



NEW ORLEANS, LOUISIANA | SEPTEMBER 3rd - 6th, 2019 | NEW ORLEANS MARRIOTT

UNITED STATES
SENTENCING COMMISSION

2019 NATIONAL SEMINAR

Co-Sponsored by the American Bar Association.



AMERICAN **BAR** ASSOCIATION

Criminal Justice Section

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U.S. Sentencing Commission's
2019 Annual National Seminar
on the
Federal Sentencing Guidelines
New Orleans Marriott • 555 Canal St • New Orleans, LA
Tuesday, September 3 – Friday, September 6, 2019

Informational booths ongoing in the foyer...

- HelpLine Live
- CLE Information Table
- Annotated Guidelines and Guidelines App Demo

Tuesday, September 3, 2019 (Day 1)

Check-In 2:30 pm – 6:00 pm

Concurrent Sessions

3:15 pm – 4:30 pm

Introduction to Criminal History*
Introduction to Relevant Conduct*

4:30 pm – 4:45 pm

BREAK

Concurrent Sessions

4:45 pm – 6:00 pm

Introduction to Criminal History*
Introduction to Relevant Conduct*

6:00 pm – 7:00 pm

Reception

*session repeated

Wednesday, September 4, 2019 (Day 2)

Check-In will begin at 7:30 am

Continental Breakfast will be provided at 7:30 am

9:00 am – 10:00 am Plenary Session: USSC Update/Interactive Review

10:00 am – 10:15 am BREAK

Concurrent Sessions

**10:15 am – 11:45 am Grouping of Multiple Counts*
Relevant Conduct in Drugs and Firearms Offenses*
Relevant Conduct in Economic Crimes*
Relevant Conduct in Sex Offenses and Other Crimes Against the Person***

11:45 am – 1:15 pm LUNCH (on your own)

Concurrent Sessions

**1:15 pm – 2:45 pm Grouping of Multiple Counts*
Relevant Conduct in Drugs and Firearms Offenses*
Relevant Conduct in Economic Crimes*
Relevant Conduct in Sex Offenses and Other Crimes Against the Person***

2:45 pm – 3:00 pm BREAK

Concurrent Sessions

**3:00 pm – 5:00 pm Ethics
Probation Officers Forum**

*session repeated

Thursday, September 5, 2019 (Day 3)

Full Breakfast will be provided at 7:30 am

8:00 am – 8:45 am **Working Breakfast and Plenary Session – Research and Data You Can Use**

8:45 am – 9:00 am **BREAK**

Concurrent Sessions

9:00 am – 10:30 am

Case Law Update – Categorical Approach*

Organizational Guidelines

Sentencing Scenarios

Criminal History – Implications for Immigration, Career Offender, Safety Valve, and First Step Act*

10:30 am – 10:45 am **BREAK**

Concurrent Sessions

10:45 am – 12:15 pm

Case Law Update – Categorical Approach*

First Step Act*

Criminal History – Implications for Immigration, Career Offender, Safety Valve, and First Step Act*

12:15 pm – 1:45 pm **LUNCH (on your own)**

1:45 pm – 3:15 pm

Case Law Update – Hot Topics

Emerging Technologies and Sentencing*

Sentencing Scenarios*

First Step Act*

3:15 pm – 3:30 pm **BREAK**

3:30 pm – 5:00 pm

Case Law Update – Supervised Release Conditions and Restitution

Emerging Technologies and Sentencing*

First Step Act*

RICO Offenses

*session repeated

Friday, September 6, 2019 (Day 4)

Continental Breakfast will be provided at 8:00 am

8:30 am – 9:45 am Bureau of Prisons – Part I

9:45 am – 10:00 am BREAK

10:00 am – 11:30 am Bureau of Prisons – Part II



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COURSE DESCRIPTIONS

Bureau of Prisons Part I

Zachary Kelton & Dr. Alix McLearen

Bissonet & Carondelet (Friday 8:30 – 9:45)

BOP will provide an update on their implementation of the First Step Act.

Bureau of Prisons Part II

Hon. Lance Africk, Zachary Kelton, & Dr. Alix McLearen

Bissonet & Carondelet (Friday 10:00 – 11:30)

BOP officials will answer the questions you submitted at registration.

Case Law Update – Categorical Approach

Alan Dorhoffer

Carondelet (Thursday 9:00 – 10:30 and 10:45 – 12:15)

Categorical Approach. Need we say more?

Case Law Update – Hot Topics

Alan Dorhoffer

Carondelet (Thursday 1:45 – 3:15)

Hot topics, including a Supreme Court update, circuit conflicts, and other new developments.

Case Law Update – Supervised Release Conditions and Restitution

Alan Dorhoffer

Carondelet (Thursday 3:30 – 5:00)

The focus of this session will be supervised release conditions and restitution – two “sleeper” topics that sometimes result in surprise reversals by the Courts of Appeals.

Criminal History – Implications for Immigration, Career Offender, Safety Valve, and First Step Act

Krista Rubin

Bissonet (Thursday 9:00 – 10:30 and 10:45 – 12:15)

For those new to the guidelines, follow up on what you learned on Tuesday. For veterans, dare to test your level of knowledge! Are you a guidelines genius? Or, have you been making the same mistakes for years? We'll use commonly asked HelpLine questions and errors we encounter most often. No one is too experienced for this session!

Emerging Technologies and Sentencing

Peter Madsen

Salons A-D (Thursday 1:45 – 3:15 and 3:30 – 5:00)

During this session you'll learn about some of the latest trends in technology and crime. Phishing, hacking, ransomware, Bitcoin, and other new tools for criminals can make it difficult to determine the guideline range. Learn what all of these terms mean, and how this complex criminal activity affects guidelines determinations.

Ethics

Brent Newton & Mitchel Neurock

Bissonet (Wednesday 3:00 – 5:00)

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

First Step Act

Raquel Wilson

Salons E-H (Thursday 10:45 – 12:15)

Bissonet (Thursday 1:45 – 3:15 and 3:30 – 5:00)

Review the most impactful legislation on criminal justice in 30 years and learn to spot some of the legal and application issues related to sentencing.

Grouping of Multiple Counts

Raquel Wilson

Salons A-D (Wednesday 10:15 – 11:45 and 1:15 – 2:45)

If you've ever encountered a federal case with more than one count of conviction, you need to attend this session. Learn how to determine a single guideline range where there are multiple counts – we'll make it easy by using our decision tree to apply the grouping rules to various offense types.

