*, 932 F.3d 437 (6th Cir. July 30, 2019) and *U.S. v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018). Here, because the robberies took place on different streets and at different times, the court would likely find that these offenses would qualify as three predicate convictions.

Scenario 2:

The defendant was arrested in March 2019 while in possession of a firearm. The metal serial-number plate had been removed from the frame of the handgun, but it had a legible serial number on its slide. The number on the slide was used to trace the firearm. The defendant pled guilty to Felon in Possession of a Firearm.

The probation officer applied a four-level enhancement pursuant to §2K2.1(b)(4), which provides an increase if any firearm had an altered or obliterated serial number. The defendant objected to the enhancement because the serial number itself was not altered or obliterated;

rather, the firearm was altered by the removal of the serial-number plate and the weapon could still be traced.

Should the enhancement apply?

Answer:

Yes. Removal of the metal serial-number plate from the frame of a firearm is a material change and alters the serial number, so the enhancement will apply. *See U.S. v. Jones*, 927 F.3d 895 (5th Cir. 2019), and *U.S. v. Thigpen*, 848 F.3d 841 (8th Cir. 2017).

Scenario 3:

Defendant pled guilty to one count of possession of child pornography on February 1, 2019. The defendant used a file sharing program called Ares to download images of child pornography.

The government believes that the 2-level increase for distribution of pornography under §2G2.2(b)(3) applies based on the use of the file sharing program. The defendant argues that he did not know how the program worked.

Should the defendant receive an enhancement pursuant to §2G2.2(b)(3)?

Answer:

To apply the 2-level enhancement at §2G2.2(b)(3)(F), the defendant must knowingly engage in distribution of the images. Thus, mere use of a peer-to-peer (file sharing program) is insufficient to apply the enhancement. *See U.S. v. Lawrence*, 920 F.3d 331 (5th Cir. 2019). The government will have to prove that the defendant knew that the images were being shared, or present evidence to support an inference of knowledge based on the defendant's characteristics. In *U.S. v. Montanez-Quinones*, 911 F.3d 59 (1st Cir. 2019), the First Circuit held that the knowledge requirement can be inferred if the government proves the defendant knew how file sharing programs operated. For example, the government could introduce evidence showing the defendant was a sophisticated and long-time computer user or that he moved files around the program. Here, the government did not introduce any evidence to prove that the defendant knew how the file sharing program was sharing images, so on these limited facts, the enhancement would not apply.

Scenario 4:

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, 2019. The defendant admitted that he had sex with this student another time on June 30, 2019. The probation officer has applied §4B1.5(b) (pattern of activity) based on these two instances of sexual conduct. 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 pornography], 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. Fox*, 926 F.3d 1275 (11th Cir. 2019) and *U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2017).

Scenario 5A:

The defendant was convicted of conspiracy to distribute cocaine in violation of 18 U.S.C. § 841(b)(1)(b) and is facing a 5-year mandatory minimum. The defendant is currently serving a 2-year sentence in state custody for possession of a weapon and has served one year for that offense. The weapon that was the basis for the state sentence was possessed during the federal drug conspiracy and the court applied the weapon enhancement at §2D1.1(b)(1).

The judge believes that the appropriate drug sentence should be 60 months and is planning on adjusting the sentence to 48 months based on §5G1.3(b), which provides that if the undischarged sentence is relevant conduct to the federal offense, the court should adjust the sentence based on the time the defendant has already served. The government argues that because there is a 5-year mandatory minimum, the court cannot adjust the sentence to 48 months and must impose a 60-month sentence.

Can the court adjust the sentence to 48 months?

Answer:

Yes. The court can sentence the defendant to 48 months because the total period of incarceration is 60 months (48 months plus the 12 months he has served on the undischarged state sentence). *See U.S. v. Rivers,* 329 F.3d 119 (2d Cir. 2003), *U.S. v. Dorsey*, 166 F.3d 558 (3d Cir. 1999), and *U.S. v. Ross*, 219 F.3d 592 (7th Cir. 2000), *U.S. v. Drake*, 49 F.3d 1438 (9th Cir. 1995), and *U.S. v. Kiefer*, 20 F.3d 874 (8th Cir. 1994).

Scenario 5B:

Same facts as above, but the defendant has finished serving his firearms sentence, so §5G1.3 does not apply. However, the court wants to depart under §5K2.23 (Discharged Terms of Imprisonment) and sentence the defendant to 36 months to account for the years the defendant served on the weapon charge because it was relevant conduct to the drug offense.

Can the court sentence below the mandatory minimum based on §5K2.23?

Answer:

No. §5K2.23 does not permit a district court to adjust a federal sentence below the mandatory minimum to account for a related state sentence that has been discharged. *See U.S. v. Moore*, 918 F.3d 368 (4th Cir. 2019) and *U.S. v. Lucas*, 745 F.3d 626 (2d Cir. 2014).

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Case Law - Restitution

Answers

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CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 1:

The defendant fraudulently obtained credit cards. The defendant used five of the cards, charging $1,000 on each card. The court determined the §2B1.1 loss amount as $7,500, based on $5,000 for the five cards used, and another $2,500 based on the $500 per card rule at §2B1.1. Assuming none of the stores where the cards were used were reimbursed at the time of sentencing, what is the amount of restitution?

Answer:

$5,000. While the amount of loss for purposes of §2B1.1 can include intended loss, restitution can only include actual loss suffered by the victims. Here, because only five of the cards were used, the restitution amount could not include the $500 special rule for the five unused cards. *See U.S. v. Lundstrom*, 880 F.3d 423 (8th Cir. 2018) and *U.S. v. Bussell*, 414 F.3d 1048 (11th Cir. 2010).

Scenario 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. The defendant argues that $50,000 of the amount paid by Medicare was for bills that involved legitimate services he provided to patients, but the defendant had submitted no evidence showing the work was legitimate. The court orders $150,000 in restitution, concluding that the defendant has the burden to prove that $50,000 was for legitimate work and the defendant did not offer any evidence.

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 completed legitimate work and that Medicare would have paid for those services. Here, as the defendant did not offer any evidence that she provided legitimate work to the patients, she will not receive any reduction from the $150,000 restitution order. *See U.S. v. Ricard*, 922 F.3d 639 (5th Cir. 2019), *U.S. v. Smathers*, 879 F.3d 453 (2d Cir. 2018) and *U.S. v. Foster*, 878 F.3d 1297 (11th Cir. 2018).

Scenario 3:

The defendant was convicted of using a company he controlled to defraud a lender of tens of millions of dollars. After the fraudulent scheme came to light and the company went bankrupt, the lender conducted a private investigation of defendant's fraud and participated as a party in the company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, the lender spent nearly $5 million in legal, accounting, and consulting fees related to the fraud. After the defendant pleaded guilty to federal wire fraud charges, the court ordered him to pay restitution to the lender for those fees because under the Mandatory Victim Restitution Act (MVRA), the defendant must "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

Was the court's order correct?

Answer:

No. The Supreme Court held that this MVRA provision regarding reimbursement is limited to government investigations and criminal proceedings and does not include expenses related to private investigations and civil or bankruptcy proceedings. *See Lagos v. U.S.*, 138 S. Ct. 1684 (2018).

Scenario 4:

The defendant is charged with federal carjacking. He pistol-whipped a woman as she was entering her car and then stole the car. The woman was taken to the hospital with a concussion and a broken nose and jaw. The government introduced into evidence medical bills showing her medical expenses were $25,000. The defendant pled guilty to felon in possession under 18 U.S.C. § 922 and the court ordered $25,000 in restitution to the victim of the carjacking.

Is this restitution order correct?

Answer:

No. Restitution is determined based on the offense of conviction and there is no identifiable victim of felon in possession offense. If the plea agreement specified that the defendant would pay restitution to the victim, then the court could order restitution to the victim. *See U.S. v. West*, 646 F.3d 745 (10th Cir. 2011).

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

Scenario 5:

The defendant is convicted of tax evasion under 26 U.S.C. § 7201. Can the court order restitution as a criminal monetary payment?

Answer:

No. The court can order restitution in tax cases under 26 U.S.C. § 7201, but it must be as a condition of supervised release, not as a criminal monetary payment. *See U.S. v. Rankin*, 929 F.3d 399 (6th Cir. 2019), *U.S. v. Jansen*, 884 F.3d 649 (7th Cir. 2018), and *U.S. v. Westbrooks*, 858 F.3d 317 (5th Cir. 2017). Thus, the defendant cannot be ordered to pay restitution while in prison. The court should examine the defendant's ability to pay restitution in determining whether to order restitution immediately or in setting up a payment schedule.

Scenario 6:

The defendant is convicted of kidnapping and assault. The court orders $50,000 in restitution under 18 U.S.C. § 3663. The defendant challenges the order because he is indigent and believes restitution should waived.

Can the court waive the amount of restitution based on the defendant's inability to pay restitution?

Answer:

No. Section 3664(f)(1)(A) mandates that the court impose restitution for the "full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *See U.S. v. Brazier*, 933 F.3d 796 (7th Cir. August 12, 2019).

Scenario 7:

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 2012 Louisiana conviction for sexual assault. He received a two year sentence for having sexual relations with his 15-year old neighbor. The defendant has no other prior sex offense convictions.

At sentencing, the probation officer is recommending lifetime supervised release and the following supervised release condition:

"Defendant is prohibited from viewing adult pornography."

Is this an appropriate supervised release condition in this case?

Answer:

Probably not. This condition would be considered a special condition of supervised release and it 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). Here, the defendant's prior sexual conviction for assaulting his 15-year old neighbor does not seem to involve anything related to watching adult pornography. Imposing a condition banning adult pornography on this record does not appear to be related to the purposes listed in § 3553(a). *See U.S. v. Eaglin*, 913 F.3d 88 (2d Cir. 2019).

Scenario 8:

The defendant was convicted of 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:

"Supervised release condition requiring defendant to notify third parties if the probation officer determines the defendant poses a risk to them."

Assuming the defendant is a risk to others, is this a reasonable condition?

Answer:

Probably not. Because this condition allows a probation officer to restrict a defendant's significant liberty interest, it is an improper delegation of authority. Courts distinguish between permissible delegations that merely task the probation officer with performing ministerial or support services related to the punishment imposed and impermissible delegations that allow the officer to decide the nature or extent of the defendant's punishment. *See U.S. v. Cabral*, 926 F.3d 687 (10th Cir. 2019), *U.S. v. Boles*, 914 F.3d 95 (2d Cir. 2019), and *U.S. v. Franklin*, 838 F.3d 564 (5th Cir. 2016).

Scenario 9:

The defendant is convicted of drug trafficking. The defendant admits to the probation officer during an interview that he is addicted to heroin and oxycodone. The probation officer recommends mental health treatment as a condition of supervised release based on this information.

Is this a proper condition of supervised release?

Answer:

Probably not. A defendant's drug addiction does not mean that the defendant has a mental health problem requiring treatment. The court could impose drug treatment as a supervised release condition on these facts, but not mental health treatment without more evidence of mental illness. *See U.S. v. Bree*, 927 F.3d 856 (5th Cir. 2019).

Scenario 10

The defendant was convicted of possession of child pornography. The court included a supervised release condition ordering the defendant to undergo polygraph testing, but she did not mention this condition at sentencing.

Is this a proper supervised release condition?

While polygraph testing has been authorized in child pornography cases, because it is a special condition of supervised release, it must be announced at sentencing and not just included in a written judgement. *See U.S. v. Washington*, 904 F.3d 204 (2d Cir. 2018) and *U.S. v. James*, 792 F.3d 962 (8th Cir. 2015).

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Criminal History Implications - Answers

September 3 - 6, 2019
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SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

ARE THESE SCORED CORRECTLY?

1. On April 29, 2018, the defendant, armed with a Glock pistol, carjacked a vehicle. After the carjacking, he led police on a high-speed chase. After crashing the vehicle, the defendant exited the car and fired the Glock pistol at one of the officers. The officer was grazed in the arm by a bullet and required stitches. The defendant was arrested by state police on the scene. The state charged the defendant with aggravated assault for the assault on the police officer.

On May 15, 2018, the defendant was charged in federal court with carjacking (18 U.S.C. § 2119) and possession of a firearm in connection with a crime of violence (18 U.S.C. §924(c)). The defendant pleaded guilty to both counts. The guideline applicable to the carjacking is §2B3.1.

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
04/29/2018	Aggravated Assault (felony) Anne Arundel County Circuit Court Annapolis, MD	06/13/2018: 18 months custody	§4A1.1(a)	~~3~~ 0

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant is a career offender.

No. The aggravated assault should not receive any criminal history points.

Section 4A1.2 states: "The term 'prior sentence' means any sentence previously imposed upon adjudication of guilt … for conduct **not part of the instant offense**." The aggravated assault is

relevant conduct to the defendant's instant offense of conviction, carjacking. The defendant committed the assault against the police officer to avoid detection or responsibility for the offense of conviction. When applying §2B3.1 for the instant offense, the increase for bodily injury at subsection (b)(3) is applied based on the assault of the officer. As a result, the assault is relevant conduct to the instant offense, and cannot be a "prior sentence" for the purpose of calculating criminal history points under §4A1.1.

2. 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 indictment alleges that the defendant, on December 17, 2018, distributed over 50 grams of methamphetamine.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
11/15/2012	Distribution of crack cocaine (felony) Hennepin County District Court Minneapolis, MN CR-14-98484	01/07/2013: 60 days custody	§4A1.1(b)	2
11/15/2012	Distribution of crack cocaine (felony) Hennepin County District Court Minneapolis, MN CR-14-98652	01/07/2013: 60 days custody, to run concurrent with CR-14-98484	§4A1.2(a)(2)	0
12/12/2012	Possession with Intent to Distribute Crack Cocaine (felony) U.S. District Court District of Minnesota	05/22/2013: 30 months custody	§4A1.1(a)	3

In 2013, when the defendant was sentenced in federal court for possession with intent to distribute crack, the prior state convictions did not count for criminal history because they were relevant conduct to the federal offense. Therefore, the defense attorney argues that the

prior state and federal cases should be treated as a single sentence so that his client is not a career offender.

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant is a career offender.

Yes. The criminal history is scored correctly.

The two state offenses for distribution of crack cocaine are treated as a single sentence because the offenses were not separated by an intervening arrest, and the sentences were imposed on the same day. Sixty days custody was imposed for each count to run concurrently to each other. When concurrent sentences are imposed on multiple prior sentences treated as a single sentence, you use the longest sentence to determine the amount of criminal history points. A prior sentence of imprisonment of at least sixty days results in the assignment of two criminal history points.

Three points are assigned to the prior federal offense of possession with intent to distribute crack cocaine because the sentence exceeded 13 months and it is within 15 years of the instant offense. This prior federal offense is counted separately from the prior state distribution offenses because the prior state offenses and prior federal offense are separated by an intervening arrest.

The fact that these prior state and federal offenses of conviction were relevant conduct to each other in 2013 has no bearing on the calculation of criminal history points.

3. Defendant pleaded guilty to one count of possession with intent to distribute fentanyl, in violation of 21 U.S.C. § 841 (applicable guideline §2D1.1). The indictment alleges that the defendant, from August 2018 through October 2018, distributed over 40 grams of fentanyl.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
10/12/2011	Theft (felony) Miami-Dade Circuit Court Miami, FL	12/30/2011: 60 days custody	§4A1.1(b)	2
09/14/2013	Burglary (felony)	11/27/2013: 6 months custody	§4A1.1(b), §4A1.2(a)(2)	2

	Miami-Dade Circuit Court Miami, FL 2010-CR-34873			
09/14/2013	Aggravated Assault (felony) Miami-Dade Circuit Court Miami, FL 2010-CR-37124	11/27/2013: 2 months custody consecutive to 2010-CR-34873	§4A1.2(a)(2), §4A1.1(e)	~~1~~0

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant has five criminal history points and is automatically ineligible for relief under the statutory safety valve.

No. The aggravated assault should not receive a criminal history point under §4A1.1(e).

The prior convictions for burglary and aggravated assault are properly treated as a single sentence pursuant to §4A1.2(a)(2). The prior offenses are not separated by an intervening arrest and are sentenced on the same day. The court imposed a sentence of six months custody on the burglary count and two months custody on the assault count to run consecutively. A total sentence of eight months requires application of two criminal history points under §4A1.1(b).

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.

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).

"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.

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).

4. 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 January 29, 2017 through May 30, 2017, distributed over 100 grams of heroin.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
06/22/2000	Robbery (felony) Danville Circuit Court Danville, VA	08/03/2001: 20 years' probation	§4A1.2(e)(2)	0
05/29/2013	Theft (misdemeanor) Bibb County Superior Court Macon, GA	06/15/2013: 90 days custody; 15 days credit time served	§4A1.1(b)	2
02/18/2015	Sale of Methamphetamine (felony) Bibb County Superior Court Macon, GA	04/03/2015: 3 years' imprisonment, 2 years suspended	§4A1.1(b)	2

The defendant committed the instant offense while serving a term of probation for robbery. Therefore, two additional criminal history points were assigned under §4A1.1(d). The defendant has a total of six criminal history points.

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant has six criminal history points and is automatically ineligible for relief under the statutory safety valve.

No. There are no points assigned under §4A1.1(d) for being under a criminal justice sentence at the time the instant offense was committed.

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 committed the instant offense while serving a 20-year probation sentence.

However, Application Note 4 at §4A1.1 states that "a 'criminal justice sentence' means a sentence **countable** under §4A1.2." 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 robbery 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.

5. 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 July 28, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/24/2005	Distribution of Marijuana (felony) Pima County Superior Court Tucson, AZ	07/30/2005: 3 years' probation 11/03/2007: Probation revoked, 180 days imprisonment	§4A1.1(b)	~~2~~ 0

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will receive a four-level increase at §2L1.2.

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

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 occurred in July 2018. The original probation sentence imposed for the distribution of marijuana conviction was imposed on July 30, 2005. 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 probation for the marijuana distribution is more than ten years prior to the commission of the instant offense.

This defendant violated the terms of his probation in November 2007. He received 180 days of imprisonment. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (180 days). The length of the sentence for the distribution of marijuana now totals six 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)).

The date of the original sentence for the distribution 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: IMPLICATIONS

6. The defendant pleaded guilty to one count of distribution of 500 grams of methamphetamine that occurred on March 22, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/16/2003	Burglary (felony) Superior Court of Connecticut; Hartford, CT	07/30/2003: 3 months' custody, 57 months' probation to follow 11/03/2005: Probation revoked, 6 months' custody 06/20/2006: Probation terminated, 6 months' custody	§4A1.1(a)	3

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will not be eligible for the safety valve.

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 occurred in March 2018. The original sentence for the felony burglary was imposed on July 30, 2003. The defendant received a sentence of three months custody followed by 57 months' probation. 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 sentence for the burglary is more than ten years prior to the commission of the instant offense.

This defendant violated the terms of his probation in November 2005. He received six months of imprisonment. He again violated the terms of his probation in June 2006 where he again received six months custody. According to §4A1.2(k)(1), the original term of imprisonment (three months) is added to any term of imprisonment imposed upon revocation (one year). The length of the sentence for the distribution of marijuana now totals 15 months custody.

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 revocation in 2006, the date of last release on this burglary conviction is in 2006, which is now within 15 years of the instant offense. Therefore, this prior sentence receives three criminal history points.