Guidelines App Demonstration and Guidelines Manual Annotated Demonstration (Ongoing in the Mardi Gras Foyer)

Commission Staff

Swing by and learn how to access and use the *Guidelines Manual* mobile app and the new *Guidelines Manual Annotated*. The *Guidelines Manual Annotated* is an online HTML version of the *Guidelines Manual* that provides improved access to the amendment history of specific guideline and commentary provisions. Visit us in the foyer for more information and a real-time demonstration of these products.

HelpLine Live (Ongoing in the Mardi Gras Foyer)

Commission Training Staff

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

Introduction to Criminal History

Peter Madsen & Krista Rubin

Salons A-D (Tuesday 3:15 – 4:30 and 4:45 – 6:00)

The defendant's criminal history is included in the presentence investigation report for every federal felony or Class A misdemeanor. It is important to understand the rules governing how criminal history is scored and how criminal history affects the guideline range. Those new to the guidelines will learn important terminology and basic application of the criminal history rules.

Introduction to Relevant Conduct

Alan Dorhoffer & Rachel Pierce

Salons E-H (Tuesday 3:15 – 4:30 and 4:45 – 6:00)

For those new to guidelines sentencing, we recommend that you start with the core principles governing application of the federal sentencing guidelines. Relevant conduct is a term of art under the guidelines. Come and learn the rules governing, and the limitations on, the information courts may consider when determining the sentencing guideline range for federal felonies and Class A misdemeanors.

Organizational Guidelines

Kathleen Grilli & James Strawley

Salons A-D (Thursday 9:00 – 10:30)

Learn how to apply the guidelines governing sentencing of organizational defendants. You'll use real-world scenarios and the Organizational Guidelines worksheet to learn about Chapter Eight of the guidelines.

Plenary Session – Commission Update and Interactive Seminar Review

Hon. Charles Breyer, Hon. Nannette Brown, Ebise Bayisa, Alan Dorhoffer, Peter Madsen, Rachel Pierce, Krista Rubin, & Raquel Wilson

Bissonet & Carondelet (Wednesday 9:00 – 10:00)

We'll open the seminar with an update on recent Commission activities and an interactive overview of seminar topics. Testing your knowledge during this session will help you decide which courses to attend Wednesday to Friday.

Probation Officers Forum

John Bendzunas & Jill Bushaw

Salons A-H (Wednesday 3:00 – 5:00)

Probation Officers will gather to give the Commission feedback on the guidelines and the Commission's policy priorities. You will be in a small group with other officers, and a table facilitator will ensure your input is heard and transmitted. You won't want to miss this chance to tell us what you think.

Relevant Conduct in Drugs and Firearms Offenses

Ebise Bayisa

Carondelet (Wednesday 10:15 – 11:45 and 1:15 – 2:45)

Relevant conduct is one of the guidelines' foundational principles, and understanding it is the key to understanding a defendant's sentencing liability. Learn how relevant conduct governs the application of specific offense characteristics and the scoring of criminal history in drugs and firearms offenses.

Relevant Conduct in Economic Crimes

Peter Madsen

Bissonet (Wednesday 10:15 – 11:45 and 1:15 – 2:45)

Relevant conduct is one of the guidelines' foundational principles, and understanding it is the key to understanding a defendant's sentencing liability. Learn how relevant conduct governs the application of specific offense characteristics in economic crimes.

Relevant Conduct in Sex Offenses and Other Crimes Against the Person

Rachel Pierce & Krista Rubin

Salons E-H (Wednesday 10:15 – 11:45 and 1:15 – 2:45)

Think it's the same thing to plead to one bank robbery as to five because "it's all relevant conduct"? Think again! Confused about when the "special instruction" applies in sex offenses? You're not alone. Learn about how relevant conduct rules really operate in sex offenses and other crimes against the person.

RICO Offenses

Rachel Pierce, Karin Bell, Diego Esquibel, & Laura Roffo

Salons E-H (Thursday 3:30 – 5:00)

As prosecutions of organized crime become more frequent, it's increasingly important to master the application of the guidelines in racketeering offenses. Join us as we explain how the guidelines work, and, discuss with a panel of practitioners some of the charging decisions and practices that affect application of this guideline.

Sentencing Scenarios

Hon. Rosanna Peterson, Ebise Bayisa, & Rachel Pierce

Salons E-H (Thursday 9:00 – 10:30 and 1:45 – 3:15)

New for 2019, we'll explore some of the practical challenges that can arise at sentencing. How will you make sure certain information is included in the presentence investigation report for the judge's consideration? Will the defendant face the possibility of losing credit for acceptance of responsibility if they object to certain findings? What departures and variances might the Court consider? Explore these questions through work on sentencing scenarios drawn from real cases.

Working Breakfast and Plenary Session – Research and Data You Can Use

Ebise Bayisa, Peter Madsen, & Glenn Schmitt

Bissonet & Carondelet (Thursday 8:00 – 8:45)

There's so much more to the Commission than the Sentencing Guidelines. Did you know that in the Sentencing Reform Act, Congress specifically created an Office of Research and Data within the Commission to collect and disseminate research and information relevant to sentencing? If you don't know what this has to do with sentencing on a daily basis, then come to this session to find out more! You'll learn where to find the latest on the Commission's study of recidivism among federal offenders, their criminal history, and more. And, you'll tour the newly formatted Annual Sourcebook to learn how to mine it for information.

Accessing the 2019 USSC National Seminar App

Before downloading this year's app, you MUST delete ANY apps you have used for USSC Seminars in the past.

Please be sure to refresh the app each day.

iOS App Store (iPad and iPhone):

1. Locate and select the **App Store** icon on your iOS device.
2. Search for **CrowdCompass AttendeeHub** and download app.
3. Once downloaded and installed, open the app and search for "**2019 USSC National Seminar New Orleans.**"
4. Then **click Download** to update the app. *(You may be asked for your Apple ID password; USSC staff are unable to assist you with Apple ID-related issues.)*

Google Play Store (Android):

1. Locate and select the **Google Play Store** icon on your Android device.
2. Search for **CrowdCompass AttendeeHub** and download app.
3. Once downloaded and installed, open the app and search for "**2019 USSC National Seminar New Orleans.**"
4. Then **click Download** to update and open the app.