7. 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
12/05/2004	Distribution of Cocaine (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	Distribution of Cocaine (felony) Kenton County Circuit Court Covington, KY Case number: 2005-CR-125	04/27/2005: 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

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

Is the defendant's criminal history scored correctly? Why or why not? If so, the defendant will be a career offender.

Yes. The criminal history is scored correctly.

The earliest date of relevant conduct for the instant offense is March 7, 2018. The defendant has two prior felony theft convictions. In 2004 and 2005, he was sentenced to a term of probation for each theft conviction. The imposition of the original sentences for these theft offenses are outside of the applicable ten-year time frame.

In 2007, both terms of probation are revoked based upon the same conduct – 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 the two theft 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 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.

8. The instant offense of conviction is felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (applicable guideline is §2K2.1). The instant offense occurred on July 19, 2017, when his state probation officer conducted a home visit and discovered the weapon. The defendant was arrested by federal law enforcement on August 1, 2017.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
01/18/2017	Burglary (felony) Superior County Court of Los Angeles County Los Angeles, CA	04/11/2017: 2 years' probation 09/05/2017: probation revoked, 2 years' custody	§4A1.1(a), §4A1.2(k)	3

The defendant committed the instant offense while serving a term of probation for burglary. Therefore, two additional criminal history points were assigned under §4A1.1(d). The defendant has a total of five criminal history points.

The defense attorney argues that the revocation time imposed for the state burglary conviction should not be added to calculate the criminal history points for his client because the revocation time was imposed solely based upon the fact that the defendant committed the instant offense of felon in possession. The attorney argues that this is "triple counting" of criminal history is unwarranted – the state burglary conviction is counted; the revocation time is counted; and the fact that the defendant was serving a probation term at the time of the instant offense is also counted.

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

Yes. The criminal history is scored correctly.

The instant offense occurred while the defendant was serving a term of probation for burglary. As a result of the instant offense, the probation was revoked, and he was sentenced to 2 years custody. According to §4A1.2(k)(1), the original term of imprisonment (zero months) is added to any term of imprisonment imposed upon revocation (two years). The length of the sentence for the burglary now totals two years custody. The sentence is imposed well within the applicable 15-year time frame, resulting in the assignment of three criminal history points.

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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 committed the instant offense while on probation.

Application Note 4 at §4A1.1 states that "a 'criminal justice sentence' means a sentence **countable** under §4A1.2." 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 burglary receives criminal history points under §4A1.1(a) and status points under §4A1.1(d). Although the defendant's state probation term was revoked precisely for the commission of the instant offense, the reason behind the revocation is not considered in calculating the appropriate amount of criminal history points.

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

2019

National Seminar

Grouping Multiple Counts - Answers

September 3 - 6, 2019
New Orleans Marriott

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, ANSWER THE FOLLOWING QUESTIONS.

1. The defendant pleaded guilty to one count of conspiracy to possess with intent to distribute methamphetamine and three counts of possession with intent to distribute methamphetamine, each occurring on a different date. The guideline that applies to all four counts of conviction is §2D1.1.

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

The counts group under rule (d). All the counts are referenced to §2D1.1, and that guideline is on the list of included offenses at §3D1.2. Apply the guideline one time to all of the conduct in the four counts of conviction.

2. The defendant, a nurse, pleaded guilty to a two-count indictment. Count 1 charged unauthorized use of an access device in violation of 18 USC § 1029. The defendant fraudulently used a patient's credit card. Count 2 charged a violation of 18 USC § 1001(c)(3) (false statements), based on unrelated conduct. The defendant falsified DEA logs after allowing a patient to take ketamine from the drug vault. The guideline that applies to both counts is §2B1.1.

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

The counts group under rule (d). All the counts are referenced to §2B1.1, and that guideline is on the list of included offenses at §3D1.2. The fact that there are two distinct crimes is not relevant to the grouping question. The fact that both counts go to a single guideline that is listed as grouping under rule (d) ends the grouping analysis.

3. The defendant pleaded guilty to a two-count indictment. Count 1 charged distribution of fentanyl resulting in death of victim A. Count 2 charged 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?

The counts group under rule (d). All the counts are referenced to §2D1.1, and that guideline is on the list of included offenses at §3D1.2. The answer doesn't change just because there are

two victims. If the court decides that the guidelines fail adequately to take into account the additional death resulting from the offense, the court may depart or vary.

4. 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?

Units should be assigned. Using the decision tree, we see that all the counts use the same guideline. However, the guideline is not listed as included under §3D1.2(d). All §2A guidelines (except one) are listed as *excluded* from grouping under rule (d). Therefore, we apply the guideline at §2A2.3 to each count of conviction. No count has an specific offense characteristic or Chapter Three adjustment embodying another count, because you apply the guideline five times, once for each victim; there is no cross-pollination between the distinct guideline applications. The counts do not involve the same victim, so units must be assigned.

5. The defendant has two counts of conviction. The first count of possession of a stolen firearm under 18 U.S.C. § 922(j) occurred in January 2018. The defendant was in possession of a stolen 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 four months later in April 2018. Federal agents found the machine gun when they arrived at the defendant's apartment to serve him with an arrest warrant for count one. The guideline applicable to both counts of conviction in §2K2.1.

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

The counts group under rule (d). Both counts are referenced to §2K2.1, and that guideline is on the list of included offenses at §3D1.2. The fact that there are two distinct crimes is not relevant to the grouping question. The fact that both counts go to a single guideline that is listed as grouping under rule (d) ends the grouping analysis.

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2018. 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 being identified by authorities. It was during the 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?

The two counts group under Rule (c). The robbery guideline includes a specific offense characteristic at (b)(2) for use of a firearm. The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. It does not matter that the firearm used in the robbery was never recovered. The respective specific offense characteristics embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction.

7. The defendant pleaded guilty to one count of felon in possession (§2K2.1), one count of 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 firearm that is the subject of the felon in possession count was 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?

Two counts – felon in possession and distribution of heroin – group under Rule (c). The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. The drug trafficking guideline includes a specific offense characteristic at (b)(1) adding two levels if a dangerous weapon (including a firearm) was possessed. It does not matter that, because of the § 924(c) count, you don't actually apply either SOC. The respective SOCs embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction. The mandatory consecutive sentence for the §924(c) offense is added to the single offense level for the felon in possession and distribution of heroin.

8. Defendant is convicted of two counts related to breaking into a post office. Count 1 charged burglary and count 2 charged theft. Defendant entered the open lobby of a post office, where post office boxes are located, after hours. He then used a metal pipe to break the glass door leading to the locked portion of the post office. There, he stole a laptop computer. The guideline that applies to the burglary is §2B2.1, and the guideline that applies to the theft is §2B1.1. §2B1.1 (theft) is on the list of guidelines that group under Rule (d). However, §2B2.1

(burglary) is excluded from grouping under rule (d). The prosecutor argues units should be assigned.

Is the prosecutor correct?

No. The counts group under Rule (b). The counts use different guidelines so they can't group under rule (d). However, the counts involve the same victim and two or more acts that constitute a common criminal objective – stealing valuables from the post office.

9. The defendant pled guilty to one indictment that charged him with violating two counts of 18 U.S.C. § 922(u) (theft of firearm from firearms dealer). The guideline applicable to both counts is §2K2.1. Count one occurred in May 2018. The defendant rammed his vehicle into the gun store, broke in, and stole several firearms. Count two occurred in September 2018. The defendant again rammed his vehicle into the same gun store, broke in, and stole several firearms.

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

The counts group under rule (d). All the counts are referenced to §2K2.1, and that guideline is on the list of included offenses at §3D1.2. While the same victim was subjected to separate instances of fear and risk of harm, that is not a consideration when grouping under rule (d).

10. The defendant is charged in two separate indictments. He pled guilty to both indictments. The first indictment is from the Eastern District of Pennsylvania. This indictment charges that the defendant committed both wire fraud and mail fraud from 2012 through 2014. The wire fraud and mail fraud scheme involved the defrauding of federal student loan programs. The applicable guideline is §2B1.1. The second indictment is from the Western District of North Carolina and charges the defendant with access device fraud. This scheme occurred from 2017 through 2018. The defendant fraudulently used stolen credit cards. The applicable guideline in this case is also §2B1.1.

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

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

The counts group under rule (d). All the counts are referenced to §2B1.1, and that guideline is on the list of included offenses at §3D1.2. The introductory commentary to Chapter Three Part D of the guidelines says that the grouping rules apply to multiple counts of conviction "contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

11. The defendant pleaded guilty to a four-count indictment charging: unlawful manufacture of a firearm; felon in possession of a firearm; possession of a machine gun; and possession with intent to distribute methamphetamine. The machine gun and manufactured firearm were found in the same room as the methamphetamine. The applicable guideline for the firearms offenses is §2K2.1, and the applicable guideline for the drug trafficking offense is §2D1.1.

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

Multiple grouping rules apply to this scenario. The firearms counts group under rule (d) because they are all referenced to §2K2.1. The firearms offenses group with the drug trafficking offense under rule (c) because each guideline contains a specific offense characteristic that embodies the conduct in the other count of conviction. After determining the offense level under both §2D1.1 and §2K2.1, the higher of the two offense levels will be the offense level for the entire group of offenses.

12. Defendant is convicted of two assault charges. Count 1 charged assault resulting in serious bodily injury in violation of 18 USC § 113(a)(6). Count 2 charged assault resulting in substantial bodily injury of a dating partner in violation of 18 USC § 113(a)(7). The counts involve two different women, however in both assaults, the defendant used a knife. The guideline is § 2A2.2, and in each case a three-level enhancement for brandishing a dangerous weapon applies. The defense attorney argues that for this reason the two counts group together, meaning all of the conduct is aggregated and you apply the guideline one time.