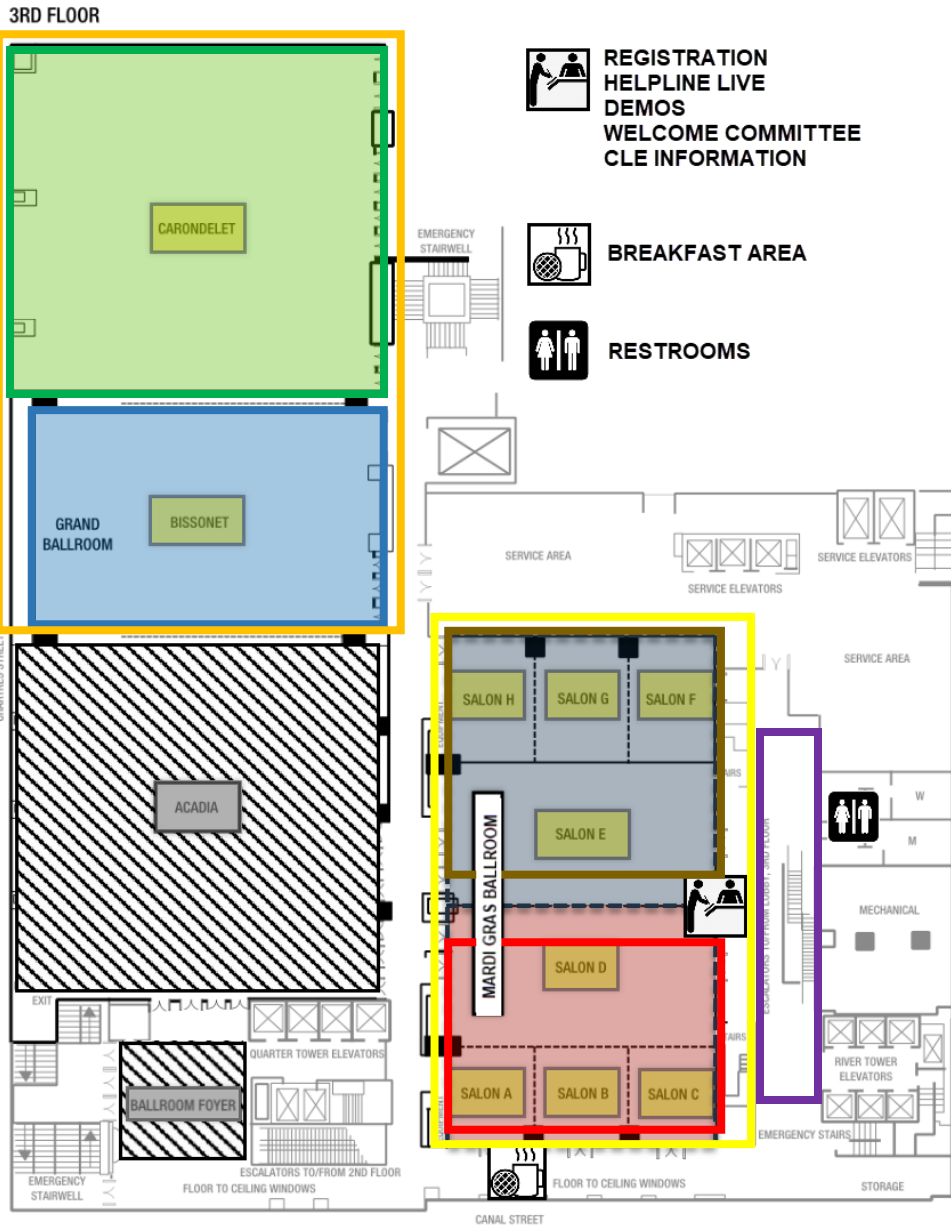
Other devices (e.g., Windows phones, laptops, etc.):

1. Navigate to <http://www.cvent.com/d/dbq4lh> on your device using the web browser of your choice.
2. Content is structured in a web-based format for your review.

Wi-Fi Name: USSC

Wi-Fi Password: Welcome2019

At A Glance Room Assignments



TUESDAY - Seminar Registration (2:30-6:00); HelpLine Live (2:30-6:00); CLE; (2:30-6:00); Welcome Committee (2:30-6:00); Live Demo (2:30-6:00)
WEDNESDAY - Seminar Registration (7:30-4:00); HelpLine Live (7:30-4:00); CLE; (7:30-4:00); Welcome Committee (7:30-4:00); Live Demo (7:30-4:00)
THURSDAY - Seminar Registration (7:30-5:00); HelpLine Live (7:30-5:00); CLE; (7:30-5:00); Welcome Committee (7:30-5:00); Live Demo (7:30-5:00)

TUESDAY - Reception (6:00-7:00)
WEDNESDAY - Relevant Conduct in Economic Crimes (10:15-11:45 & 1:15-2:45); Ethics (3:00-5:00)
THURSDAY - Criminal History: Implications for Immigration Offenses, Career Offender, Safety Valve, and First Step Act (9:00-10:30 & 10:45-12:15); First Step Act (1:45-3:15 & 3:30-5:00)

WEDNESDAY - Relevant Conduct in Drugs and Firearms Offense (10:15-11:45 & 1:15-2:45)
THURSDAY - Case Law Update (9:00-10:30; 10:45-12:15; 1:45-3:15; & 3:30-5:00)

WEDNESDAY - Plenary Session: Commission Update/Interactive Seminar Review (9:00-10:00)
THURSDAY - Plenary Session/Working Breakfast: Research and Data You Can Use (8:00-8:45)
FRIDAY - BOP Part I (8:30-9:45); BOP Part II (10:00-11:30)

TUESDAY - Intro to Criminal History (3:15-4:30; 4:45-6:00)
WEDNESDAY - Grouping of Multiple Counts (10:15-11:45 & 1:15-2:45)
THURSDAY - Organizational Guidelines (9:00-10:30); Emerging Technologies and Sentencing (1:45-3:15 & 3:30-5:00)

TUESDAY - Intro to Relevant Conduct (3:15-4:30; 4:45-6:00)
WEDNESDAY - Relevant Conduct in Sex Offenses and Other Crimes Against the Person (10:15-11:45 & 1:15-2:45)
THURSDAY - Sentencing Scenarios (9:00-10:30 & 1:45-3:15); First Step Act (10:45-12:15); RICO Offenses (3:30-5:00)

WEDNESDAY - Probation Officers Forum (3:00-5:00)



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Criminal Justice Section

Course Materials

Please check the mobile app for additional materials.

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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?

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?

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?

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?

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.

CASE LAW UPDATE - CATEGORICAL APPROACH

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?