Is the defense attorney correct?

No. Units should be assigned. Using the decision tree, we see that all the counts use the same guideline. However, the guideline is not listed as included under §3D1.2(d). All §2A guidelines (except one) are listed as *excluded* from grouping under rule (d). Therefore, we apply the guideline at §2A2.3 to each count of conviction. No count has an specific offense characteristic or Chapter Three adjustment embodying another count, because you apply the guideline five

times, once for each victim; there is no cross-pollination between these distinct guideline applications. The counts do not involve the same victim, so units must be assigned.

13. Defendant is convicted of three counts of sexual exploitation of a child. The applicable guideline is §2G2.1. The counts involve the same 13-year-old victim. The defendant engaged in sexual contact with the child over the course of a weekend on three occasions: May 1, 2 and 3, 2018. On each occasion, the defendant photographed the victim.

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

Units should be assigned. Although the counts involve the same victim, each involves a separate instance of fear and risk of harm.

14. If multiple counts don't group under Rule (d) (aggregate all the relevant conduct and apply the guideline one time), the next step is to add units for the different counts.

True or False

False. The counts might group under Rules (a), (b), or (c).

15. Multiple counts have been consolidated into one sentencing proceeding. **What grouping rules apply?**

All of them. See the Introductory Commentary to §3D1.1.

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

2019

National Seminar

Introduction to Criminal History - Answers

September 3 - 6, 2019
New Orleans Marriott

SCENARIOS: INTRODUCTION TO CRIMINAL HISTORY

ARE THESE SCORED CORRECTLY?

1. The date of the instant offense is April 19, 2018. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
07/13/2010 (Age 23)	Possession of Class D Substance/Marijuana (misdemeanor), District Court Worcester, MA	10/25/2010: 1 year jail; sentence suspended; 2 years' probation	§4A1.1(b)	~~2~~ 1

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

No. The possession of marijuana conviction should receive one criminal history point.

Section 4A1.2(b)(2) states: "If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." Therefore, the court must determine the number of criminal history points for a sentence of two years' probation. The prior sentence was imposed within ten years of the instant offense. The possession of marijuana conviction receives one criminal history point under §4A1.1(c).

2. The date of the instant offense is November 23, 2017. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
04/06/2011 (Age 44)	Possession of Class D Substance/Marijuana (misdemeanor), District Court Worcester, MA	9/21/2011: $500 fine	§4A1.1(c)	1

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

Yes. The criminal history is scored correctly.

"Prior sentence," as used to determine criminal history points under §4A1.1 is defined at §4A1.2(a)(1). A "prior sentence means any sentence previously imposed upon adjudication of guilt … for conduct not part of the instant offense." Although the defendant did not receive a custodial or supervisory sentence, the defendant was convicted of the offense, and was fined $500. Additionally, the sentence for the possession of marijuana offense was imposed within ten years of the instant offense.

3. The date of the instant offense is March 7, 2016. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
07/27/2004 (Age 16)	Assault Causing Bodily Injury (felony), Montgomery County Juvenile Court, Dayton, OH	04/04/2005: Pled true, adjudicated delinquent, 6 months' probation	§4A1.2(d)(2)	0

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

Yes. The criminal history is scored correctly.

No criminal history points are assigned to the prior assault conviction because the sentence was imposed more than five years before the instant offense. See §4A1.2(d)(2).

4. The date of the instant offense is May 27, 2017. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
02/20/2017 (Age 28)	Arson (felony), Third Circuit Court, Detroit, MI	08/29/2017: 12 months to 5 years' custody	§4A1.1(b)	~~2~~ 3

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

No. The prior conviction for arson should receive three criminal history points.

Application note 2 at §4A1.2 states: that the length of a sentence of imprisonment is the stated maximum. Therefore, when the court imposes an indeterminate sentence as in this scenario, the stated maximum of five years is used to determine the appropriate number of criminal history points. A sentence of imprisonment of 13 months or greater that was imposed within 15 years of the instant offense receives three criminal history points under §4A1.1(a).

5. The date of the instant offense is January 23, 2019. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
11/03/2016 (Age 28)	Terroristic Threats (misdemeanor), 68th Judicial District, Lubbock, TX	05/14/2017: 10 days jail	§4A1.1(c)	1

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

Yes. The criminal history is scored correctly.

"Prior sentence," as used to determine criminal history points under §4A1.1 is defined at §4A1.2(a)(1). A "prior sentence means any sentence previously imposed upon adjudication of guilt … for conduct not part of the instant offense." The defendant received a sentence of 10 days jail for terroristic threats, and that sentence was imposed within ten years of the instant offense. One criminal history point is assigned under §4A1.1(c).

SCENARIOS: INTRODUCTION TO CRIMINAL HISTORY

6. The date of the instant offense is March 23, 2017. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
10/09/2015 (Age 35)	Possession of Cocaine (felony), Ramsey Court District Court, St. Paul, MN	03/19/2016: 355 days jail, time served	§4A1.1(c)	~~1~~ 2

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

No. The prior conviction for possession of cocaine should receive two criminal history points.

Although the defendant received a sentence of "time served" and he was not required to serve any additional days in jail, the sentence imposed in this case is 355 days in custody. This is a sentence of imprisonment of greater than 60 days. The sentence was imposed within ten years of the instant offense. Therefore, two criminal history points should be assigned under §4A1.1(b).

7. The date of the instant offense is April 16, 2017. The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
06/16/2006 (Age 15)	First Degree Manslaughter (felony), Hennepin County District Court, Minneapolis, MN	12/08/2007: 10 years' jail and 3 years supervised release Although a juvenile at the time of his arrest, the defendant was certified as an adult and appeared in adult court	§4A1.1(a)	3

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

Yes. The criminal history is scored correctly.

Although the defendant committed the prior manslaughter offense as a juvenile, he was convicted as an adult. Section 4A1.2(d)(1) states that three criminal history points are added when the defendant is convicted as an adult and received a sentence of greater than 13 months. The sentence was imposed with 15 years of the commencement of the instant offense. Three points are assigned under §4A1.1(a).

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Introduction to Relevant Conduct - Answers

September 3 - 6, 2019
New Orleans Marriott

INTRODUCTION TO RELEVANT CONDUCT

1. The defendant is convicted of one count of Bank Robbery in which the defendant stole $1,700.

Applicable guideline is §2B3.1 (Robbery)

If the defendant did not possess a gun in the bank, but after the bank robbery used a gun to carjack a vehicle in order to aid the getaway, would the §2B3.1 firearm specific offense characteristic apply?

Yes. It was an act committed by the defendant in order to avoid detection or responsibility for the offense of conviction. The defendant carjacked the victim to obtain a vehicle to use to aid in the getaway from the robbery.

2. The defendant is convicted of a drug conspiracy involving at least 100 kg of cocaine. Applicable guideline is §2D1.1 (Drugs)

Conspiracy involved multiple importations; however, the defendant was only involved in two importations of 5 kg each.

What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

5kg each for a total of 10 kgs. Defendant is not responsible for the drugs in the entire conspiracy simply because he is convicted of a conspiracy involving 100kgs. Relevant conduct is an individualized determination and this defendant's undertaking only involves 10kgs of cocaine.

3. The defendant is convicted of bank robbery.

Applicable guideline is §2B3.1 (Robbery)

Co-participant carried a gun in the robbery, a fact unknown to the defendant until the commission of the robbery. Will the §2B3.1 specific offense characteristic for "if a firearm was brandished or possessed" apply?

Yes. Defendant and co-defendant agreed to commit a bank robbery. The act of the co-defendant carrying a gun during the robbery was in furtherance of their agreement to rob the bank and it is certainly forseeable that a gun would be used while committing a robbery. The fact that the defendant did not "know" about the gun is not relevant as the relevant conduct analysis is not determined on the basis of knowledge but rather the 3-part analysis at §1B1.3(a)(1)(B) to determine jointly undertake criminal activity.

4. The defendant is convicted of bank robbery.

Applicable guideline is §2B3.1 (Robbery)

Defendant and co-participant robbed the bank while armed. During the robbery, a teller set off a silent alarm. The police responded to the robbery in process. While attempting to subdue the defendant and his co-participant, the officer shot and injured a customer in the bank. Will the §2B3.1 specific offense characteristic for "bodily injury" apply?

No. Neither defendant is involved in a jointly undertaken criminal activity with the police officer. The first step of the three-part analysis is determining the scope of the jointly undertaken criminal activity. If there is no jointly undertaken criminal activity, the three-part analysis is over.

5. Three defendants convicted of a Drug Conspiracy involving 10,000 kg of Marijuana- §2D1.1.

Defendant 1 lives in Minnesota, but owns a marijuana grow operation in California. Defendant 2 lives in California at the grow operation and is responsible for taking care of the plants, watering them, harvesting, etc. Defendant 3 lives in New Orleans and has access to an airplane. He flew to California on several occasions to pick-up the marijuana (total of 5,000 kgs) and took it back to New Orleans to distribute to his people.

What amounts are attributable to each defendant?

Defendant 1 is responsible for the entire 10,000 kgs as he is the "king pin" in charge of the entire operation. Defendant 2 is also responsible for the entire 10,000 kg as he lives at the grow operation and is responsible for caring for all the plants. Defendant 3 is only responsible for 5,000 kg as that is his agreement with defendant 1 who runs the entire operation.

6. Defendants were convicted of Filing False Tax Returns. Applicable guideline is §2T1.1. (Tax Evasion). Defendant 1 steals personal identifying information from a local business. Defendant 2 files the vast majority of the false tax returns. Defendant 1 only files a handful of returns, but they share the return money which exceeds $100,000.

Is each defendant accountable for the total loss amount?