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?

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?

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?

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 defendant using 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)?

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?

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).

CASE LAW UPDATE - HOT TOPICS

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?

Scenario 5B:

Same facts as above, but the defendant has finished serving his firearms sentence so §5G1.3 does not apply because there is no undischarged sentence. However, the court wants to apply a departure 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?

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 time of sentencing, what is the amount of restitution?

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 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 were for legitimate work and because he did not offer any evidence, there is no credit against the \$150,000 order.

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

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

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

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?

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?

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?

CASE LAW UPDATE - RESTITUTION AND SUPERVISED RELEASE CONDITIONS

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 be waived.

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

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?

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?

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?

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?

Decision Tree: Determining Whether Multiple Prior Sentences Should be Treated as a Single Sentence or Separate Sentences

Step 1:

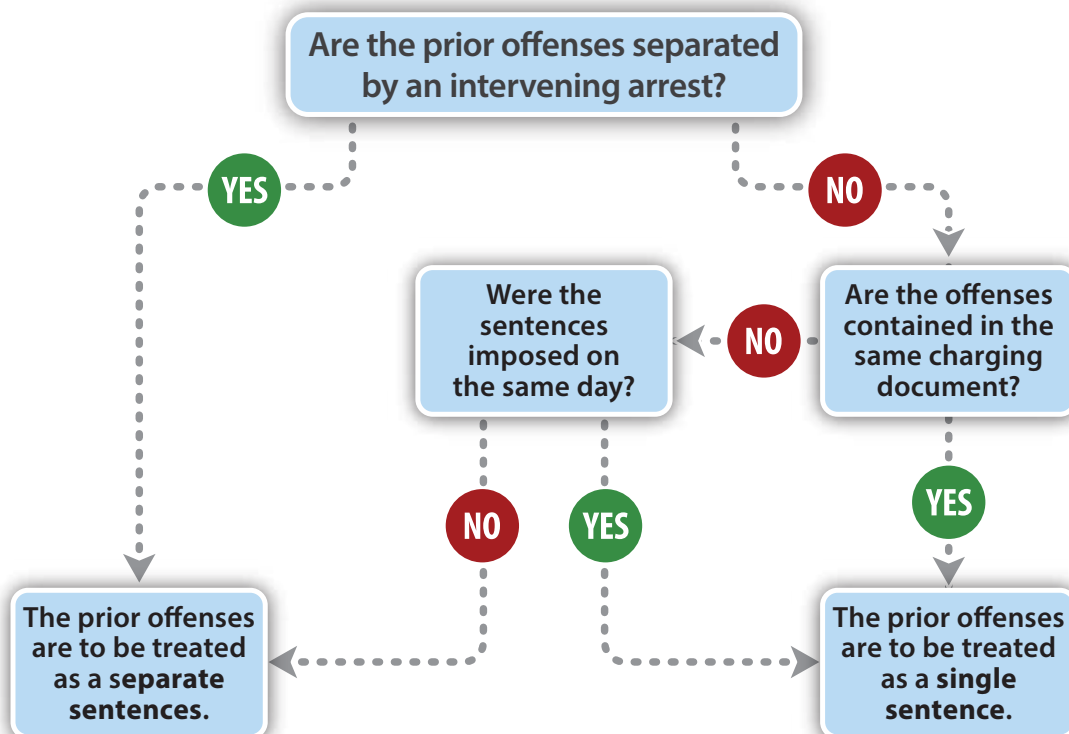
Determine whether the multiple prior offenses are separated by an intervening arrest.

What is an **intervening arrest**? An **intervening arrest** means that the defendant is arrested for the first offense before committing the second offense.

Example 1	Example 2	Example 3
Commits Robbery	Commits Robbery	Commits Robbery
Arrested for Robbery	Commits Burglary	Arrested for DUI
Commits Burglary	Arrested for Robbery	Commits Burglary
Intervening Arrest	NO Intervening Arrest	NO Intervening Arrest

Step 2:

Determine whether the multiple prior sentences will be treated as a single sentence or separate sentences.



Decision Tree: Determining Whether Multiple Prior Sentences Should be Treated as a Single Sentence or Separate Sentences

Step 3:

Determine the length of the prior sentence to calculate criminal history points under §4A1.1

Multiple Prior Convictions Treated as Separate Sentences

If the multiple prior sentences are treated as **separate sentences**, each prior sentence is scored individually under §4A1.1. Use the length of the sentence imposed on each prior conviction to assign criminal history points under §4A1.1(a), (b) or(c), as appropriate.

Arrest Date	Conviction / Court	Date Sentence Imposed / Disposition	Guideline	Points
12/05/2014	Theft (felony)	01/05/2014 30 days custody	§4A1.1(c)	1
02/28/2016	Theft (felony)	02/28/2016 30 days custody	§4A1.2(c)	1

Multiple Prior Sentences Treated as a Single Sentence –

If the multiple prior sentences are treated as a **single sentence**, the group of multiple prior sentences that are treated as a **single sentence** will be assigned **one set** of criminal history points.

Sentences Imposed Concurrently

If the prior sentences ran concurrently, use the longest sentence of imprisonment to determine the number of criminal history points under §4A1.1.

Arrest Date	Conviction / Court	Date Sentence Imposed / Disposition	Guideline	Points
12/05/2014	Theft (felony)	01/12/2015: 30 days custody	§4A1.1(c)	1
12/05/2014	Theft (felony)	01/12/2015: 30 days custody concurrent	§4A1.2(a)(2)	0

Sentences Imposed Consecutively

If the prior sentences ran consecutively, use the aggregate amount of time imposed to determine the number of criminal history points under §4A1.1.

Arrest Date	Conviction / Court	Date Sentence Imposed / Disposition	Guideline	Points
12/05/2014	Theft (felony)	01/12/2015: 30 days custody	§4A1.1(b)	2
12/05/2014	Theft (felony)	01/12/2015: 30 days custody consecutive	§4A1.2(a)(2)	0

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

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

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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.

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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) Miami-Dade Circuit Court Miami, FL 2010-CR-34873	11/27/2013: 6 months custody	§4A1.1(b), §4A1.2(a)(2)	2
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

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.

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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.

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.

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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

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.

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

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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

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

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

SCENARIOS: CRIMINAL HISTORY: IMPLICATIONS

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?

ETHICS HYPOTHETICALS

ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING (2019)

In all hypos, these are the “players”:

Defendant Peter **Meyers**

Defense Counsel Paul **Jones**

AUSA Mary **Brown**

I.