Yes. They have agreed to participate in a fraudulent tax return scheme together. The acts of defendant 1 stealing personal identifying information are in furtherance of the agreement to participate in a fraudulent tax scheme and certainly reasonably forseeable in connection with the agreement to participate in the fraudulent tax scheme. Finally, both defendants shared the proceeds of the illegal activity.

7. The defendant is convicted of sale of 1 kg of cocaine on a single occasion

Applicable guideline is §2D1.1 (Drugs)

It is determined that the defendant additionally sold 1 kg of cocaine to the same gang member each week for 40 weeks.

What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

41 kgs. The defendant is only convicted of the single distribution on the single occasion, however the additional 40 kilos will be included through expanded relevant conduct as they are part of the same course of conduct, common scheme or plan. See also §1B1.3(a)(2) and App. Note 5(B). They involve common accomplices, similar modus operandi, regularity, similarity, etc.

INTRODUCTION TO RELEVANT CONDUCT

8. Defendant convicted of Felon in Possession of a Firearm. Applicable guideline is §2K2.1. (Prohibited Transactions involving Firearms).

Several weeks after the offense cited in the indictment, during the execution of a search warrant, officers located seven additional firearms, including two that were stolen and four that had the serial numbers scratched off.

Is the defendant accountable for the firearm in the count of conviction as well as the seven firearms located at his residence?

Yes. Although the defendant was not convicted of the additional firearms that were found during the search warrant, they will be included through expanded relevant conduct as they will meet the definition of same course of conduct, common scheme or plan. Also, note: as two were stolen and four had obliterated serial numbers, that will also impact guideline application as the specific offense characteristic at §2K2.1(b)(4)(B) will apply. There will only be a 4-level increase at this SOC.

9. The defendant was arrested for committing two robberies. The first robbery occurred on June 7, 2019 and the defendant passed a note to the teller stating that the teller would die unless he gave him the money. The defendant did not possess a gun during the robbery. On June 8, 2019, the defendant committed another bank robbery where he possessed a gun. The defendant plead guilty to only the June 7th robbery. The probation officer applied a two-level increase for threat of death under §2B3.1(b)(F), but the government believes the defendant should have received a five-level increase for possession of a gun under §2B3.1(b)(2)(C).

Is the government correct?

No. The guideline for bank robbery (§2B3.1) is not listed as groupable under §3D1.2 and therefore not subjected to “expanded relevant conduct”. You cannot look to the second robbery as same course of conduct, common scheme or plan.

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Organizational Guidelines - Answers

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ORGANIZATIONAL GUIDELINE SCENARIO

1. The Defendant company, a multi-million dollar business, operated cargo ships that knowingly operated in U.S. waters without required equipment to separate oil and other waste from bilge water before being pumped into open waters. Company was charged with failure to maintain an accurate oil record book and unlawful discharge in violation of 33 U.S.C. § 1908(a)).

Is it necessary to calculate a fine range under the guidelines?

No. Pursuant to §8C2.1 (Applicability of Fine Guidelines), the fine range provisions at §§8C2.2 through 8C2.9 apply to each count for the guideline offense level determined under one of the listed guidelines. Section 1908 of Title 33 is referenced in Appendix A to §2Q1.3, which is not included in the list at §8C2.1. For any count or counts not covered under §8C2.1, the court is instructed to apply §8C2.1 (Determining the Fine for Other Counts), which in turn provides that courts should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 (Determining the Fine Within the Range) and §8C2.9 (Disgorgement).

2. The Defendant company, a multi-million dollar business, was convicted of wire fraud (18 U.S.C. § 1343) resulting in $10M in loss to 15 victims. The government notified the court that Defendant fully cooperated and accepted responsibility.

What is the offense level for purposes of calculating a fine range under the guidelines?

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 18 U.S.C. § 1343 is referenced to §2B1.1, which is covered under §8C2.1. Under §2B1.1, defendant would have a base offense level of 7 since § 1343 has a statutory maximum of 20 years or more. The loss is more than $9,500,000, resulting in a 20-level increase under §2B1.1(b)(1), and there are 10 or more victims, resulting in a 2-level increase under §2B1.1(b)(2). This results in a total offense level under §2B1.1 of 29.

Even though the fact pattern provides that the defendant accepted responsibility, do not apply a 2- or 3-level reduction under §3E1.1 (Acceptance of Responsibility). Section 8C2.3, Application Note 2 provides that courts "[d]o not apply the adjustments in Chapter Three, Parts A (Victim-

Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), and E (Acceptance of Responsibility)." Instead, the defendant's cooperation and acceptance are accounted for as part of the calculation of their culpability score under §8C2.5 (Culpability Score). *See* §8C2.5(g).

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

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

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

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

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

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

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 18 U.S.C. § 1956 is referenced to §2S1.1, which is covered under §8C2.1.

After determining the fine range provisions apply, the court should first make a preliminary determination of the defendant's ability to pay. Where it is readily ascertainable that the organization cannot and is not likely to become able to pay required restitution or to pay the minimum guideline fine preliminarily determined under §§8C2.3 through 8C2.7, a further

determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay). In this case, it appears the company is financially secure with assets of approximately $3 million. Therefore, the court would proceed with calculating the fine range.

Under §2S1.1, defendant would have a base offense level of 8 plus 12 levels from the table in §2B1.1 based on $250,000 in laundered funds. An additional two levels apply under §2S1.1(b)(2)(B) because the defendant was convicted under section 1956. This results in a total offense level of 22. Pursuant to the Offense Level Fine Table at §8C2.4(d), an offense level of 22 results in a base fine amount of 2,000,000.

The court next calculates the defendant's culpability score under §8C2.5. In all cases, the culpability score starts at 5 points. An additional 3 points are added under §8C2.5(b) because the company had 200 or more employees and an individual within high-level personnel of the organization (in this case, the owner) participated in the offense. Two points are deducted under §8C2.5(g)(2) because the defendant fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. This results in a final culpability score of 6.

Under §8C2.6, a culpability score of 6 results in a minimum multiplier of 1.2 and a maximum multiplier of 2.4. Using these multipliers on the base fine amount of $2,000,000 results in a fine range of $2,400,000 to $4,800,000. *See* §8C2.7. In this case, however, the statutory maximum penalty for an offense under 18 U.S.C. § 1956 is $500,000. *See* 18 U.S.C. § 3571(c)(1), (3) [Note: The alternative fine provision under 18 U.S.C. § 3571(d) – twice the defendant's gain of $25,000 – does not exceed the statutory fine.] Thus, the guideline minimum fine ($2,400,000) exceeds statutory maximum fine ($500,000), in which case statutory maximum fine becomes guideline fine. Therefore, the fine range in this case is $500,000.

ORGANIZATIONAL GUIDELINE SCENARIO

3A. Assume the same facts as Fact Pattern 3, except Defendant A has pleaded guilty to 25 counts of money laundering (one for each check) and the crime occurred prior to November 1, 2015.

How will the guideline fine be calculated?

The guidelines would be calculated in the same manner as scenario 3, with two exceptions. First, §8C2.4 includes a special instruction for calculating the base fine if the offense was committed prior to November 1, 2015. Subparagraph (e) provides that "For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than offense level fine table set forth in subsection (d) above." Under the 2014 offense fine table, an offense level of 22 results in a base fine amount of 1,200,000. Under §8C2.6, a culpability score of 6 results in a minimum multiplier of 1.2 and a maximum multiplier of 2.4. Using the applicable multipliers (1.2 and 2.4) results in a fine range of $1,440,000 to $2,880,000.

Additionally, because the combined statutory maximum penalties would now be $12,500,000 ($500,000 multiplied by 25 counts), the guideline minimum fine no longer exceeds statutory maximum fine.

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

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

There is no evidence of other misconduct in the company's 15-year history. The current market value of the company's assets is approximately $20 million. The company's annual net income is approximately $1,750,000.

The company has cooperated with the investigation and the company's president has written a statement accepting responsibility on behalf of the company.

ORGANIZATIONAL GUIDELINE SCENARIO

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

Pursuant to §8C2.3 (Offense Level), for each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In this scenario, 15 U.S.C. § 1 is referenced to §RS1.1, which is covered under §8C2.1.

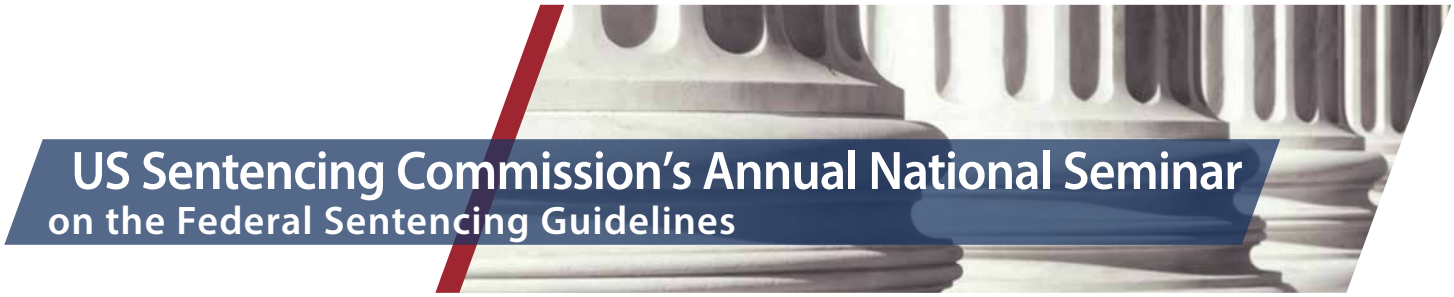
After determining the fine range provisions apply, the court should first make a preliminary determination of the defendant's ability to pay. Where it is readily ascertainable that the organization cannot and is not likely to become able to pay required restitution or to pay the minimum guideline fine preliminarily determined under §§8C2.3 through 8C2.7, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay). In this case, it appears the company is financially secure with annual net income of approximately $1,750,000. Therefore, the court would proceed with calculating the fine range.