Peter Meyers, a 20 year-old heroin addict with no criminal record, was arrested by DEA agents during their execution of a search warrant at a drug stash house. At the time of the raid, Meyers was in the house assisting the home’s owner, his second cousin, package heroin for sale. In exchange for assisting his cousin, Meyers was to receive heroin for his own use. At the time of the agents’ raid, Meyers’ cousin temporarily had left the house and thus was not arrested by the DEA. After he learned of the search of his house, Meyers’ cousin fled and remained at large. In the room in which Meyers was packaging heroin when he was arrested, an unloaded single-barrel, single-shot .410 shotgun (the smallest caliber shotgun, typically used for hunting small game) was leaning against the wall of the room in plain view. The agents did not find any unused shotgun shells in the house. Inside shotgun was a single, spent shell. The agents determined that this shell had contained “No. 9 birdshot,” the smallest size pellets available. The agents seized a total of 435 grams of heroin as well as the .410 shotgun. Meyers was the only person whom they arrested.

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

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probation officer information about the shotgun being in the room? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify him for the safety valve.”

A. May AUSA Brown ethically enter into the plea agreement proposed by Jones – leaving out mention of the unloaded .410 shotgun from the factual basis? May AUSA Brown ethically agree to withhold information about the .410 shotgun from the probation officer assigned to write the presentence report?

i. Is there another way the attorneys could ethically approach this issue?

B. Assume Brown and Jones ultimately entered into the agreement. At sentencing, the court specifically asks both attorneys: “The PSR doesn’t say anything about it, but I just want to make sure that the defendant wasn’t armed when he was packaging the heroin. It’s my understanding guns are tools of the trade for drug dealers.” How should AFPD Jones respond? How should AUSA Brown respond?

II.

Peter Meyers, a British citizen, was charged with one count of illegal reentry by a previously deported alien, in violation of 8 U.S.C. § 1326(a). Prior to his sole deportation, he had been convicted in federal court of distributing drugs and given a five-year prison sentence followed by three years of supervised release. He was deported after being released from federal prison and thereafter was found in the United States by an immigration agent.

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

Thereafter, when the federal probation officer prepared the PSR, she noted Meyers’s prior federal drug-trafficking conviction and stated that the statutory range of punishment was 0-20 years under 8 U.S.C. § 1326(b)(2). Without that prior conviction, Meyers’ statutory maximum sentence would be two years of imprisonment under 8 U.S.C. § 1326(a). The PSR stated that Meyers’s sentencing

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guideline range was 46-57 months after credit for acceptance of responsibility (base offense level of 21/CHC III).

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

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

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III.

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

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

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

After defense counsel **Paul Jones** received the PSR and saw the “relevant conduct” findings related to the CS’s allegations, Jones objected that the evidence of the prior (unadjudicated) drug deals should not be adopted by the district court because it did not have “sufficient indicia of reliability to

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support its probably accuracy” (USSG §6A1.3, comment.) – in that it was based solely on the hearsay of an unidentified CS.

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

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

IV.

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

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the Sentencing Guidelines would disqualify Meyers for the two-level “safety valve” reduction under USSG §2D1.1(b)(18).

The PSR calculated Meyers’s adjusted offense level to be 31 by starting with a base offense level of 34 and subtracting 3 levels for acceptance of responsibility. However, the PSR further stated that Meyers qualifies for the two-level safety valve reduction under USSG §2D1.1(b)(18) because he has no criminal history points and also that the ten-year statutory mandatory minimum sentence no longer applies to him under 18 U.S.C. § 3553(f). With the application of the safety valve and placement of Meyers in CHC I, Meyers’s total offense level would be 29 and the corresponding guidelines imprisonment range would be **87 to 108** months (without the 10-year mandatory minimum, the low-end of the guideline range would be 87 months, not 120 months). Had the guidelines calculations been correctly scored in the PSR – *i.e.*, no safety valve and a determination that Meyers is in CHC II – Meyers’s guidelines imprisonment range would have been **121 to 151** months (with a statutory mandatory minimum sentence of **120 months**).

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

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

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4. Assuming that Jones has filed a short statement of non-objection to the PSR as it currently exists (i.e., with its 87-108 month range), if the court explicitly asks Jones at sentencing if the PSR and the sentencing calculations within it are correct, how should Jones respond?

V.

Defendant **Peter Meyers**, aged 46 and lacking a criminal record, was charged in a criminal complaint in federal court with four counts of armed bank robbery (involving four different banks) and three corresponding section 924(c) counts (alleging that Meyers had brandished a 9-mm pistol during each of the three robberies). Conviction on all six counts would effectively result in a life sentence (a mandatory 28 years of imprisonment on the three section 924(c) counts to run consecutively to the prison sentence for the bank robberies, which would likely have a guideline minimum of at least 12 years based on various aggravating factors in the worst robbery and the extra “units” for the multiple counts). Although Meyers did not confess and no eyewitness could identify him as the robber, the prosecution’s evidence of Meyers’ guilt of the four armed robberies was very strong, including: video surveillance from the four banks that clearly show a white male robber with the same height and body type as Meyers, who is a white male (the robber wore a Halloween mask during each robbery so his face could not be identified); cell-tower evidence from Meyers’ cell phone records showing that his cell phone (seized by police when he was arrested) was located very near each bank at the time of each robbery (the three banks were located many miles apart); dozens of \$20, \$50, And \$100 bills with serial numbers matching the money taken from the three banks found in Meyers’ wallet, car, and apartment, including some with purple dye stains from a dye pack that had exploded during the fourth robbery; and a loaded stainless steel 9-mm pistol found in Meyers’ car that appears to be the same type as the one brandished by the robber during each of the four robberies (as shown on the video surveillance). In addition, after the fourth robbery, a witness on the street had seen an unidentified person wearing a Halloween mask run out of a bank, get into a car, and drive away at a high rate of speed and had taken a photo of the car’s license plate with her iPhone. The license plate was registered in the name of Meyers’ sister. FBI agents were thus able to identify Meyers as a suspect.