Under §8C2.4, the base fine is the greatest of the amount from the offense level fine table, the pecuniary gain or the pecuniary loss. That guideline also provides, however, "that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate." USSG §2R1.1 includes such a special instruction providing that "[i]n lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce." Here, 20 percent of the $12,000,000 in affected commerce results in a base fine of $2,400,000.

The court next calculates the defendant's culpability score under §8C2.5. In all cases, the culpability score starts at 5 points. An additional 2 points are added under §8C2.5(b) because the company had 50 or more employees and an individual within high-level personnel of the organization (in this case, the owner) participated in the offense. Two points are deducted under §8C2.5(g)(2) because the defendant fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. This results in a final culpability score of 5.

ORGANIZATIONAL GUIDELINE SCENARIO

Under §8C2.6, a culpability score of 5 results in a minimum multiplier of 1.0 and a maximum multiplier of 2.0. Using these multipliers on the base fine amount of $2,400,000 results in a fine range of $2,400,000 to $4,800,000. *See* §8C2.7.



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Relevant Conduct in Guns and Drugs - Answers

September 3 - 6, 2019
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RELEVANT CONDUCT-GUNS AND DRUGS

Scenario #1

Defendant Marc Smith plead guilty to a heroin conspiracy that, according to the Indictment, began in February 15, 2017 and ended on December 15, 2017. The total amount of drugs for the conspiracy is 3 kilos of methamphetamine. Smith never sold drugs on the streets; rather, his role was to transport heroin from a supplier in New Jersey to street level dealers in Virginia so the street level dealers could sell the drugs. Smith was paid a flat fee for each trip. The Indictment lists three instances where Smith delivered drugs:

April 1, 2017: 50 grams

May 20, 2017:50 grams

September 2017: 50 grams

Smith knew that the conspiracy involved many other people but he didn't know who they were. After his last shipment, Smith heard that someone died of a drug overdose from heroin and Smith decided that he would stop transporting drugs. He was arrested for the instant federal offense on January 1, 2019.

1(a): What quantity of drugs will be attributed to Smith?

Answer: 150 grams. Even though the conspiracy amounted to 3 kilos, we first look at the defendant's jointly undertaken criminal conduct. Here, from the facts in front of us, his jointly undertaken criminal conspiracy is three trips, each totaling 50 grams of meth, for a total 150 grams. There is no indication he had any further involvement with others in conspiracy so he cannot be held liable for the entire three kilos. A defendant's scope of jointly undertaken criminal conspiracy is not necessarily equal to the scope of the criminal conspiracy.

1(b): The probation officer reads through the discovery and learns that Smith actually made two other trips from New Jersey to Virginia on the following dates

January 19, 2017: 60 grams of heroin

June 3, 2017: 60 grams of heroin

RELEVANT CONDUCT-GUNS AND DRUGS

After learning this Information, what quantity of drugs would you assign to Smith?

Answer: 270 grams. Drugs are the type of offense for which expanded relevant conduct applies. That means that we can look beyond the offense of conviction to all acts that were within the same course of conduct or common scheme or plan as the offense of the conviction. Here, it appears that these additional trips would be the same course of conduct and/or common scheme or plan as the conduct described in the Indictment because they involve the same type of drugs in the same quantity and the trips have temporal proximity.

Remember, for drug offenses, relevant conduct is not limited to the dates in the Indictment. See §1B1.3(a)(2) and App. Note 5(B).

1(c): Upon further research, you learn that Mr. Smith was stopped by the New Jersey police during his trip on January 19, 2017. He was arrested after a search of his car turned up the drugs. On January 25, 2017, he pleaded guilty to possession of heroin and received a sentence of probation.

Does this information change the drug amount attributed to Smith?

Answer: Yes. The first trip on January 19th that resulted in a conviction will not count for relevant conduct purposes. Application Note 5(c) to U.S.S.G. §1B1.3 states that any conduct "associated" with a prior sentence that occurred before the start of the offense will not count as relevant conduct and is counted as criminal history instead. So, in this case, the drug amount will be reduced by 60 for a total of 210 grams.

1(d): Mr. Smith argues that he is eligible for safety valve under the First Step Act. The government counters that he cannot get safety valve relief because there was a death that resulted as a part of this conspiracy. Specifically, the government has proof that three people died as a result of the drugs distributed during this conspiracy. Therefore, the third criteria; "the offense did not result in death or serious bodily injury"- has not been met.

Is Mr. Smith eligible for safety valve?

Maybe but we need more information. The conspiracy resulted in a death but we don't know if the death was within Smith's jointly undertaken criminal conduct. Was Mr. Smith involved with the drugs that led to the death? Did he agree to work with other who distributed the drugs that led to the death?

RELEVANT CONDUCT-GUNS AND DRUGS

Scenario #2

Mr. Howard's home was the subject of a search warrant where the law enforcement officers found two firearms and 35 grams of methamphetamine. The drugs and guns were found together in a locked box in the defendant's closet. Defendant Howard plead guilty to the following offenses:

- Count 1: Conspiracy to distribute methamphetamine in violation of 18 USC 841(a)(1) and (b)(1)(C) – Statutory maximum of 20 years
- Count 2: Felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1) – Statutory maximum of 10 years
- Count 3: Possession of a firearm in connection with a drug trafficking offense – mandatory minimum 5 years

2(a): Does the specific offense characteristic for possession of a dangerous weapon at 2D1.1(b)(1) apply in this case?

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 (18 U.S.C. §924(c)). 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) . . . .)

2(b): Does the specific offense characteristic for possessing a firearm in connection with another felony offense at 2K2.1(b)(6)(B) apply in this case?

Section 2K2.4, Application Note 4 also precludes the application of §2K2.1(b)(6)(B) for the same reasons stated above.

2(c): Do Counts 1 and 2 group?

Two counts – felon in possession and distribution of heroin – group under Rule (c). The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. The drug trafficking guideline includes a specific offense characteristic at (b)(1) adding two levels if a dangerous weapon (including a firearm) was possessed. It does not matter that, because of the § 924(c) count, you don't actually apply either SOC.

The respective SOCs embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction. The mandatory consecutive sentence for the §924(c) offense is added to the single offense level for the felon in possession and distribution of heroin.

RELEVANT CONDUCT-GUNS AND DRUGS

Scenario #3

Defendant Washington was convicted of the one count Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Mr. Washington was pulled over for drunk driving. Because he had an outstanding warrant, the officer searched the defendant's vehicle and found a .40 caliber pistol which is the pistol in the 18 U.S.C. §922(g) violation. A subsequent search of the defendant's home resulted in the discovery of six additional firearm. These firearms are not listed in the indictment. One of the firearms found in the home was a sawed-off shotgun that the police were able to trace to a robbery where the security guard was shot and gravely wounded. The security guard was shown a picture of Mr. Washington and positively identified him as the person who shot him.

3(a): Will the defendant get an increase under §2K2.1(b)(1) for number of firearms to include the weapons found at his home?

Answer: Yes, the specific offense characteristic will apply. Remember, firearms are the type of offense for which expanded relevant conduct will apply. That means we are not limited by the Indictment. That means we can look outside the offense of conviction. Here, the defendant is convicted of being a felon in possession of a firearm. That means that any weapon the possessed by the defendant is unlawful so weapons found in the defendant's home are part of his relevant conduct.

3(b): Will the defendant get an increase for use of a firearm in connection with another offense under §2K2.1(b)(6)(B) apply?

Answer: Yes. The specific offense characteristic applies to "any weapon' used in connection with another offense. Because of expanded relevant conduct, we can count any firearm in the relevant conduct determination. Here, we know that that one of the weapons found in the home was used in connection with another offense, the robbery, so the specific offense characteristic applies.

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

Answer: NO. The cross-reference specifically states that the cross reference applies if the weapon was "cited in the offense of conviction." Here, the weapon connected with the robbery was not cited in the Indictment so it cannot be the basis for the cross reference.

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Relevant Conduct in Economic Crimes- Answers

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Question 1

The defendant was convicted of health care fraud. In this case, the defendant recruited seven patients from March 2016 to May 2017 to be "fake patients" at a local chiropractor's office. The loss sustained as a result of these 7 patients was $200,000. However, the government believes the defendant is responsible for the entire loss of the conspiracy ($1.8 million) which spanned from January 2015 through May 2017.

What is the loss amount?

Answer: The loss amount is $200,000. You need to evaluate §1B1.3(a)(1)(B) - scope, furtherance, and reasonable foreseeability – and it appears defendant is only responsible for 7 patients he recruited - and loss of $200,000. In addition, the defendant cannot be held responsible for conduct prior to his joining the conspiracy - see §1B1.3(B)(3).

Question 2

A and B were convicted of Conspiracy to Defraud the United States with Respect to Claims - §2B1.1. A stole personal identifying information from a local business and shared them with B. B filed the vast majority of the false tax returns listing her address for the refunds. She collected over $500,000. A filed a handful of tax return and collected $20,000.

What amount of loss should Defendant A be held accountable for?

Answer: ($520,000). You need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? It would appear so in this case. They worked in concert with one another.

Question 3

The defendant was convicted of stealing money from an ATM via jack potting (installing malware and bypassing regular codes and in essence, stealing money from the ATM). The defendant was charged by indictment in Utah. However, during the presentence investigation, the USPO also learned the defendant orchestrated the same scheme in his home state of Colorado as well as in Washington state.

Can the USPO use the loss from those states as well or are there jurisdictional issues?

Answer: It is a relevant conduct issue and since §2B1.1 is on included list at §3D1.2, you can use same course of conduct, common scheme or plan when trying to determine the loss for those additional states. See also §1B1.(a)(2) and App. Note 5(B).