After being arrested on the complaint, appointed counsel, and having a preliminary hearing in which the foregoing evidence was introduced, Meyers briefly met with his defense attorney, AFD **Paul Jones**. Meyers angrily asserted that he was innocent of all four armed robberies. He offered no explanation for the cell tower records, his sister’s car being identified outside the fourth bank, and the

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bank money found in his possession other than to insist that it was a “sheer coincidence or maybe I’m being set up for some unknown unreason.” Meyers also said he had been unemployed during the past two years and had spent virtually all of his time alone in his trailer, and thus would have no way to prove an alibi defense with any concrete evidence. When Jones brought up the issue of whether he should seek a plea bargain to avoid what would be a virtual life sentence for Meyers if he were convicted of four robbery counts and section 924(c) charges, Meyers angrily responded, “I told you I am innocent. I am not pleading guilty to something I didn’t do.” Jones said that he would continue investigating the case and also carefully examine all of the prosecution’s evidence disclosed during pretrial discovery.

After he returned to his office, Jones telephoned the prosecutor, AUSA **Mary Brown**, and asked to arrange for a time for Jones to see the discovery. Brown responded to Jones that, “we can arrange for that after I get an indictment, but at this point I will offer your client a plea bargain offer that may make it unnecessary: if he agrees to waive the indictment, proceed on an information, and plead guilty to one of the bank robberies and a single section 924(c) count concerning a different robbery, I will drop the other three section 924(c) counts. His likely guideline range for the robbery count will be 70-87 months with acceptance of responsibility,¹ so his total prison sentence would be around 13-14 years with the consecutive seven-year section 924(c) sentence for brandishing a firearm in the other robbery.” She also said that, “This offer is only good for a week. I am going to the grand jury one week from today to obtain an indictment. If he doesn’t agree to the deal, I will get an indictment with all eight counts and thereafter won’t drop any of them.” Jones told Brown that he would give her a response to her plea offer within seven days.

- A. What ethical obligation does AFPD Jones have regarding AUSA Brown’s plea bargain offer? Could Jones ethically advise Meyers to accept the plea offer without Jones conducting any additional investigation and without actually reviewing the discovery (to which he is not entitled under Fed. R. Crim. P. 16 until after an indictment or information has been returned)?
- B. Assume Jones conveys the plea bargain offer to Meyers within the seven-day period and that Meyers adamantly responds, “I told you I’m not taking any plea bargain. I’m innocent.” Does Jones have any additional ethical or constitutional obligation (under the Sixth

¹ In the robbery count that the prosecutor envisioned for a plea agreement, the final offense level, after acceptance, would be 27, with a corresponding guideline range of 70-87 months (CHC I).

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Amendment) to attempt to persuade Meyers to consider the plea bargain offer before it expires?

- C. Assume that Jones did not convey the plea offer to Meyers within the seven-day period and that AUSA Brown thereafter withdrew the offer as promised after going to the grand jury and obtaining an eight-count indictment. Further assume Meyers went to trial, was convicted of all eight counts, and received a prison sentence of 121 months for the robberies with a consecutive 28-year sentence for the four section 924(c) counts (for a total sentence of around 38 years). After overhearing a remark by AUSA Brown to Jones made as she was leaving the courtroom following sentencing, Meyers for the first time learned that Brown had made a plea bargain offer to Jones and that Jones had failed to convey the offer to Meyers. Does Meyers have any constitutional basis to challenge his convictions and 38-year sentence in a motion for a new trial or section 2255 motion?

Grouping Multiple Counts of Conviction

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

Key Points about Grouping Multiple Counts of Conviction:

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

Key Terms

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

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

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

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



Grouping Multiple Counts of Conviction

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

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

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

Guidelines excluded from grouping under this subsection include:

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

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

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

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

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

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



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

Keys to Grouping under USSG §3D1.2(a) – (d)

Grouping Under Rule (d) - INCLUDED list

These guidelines are on the INCLUDED list (they group under Rule (d) if all counts go to the same guideline):

§2A3.5;
 §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
 §§2C1.1, 2C1.2, 2C1.8;
 §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
 §§2E4.1, 2E5.1;
 §§2G2.2, 2G3.1;
 §2K2.1;
 §§2L1.1, 2L2.1;
 §2N3.1;
 §2Q2.1;
 §2R1.1;
 §§2S1.1, 2S1.3;
 §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Grouping Under Rule (d) - EXCLUDED list

These guidelines are on the EXCLUDED list (they don't group under Rule (d), but they might group under Rules (a)(b) or (c) or you might have to add units):

all offenses in Chapter Two, Part A (except §2A3.5);
 §§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
 §2C1.5;
 §§2D2.1, 2D2.2, 2D2.3;
 §§2E1.3, 2E1.4, 2E2.1;
 §§2G1.1, 2G2.1;
 §§2H1.1, 2H2.1, 2H4.1;
 §§2L2.2, 2L2.5;
 §§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
 §§2P1.1, 2P1.2, 2P1.3;
 §2X6.1.

Keys to Grouping under USSG §3D1.2(a) – (d)

Grouping Under Rule (c)

- There are some commonly-occurring specific offense characteristics (SOC) and Chapter Three adjustments that will result in a Rule (c) grouping:
 - An SOC for injury where an assault is also charged.
 - A firearms SOC (such as in a robbery offense) where possession of the firearm is also charged.
 - An increase for a firearm being used in a felony offense (such as in robbery or a drug trafficking offense) where the other felony offense is also charged.
 - Tax evasion where the income was derived from criminal activity that is also charged.
 - Money laundering where the defendant is also charged with the underlying offense from which the laundered funds were derived.
 - An adjustment for obstruction of justice where obstruction is charged, and the offense with respect to which the obstructive conduct occurred is also charged.