Question 4

Defendant committed health care fraud from 2010 - 2014. She was sentenced for that offense in June 2016 and placed on home detention for one year as a condition of probation, plus 5 years of probation.

However, the defendant never stopped committing health care fraud. She again pleaded guilty in August 2017 to health care fraud that occurred from 2015 - 2017. She committed that offense while on release, so an increase under §3C1.3 applies.

Is the initial fraud (2010 - 2014) relevant conduct or criminal history?

Answer: See application note 5(C) at §1B1.3, conduct associated with a sentence imposed prior to the acts or omissions constituting the instant federal offense are not the same course of conduct, or common scheme or plan.

In this case, the sentence was NOT imposed prior to the acts or omissions constituting the instant federal offense. She was sentenced DURING the instant federal offense. So, therefore, the application note does not apply to her and the first fraud could be relevant conduct and not get criminal history points.

Question 5

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. In total, Cictim 2, however, transferred $310,000 (including the Western Union transfers) to her nephew.

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 6

Defendants are convicted of bank fraud and aggravated identity theft. The organizer of the scheme talked an ex-girlfriend into stealing checks from UPS, where she worked. She stole the checks, gave him the checks, and in exchange, he paid for home renovations and other expenses. He then made fake checks and used 4 other women, as runners, to try to cash the fake checks. Two of the women went on two trips with the organizer. The Probation Officer says it does not appear the women knew each other nor were they conspiring together. It appeared that they acted individually with the organizer and each woman received a portion of any check she cashed. The USPO has concluded that the relevant conduct of each woman is only the checks they cashed. The government is objecting to the PSR, indicating that it is reasonably foreseeable that the four women knew what each was doing and is trying to hit the women with the entire loss.

Is the government correct in that the total amount of loss will be the same for each defendant?

Answer: No. You cannot apply the relevant conduct standard since the mere knowledge of the other women cashing checks is not enough to "determine the scope of the specific conduct and objectives embraced by the defendant's agreement..." as noted in §1B1.3. A.N.#2.

Question 7

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 8

Smith owned a convenience store that also cashed checks for customers. In addition, Smith provided illicit check-cashing services to Johnson and Williams. Each had brought hundreds of checks, many of them US Treasury or government checks, especially around tax season. Over the course of two years, the store owner (Smith) cashed checks totaling $1.5 million, which is his loss amount. Johnson's portion of the loss was $1 million, and Williams' was $500,000. However, at sentencing, the Judge ruled that each defendant was responsible for the total amount of loss because of the relevant conduct provisions of §1B1.3. Williams indicated he never worked with Johnson and although he knew other people were cashing checks at Smith's business, he never did so with Johnson. While it was true that they both used Smith's store to cash checks in much the same manner, they never split the proceeds with one another, nor did it appear the men knew each other.

Was the court's ruling correct in that each defendant was responsible for the entire loss amount?

Answer: The defendant's "mere awareness that she was part of a larger check-cashing scheme" did not demonstrate that the acts of others were within the scope of her jointly undertaken criminal activity. What was the scope of the jointly undertaken activity? It appears Johnson and Williams were not in it together, but independent of one another. As a result, Williams will not be held responsible for any of Johnson's loss.

See United States v. Presendieu, 880 F.3d 1228 (11th Cir. 2018). The court erred when it attributed to the defendant losses caused by a co-conspirator. The defendant's "mere awareness that she was part of a larger check-cashing scheme" did not demonstrate that the acts of others were within the scope of her jointly undertaken criminal activity.

Question 9

From September 2009 through June 2013, White and his co-schemers bought merchandise in retail stores with fake checks and then returned the merchandise for cash. Over about four years, the group targeted 32 stores and inflicted actual losses of approximately $627,000. White was in prison from September 2009 until August 2011. He was then incarcerated again on another state charge in August 2012, where he remained until his federal arrest in June 2013. The court agreed with the government and held the defendant responsible for the full amount of loss, $548,000. It is unclear when the defendant entered the conspiracy, but the government contends he signed a plea agreement indicating he was part of the conspiracy from September 2009 through June 2013, cashing checks at various businesses.

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, without a more specific and supported finding on when White's participation in the scheme began, we cannot assume that his participation began any earlier than the September 13, 2011 arrest.

See United States v. White, 883 F.3d 983 (7th Cir. 2018). The court erred when it held the defendant responsible for the loss amount from the entire conspiracy, rather than conducting an individualized relevant conduct analysis based on the defendant's criminal undertaking. The defendant's admission in a plea agreement that he was part of a wire fraud scheme that existed for four years did not establish that he was part of that scheme for its entire four-year term, particularly when he was in state custody for one of those years.

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 10

Defendant deposited five counterfeit and/or stolen checks, equaling $108,600. He successfully withdrew $27,800. Is the loss amount the intended loss of $108,600 - $27,800, which is $80,800 or the actual loss of $27,800?

Answer: The intended loss amount of $108,600 should be used. Loss is defined in §2B1.1 as the greater of actual or intended loss. Based on the defendant's action of depositing all of the checks, it is reasonable to conclude that he intended to withdraw the entire amount at some point.

Question 11

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*, 887 F.3d 830 (7th Cir. 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 trap 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."

US Sentencing Commission's Annual National Seminar
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Relevant Conduct in Sex Offenses - Answers

September 3 - 6, 2019
New Orleans Marriott

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

1. Defendant pled guilty to two counts of Coercion and Enticement (§2G1.3). The counts involve separate victims. The first count involving victim 1 was committed on February 16, 2016. The second count involving victim 2 was committed on March 28, 2016.

Further investigation revealed that the defendant victimized seven additional minors from January 2016 through April 2016, but not on the same dates as the counts of conviction.

At §2G1.3, there is the following special instruction:

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

How many additional calculations of §2G1.3 should be completed?

No additional calculations of §2G1.3 should be completed. The special instruction at §2G1.3(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G1.3(d), the additional minors must be part of the relevant conduct for the offense of conviction.

In this scenario, the first offense of conviction involving victim 1 occurred on February 16, 2016. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction that occurred on February 16, 2016. The second count of conviction involving victim 2 occurred on March 28, 2016. The relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction that occurred on March 28, 2016.

Although the defendant victimized seven additional minors from January 2016 through March 2016, none of those acts occurred during, in preparation, or to avoid detection or responsibility for the offenses that occurred on February 16 or March 28 of 2016. Therefore, the seven

additional minors are not relevant conduct to the offenses of conviction. Because they are outside the relevant conduct, the special instruction cannot be applied.

Section 2G1.3 is neither included nor excluded from grouping at §3D1.2(d), which means that the court must make an individual determination of whether §2G1.3 is a guideline that has an "offense level … determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." The composition of §2G1.3 is very similar to §2G1.1, which is an offense specifically excluded from grouping under §3D1.2(d). Arguably, this also excludes §2G1.3 from grouping under §3D1.2(d), which precludes the court from applying §1B1.3(a)(2); meaning that the court cannot look at the same course of conduct or common scheme or plan as the offense of conviction. Therefore, the special instruction cannot be applied under this principle.

2. Defendant is convicted of one count of sexual exploitation of a minor (§2G2.1) involving a 14-year-old girl, and one count of receipt of child pornography (§2G2.2). The defendant used social media to contact minor female victims to solicit sexually explicit images of them. The defendant received pornographic images from the 14-year-old victim of the sexual exploitation offense in addition to images from five other minor victims.

When applying §2G2.2, the cross reference to §2G2.1 applies because the defendant caused minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

At §2G2.1, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

How many additional calculations of §2G2.1 should be completed?

No additional calculations of §2G2.1 should be completed. The special instruction at §2G2.1(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G2.1, the additional minors must be part of the relevant conduct for the offense of conviction.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

In this scenario, the offense of conviction for sexual exploitation of a minor involved a 14-year-old girl. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction involving the 14-year-old victim. None of the other images meet the criteria for relevant conduct.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the defendant used the same modus operandi to coerce the additional minor victims to send him sexually explicit images, the court cannot apply §1B1.3(a)(2) to consider acts of the defendant that are the same course of conduct or common scheme or plan as the offense of conviction for sexual exploitation of a minor. This also precludes application of the special instruction at §2G2.1(d).

The second count of conviction is for possession of child pornography. This guideline is included for grouping under §3D1.2(d) which means that when applying §2G2.2, the court can look to acts that are the same course of conduct or common scheme or plan as the offense of conviction. This is why the images from all the minor victims are included in the application of §2G2.2.

The court, however, in this scenario, applies the cross reference to §2G2.1 because the defendant caused minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. When applying the cross reference to §2G2.1, the court will determine which image results in the greatest offense level under §2G2.1 and will apply §2G2.1 based upon that offense. In this application of §2G2.1, the special instruction also does not apply for the same reasons discussed above. The additional images are not relevant conduct to this specific exploitation – the other images were not created during, in preparation or to avoid detection or responsibility for the offense. Sometimes, guideline users get confused and think that because the offense of conviction is possession of child pornography and that offense is a guideline that is subject to "expanded" relevant conduct (same course of conduct/common scheme or plan), when cross referencing from that count to §2G2.1, the "expanded" relevant conduct carries over. This is incorrect. Whether "expanded" relevant conduct is applicable depends upon the guideline that is applied. Once the cross reference applies to §2G2.1, application of §1B1.2(a)(2) ("expanded" relevant conduct) is prohibited.

3. The defendant and his co-conspirators robbed Chevy Chase Bank on November 18th, 2018. The defendant has pled to one count of robbery and one count of attempted robbery.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

During the investigation of the Chevy Chase bank robbery, the authorities learned that the defendant and his co-conspirators were planning on robbing M&T Bank on December 15th, 2018. As a result, law enforcement officers set up a sting operation at M&T Bank the morning of December 15th, 2018.

As expected, the defendant and his co-conspirators arrived at M&T Bank just after noon on December 15th. SWAT officers quickly descended on the defendant and his co-conspirators in order to stop the bank robbery. While attempting to subdue the co-conspirators, a SWAT officer shot and killed one of the defendant's co-conspirators.

Will the cross reference at §2B3.1 apply? Why or why not?

No, the cross reference at §2B3.1 does not apply. Section 2B3.1(c)(1) applies "if a victim was killed under circumstances that would constitute murder" and is applied if the homicide is relevant conduct to the robbery offense. The killing of one of the co-conspirators is not relevant conduct.

The slaying of the co-conspirator is not an act that the defendant "committed, aided, abetted, counseled, commanded, induced, procured or willfully caused" during, in preparation, or to avoid detection for the robbery offense as required under §1B1.3(a)(1)(A).

The only way to hold the defendant accountable for the act of another person is to conduct a relevant conduct analysis under §1B1.3(a)(1)(B). This is a three-part analysis that requires a determination of: 1) the scope of the defendant's jointly undertaken activity with the other person; 2) whether the act of the other person was in furtherance of the defendant's joint undertaking; and 3) whether the act of the other person was reasonably foreseeable to the defendant.

The defendant in this scenario does not have a jointly undertaken agreement with the SWAT officer. Therefore, the defendant cannot be held accountable for the act of killing his co-conspirator. The cross reference will not apply.

4. The defendant has been convicted of one count of kidnapping. The indictment alleges three victims were kidnapped as a result of the offense.

Will "pseudo counts" be calculated for this case? Why or why not?

No, "pseudo counts" will not be calculated for this case. There are only three ways under the guidelines where "pseudo counts" can be applied. The first circumstance is where the parties

stipulate to the commission of additional offenses in a plea agreement and agree that the stipulation will be for the purpose of calculating additional "pseudo counts." See §1B1.2(c). The second circumstance is where the defendant is convicted of a conspiracy to commit multiple offenses. When this occurs, guideline application requires that the court apply the guidelines as if the defendant had been convicted on a separate count of conspiracy for each offense the defendant conspired to commit. The third and final circumstance is where the Chapter Two guideline itself contains a special instruction that permits application of "pseudo counts" when the relevant conduct of the offense includes multiple victims, such as the ones found in §2G1.3 and §2G2.1.

In this scenario, none of the three ways in which "pseudo counts" can be applied are present. There will be one calculation of the kidnapping guideline, §2A4.1, based upon one victim – the victim where the application of §2A4.1 will result in the highest offense level.

5. The defendant has been charged with one count of interstate transportation of an individual other than a minor for the purpose of prostitution. The indictment alleges that beginning on or about January 20, 2018 and continuing through July 17, 2018, the defendant transported victim A on several occasions for the purpose of prostitution.

Further investigation reveals that the defendant also transported four additional women for the purpose of prostitution.

At §2G1.1, there is the following special instruction:

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

How many additional calculations of §2G1.1 should be completed?

More information is needed. More facts are needed to determine if, on a specific occasion while transporting victim A for the purpose of prostitution, additional victims were transported for the same purpose.

The special instruction at §2G1.1(d) applies "if the offense involved more than one victim." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G1.1(d), the additional victims must be part of the relevant conduct for the offense of conviction.

Without knowing whether the transportation of victim A also included additional victims, additional calculations of §2G1.1 can be completed.

6. The defendant was originally charged with two counts: Assault on a Federal Officer involving victim A, and Attempting to Kill a Federal Officer involving victim B.

The defendant was found guilty at trial for the Assault on a Federal Officer involving victim A. The defendant was found not guilty at trial for Attempting to Kill a Federal Officer involving victim B.

Can the more serious injuries related to victim B be used when calculating §2A2.2? Why or why not?

No. The more serious injuries related to victim B cannot be used when calculating §2A2.2. Specific offense characteristic (b)(3) at §2A2.2 provides increases of three, five, or seven levels based upon the degree of bodily injury the victim sustained as a result of the assault. In order for this enhancement to apply, the injury must have resulted from an act the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction. See §1B1.3(a)(1)(A). The aggravated assault guideline is not a guideline that allows the court to look to "expanded" relevant conduct – acts that are the same course of conduct or common scheme or plan as the offense of conviction. As a result, the more serious injury that resulted from the attempt to kill count cannot be included in the calculation of §2A2.2. It is not part of the relevant conduct.

7. The defendant is convicted of one count of coercing a minor to engage in production of child pornography. During a three-month period, the defendant contacted hundreds of minors via a live app and enticed/coerced them to send him explicit sexual videos using the app.

The defendant received numerous videos, but law enforcement can only locate two of them as the videos disappear from the app after a short time.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

At §2G2.1, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

How many additional calculations of §2G2.1 should be completed?

No additional calculations of §2G2.1 should be completed. The special instruction at §2G2.1(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G2.1, the additional minors must be part of the relevant conduct for the offense of conviction.

In this scenario, the offense of conviction involved coercing a minor to engage in production of child pornography. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction. None of the other images (whether located or not) meet the criteria for relevant conduct.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the defendant coerced a significant number of minors to engage in production of child pornography, the court cannot apply "expanded" relevant conduct at §1B1.3(a)(2) to consider acts of the defendant that are the same course of conduct or common scheme or plan as the offense of conviction for sexual exploitation of a minor. This also precludes application of the special instruction at §2G2.1(d).

8. The defendant has pled guilty to a single count of production of child pornography involving a 12-year-old victim.

The defendant's plea agreement contains the following statement: "the defendant agrees that the Statement of Facts constitutes a stipulation of facts for purposes of Section 1B1.2(c)."

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

The Statement of Facts discusses the defendant's production of child pornography (involving the 12-year-old girl) and outlines the defendant's receipt of child pornography.

Should an additional calculation of §2G2.2 be completed?

Yes. An additional calculation of §2G2.2 should be completed. Section 1B1.2(c) states that when a plea agreement contains a stipulation that specifically establishes the commission of additional offense(s), the court shall apply the guidelines as if the defendant had been convicted of additional count(s) charging those offense(s).

In this scenario, the plea agreement specifies that, for the purpose of guideline application, the parties agree that an additional guideline calculation under §2G2.2 shall be completed in addition to the calculation under §2G2.1 for the production count to which the defendant pleaded guilty.

9. The defendant has pled guilty to one count of production of child pornography that occurred on August 15, 2017. The production involves a single image of his grandson.

The defendant molested both his grandson and granddaughter over a significant length of time. The state prosecuted the defendant for the molestation cases. Neither state conviction encompasses the date of the instant offense.

Defense counsel is arguing that the prior state convictions for the molestation conduct are the same course of conduct as the instant offense of conviction and as such, should not be given criminal history points.

Are the prior convictions the same course of conduct as the instant offense? Should they be given criminal history points?

The prior convictions are not the same course of conduct as the instant offense. Therefore, they will be given criminal history points. The instant offense involves production of a single image of the minor male victim on August 15, 2017. The prior molestation case against the minor female victim is not relevant conduct to the instant offense. The molestation of the minor female victim is completely outside of the acts the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction – the production of the image of the minor male victim.

The prior conviction for the molestation of the minor male victim also is not relevant conduct. The molestation of the young boy occurs at a different time than the offense of conviction. The

molestation, therefore, is not an act that the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction – the production of the image of the minor male victim.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the molestation and the production of images is similar abusive conduct, the court is not permitted to look at "expanded" relevant conduct – acts that are the same course of conduct, common scheme or plan as the offense of conviction.

Therefore, because the conduct associated with the prior sentences are not part of the instant offense, criminal history points will be assigned.

US Sentencing Commission's Annual National Seminar
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2019

National Seminar

RICO Answers

September 3 - 6, 2019
New Orleans Marriott

RICO OFFENSES

Dante Gray 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 Martin Tucker until he was murdered by a rival gang in August of 2015, has been at the center of the violent conflicts. The LPC has been responsible for multiple murders, attempted murders, shootings, 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 Martin Tucker and Tyrell Mitchell 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 several 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.

Dante Gray and the LPC RICO Conspiracy

In approximately 2007 **Gray** became a member of the LPC because of his affiliation and friendship with the now deceased Martin Tucker, one of the founders of the gang. As an LPC member, **Gray** was aware that the LPC sold drugs and committed assaults and shootings of rival gang members. **Gray** held guns for other LPC members, sold crack cocaine with other members, and participated in shootings.

In 2009, **Gray** got involved in the prescription drug business. The Lincoln Park grocery was owned by the Jones family. **Gray** was hired by the Jones family to provide security for the store. 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.

RICO OFFENSES

At some point, **Gray** began stealing customers from the Jones family. Among other things, **Gray** 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.

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

In 2010, **Gray** was riding in a vehicle with another gang member, when they were pulled over by the police because the vehicle was missing license plates. When the police approached the vehicle, they observed Gray, who was in the passenger seat, shove something into his pants. When Gray exited the vehicle, several crumpled up checks fell from his pants.

In total, the police recovered eleven forged payroll checks drawn from the Chase bank account of a company called SC2 LLC doing business as "Edible Arrangements", worth a total of nearly $10,000. Police contacted the owner of SC2 LLC who examined the checks and confirmed that they were forged and that his signature appeared to be copied.

1. What are the underlying predicate offenses are involved 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 Fraud. There is a circuit split regarding the standard of evidence used to determine the underlying offenses in a RICO Conspiracy. The First, Second, and Sixth, and Seventh circuits use a preponderance of evidence standard while the 11th Circuit requires a beyond a reasonable doubt standard. Regarding Gray's other activities as part of the Lincoln Park Crew, more information would be needed to establish additional underlying offenses.

2. How is the guideline range determined for each underlying predicate offense?

Answer: §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 and choose the greater.