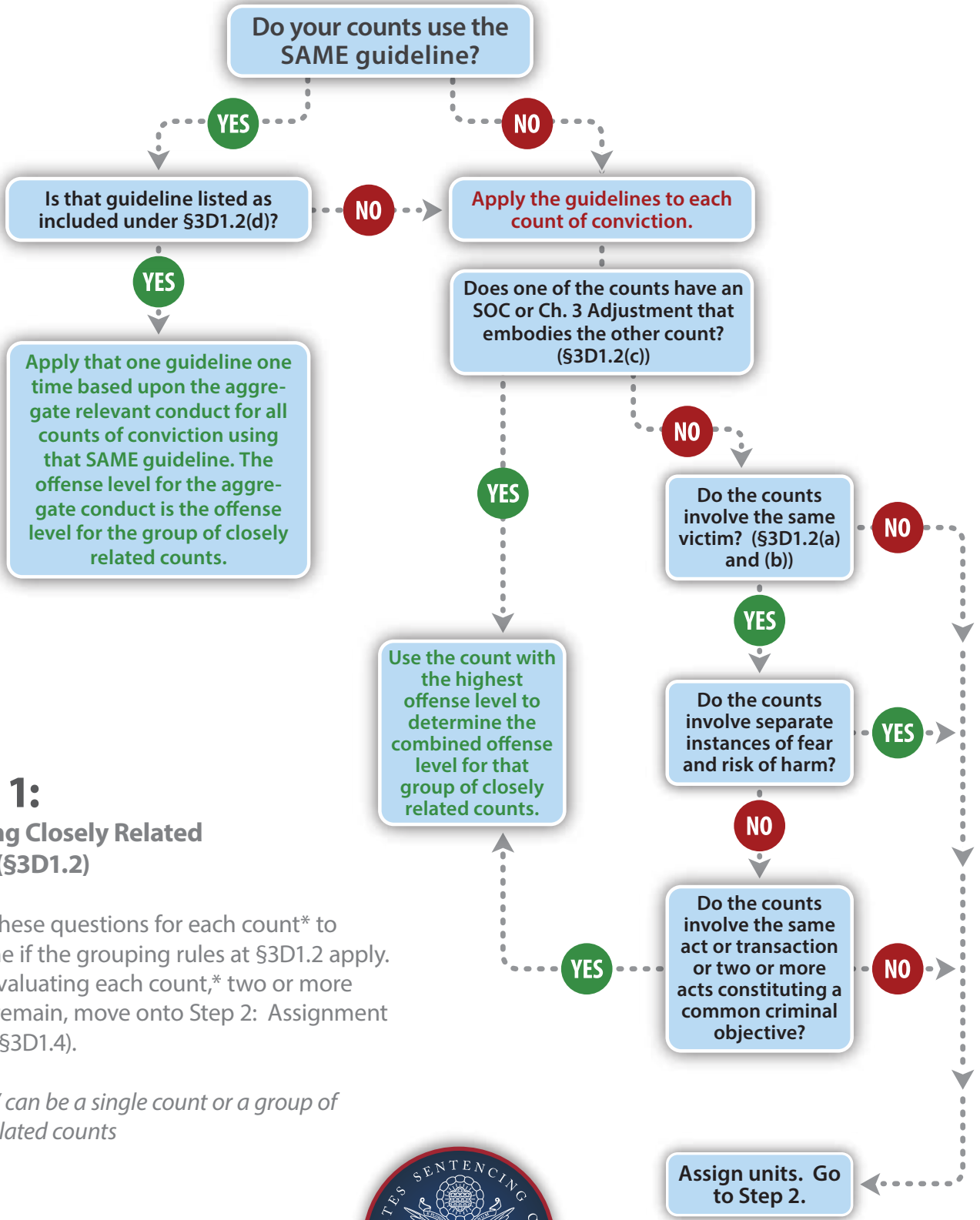
Helpful Application Notes

- §3D1.2 (Grouping of Closely Related Counts) Application Note 2. “For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the ‘victim’ . . . is the societal interest that is harmed.” An example of a case in which societal harms are closely related is a case in which the defendant unlawfully enters the U.S. and also possesses fraudulent proof of citizenship. An example of a case in which societal harms are distinct is one in which the defendant enters the country illegally and is also carrying a distribution amount of drugs.
- See Application Notes 3 and 4 to §3D1.2 for examples of grouping under Rules (a) and (b).



Decision Tree: Grouping Multiple Counts of Conviction

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

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

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



Flip over for Step 2:

Decision Tree: Grouping Multiple Counts of Conviction

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Step 2:

Assignment of Units (§3D1.4)

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

Checklist to Determine a Single Combined Offense Level:

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

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

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, 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?

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?

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?

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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?

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?

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?

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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?

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?

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?

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

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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?

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?

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?

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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?

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

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

Criminal History Calculations / USSG §4A1.1 & 4A1.2

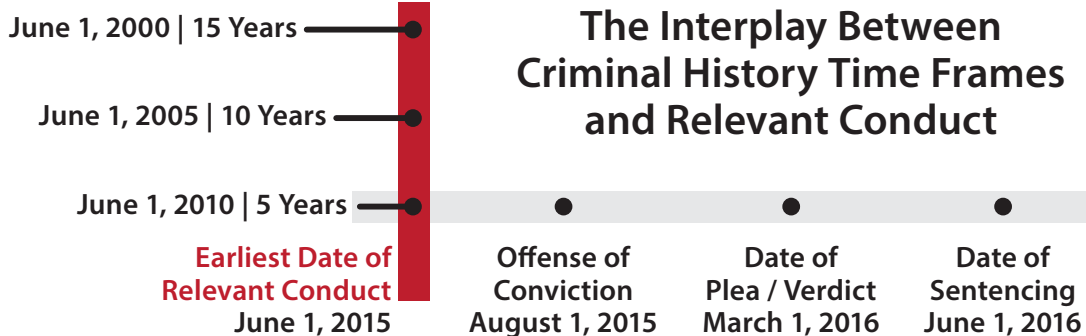
This handout is intended to be a quick reminder of some key considerations when applying the criminal history calculations at §4A1.1 and 4A1.2.

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

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

* If Otherwise Countable
** Exceptions May Apply

* If Otherwise Countable
** Exceptions May Apply



Other Considerations:

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

Multiple Prior Sentences / USSG §4A1.2(a)(2)

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

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

--- AND ---

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

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

Example 1

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

Example 2

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

Career Offender “Override”

Criteria

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

Override

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

Career Offender Table

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

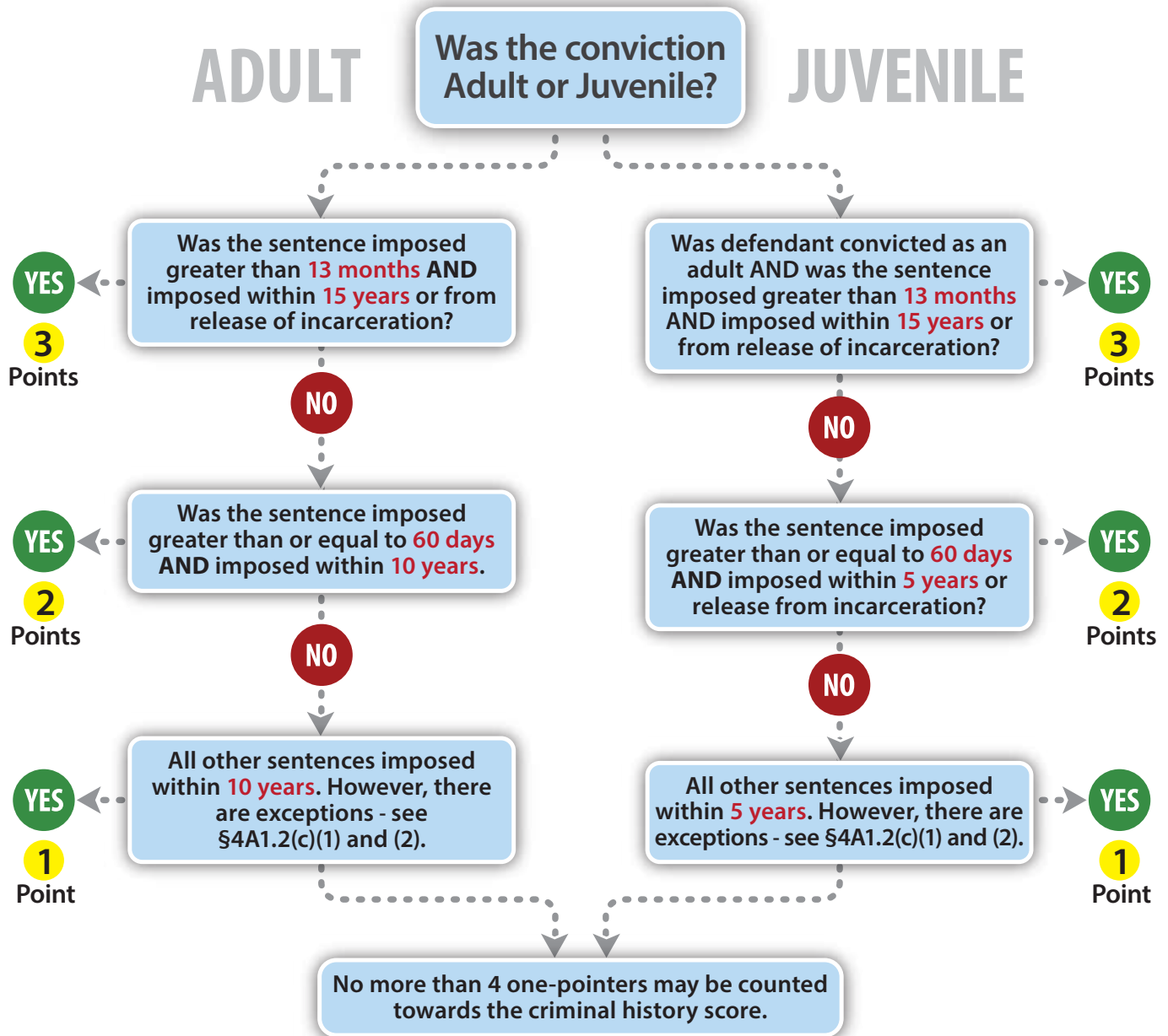
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Decision Tree: Adult or Juvenile Conviction

How to Score Basic Criminal History Convictions



In order for the prior conviction to count, the sentence must be imposed within the applicable time periods noted above.

In addition, you will need to know the earliest date of relevant conduct for the instant federal offense. That is the date from which you work backwards for the 5, 10, and 15-year time frames. §4A1.2 (d) and (e).

If the defendant committed the instant offense, while he was under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status, they receive an additional two points.

Decision Tree: Adult or Juvenile Conviction

How to Score Criminal History Points with a Conviction Involving Revocations

Special Rules for Revocations §4A1.2(k) and Application Note 11

Generally, you add the amount of time imposed at the original sentencing with the time imposed upon revocation. In some cases, the amount of revocation may affect the time period under which some sentences are counted.

Example 1 / Date of Instant Offense – March 15, 2019

Arrest Date	Conviction / Court	Date Sentence Imposed / Disposition	Guideline	Points
03/04/2006	Importation of Marijuana (felony) / U.S. District Court, San Diego, CA	06/28/06: 4 months prison, 2 years TSR 11/10/06: TSR violation, warrant issued 05/29/07: TSR revoked, 10 months prison, 1-year TSR reimposed	§4A1.1(a), §4A1.2(k) and App. Note 11	3

Original sentence is too old to count – since we can only look back 10 years from the date of the instant offense. However, when the defendant was revoked, we then added the revocation sentence of 10 months to the original sentence of 4 months. When we add the sentences together, the total imposed sentence is now more than 13 months, as such, the time frame is now 15-years and we look to the date of his last release from incarceration.

Example 2 / Date of Instant Offense – March 15, 2019

Arrest Date	Conviction / Court	Date Sentence Imposed / Disposition	Guideline	Points
09/14/2007	Aggravated Assault (felony) / Ramsey County District Court, St. Paul, MN 2007-CR-34873	11/27/2007: 8 months custody 12/25/2008: Supervision revoked, 2 months custody	§4A1.1(e)(2)	0

Original sentence is too old to count – since we can go back 10 years from the date of the instant offense. However, offender was then revoked and he received 2 more months of incarceration. Even when we add the sentences together, the total sentence is less than 13 months, as such, the 10-year time frame remains and the sentence is still too old to count. We can only look to the original sentence date, §4A1.2(k)(2).

Example 3 / The defendant has two prior convictions for Theft that are counted separately under §4A1.2(a)(2). For the first conviction, he was sentenced to 2 years' probation. On the second conviction, he received a sentence of 3 years' probation. Due to the defendant's instant federal offense, his probation terms were all revoked. The state judge revoked both probation terms and imposed 18 months' imprisonment for each of the cases. How many criminal history points?

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

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

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

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?

SCENARIOS: INTRODUCTION TO CRIMINAL HISTORY

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?

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

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

SCENARIOS: INTRODUCTION TO CRIMINAL HISTORY

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?

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

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

SCENARIOS: INTRODUCTION TO CRIMINAL HISTORY

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?

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Relevant Conduct / §1B1.3

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This provision, located at §1B1.3, specifies the conduct for which a defendant may be held accountable in the determination of the offense level. The conduct need not have been formally charged or proved at trial, so long as the sentencing court finds the facts by a preponderance of the evidence. Relevant conduct may include the defendant's conduct as well as the conduct of others under certain circumstances.

Key Points about Relevant Conduct

- Serves as a “gatekeeper” in determining the conduct to be considered in the application of the existing guideline factors.
- Will limit the conduct that can be used in guideline application. However, for purposes of sentencing, generally all information can be used. (See 18 U.S.C. § 3661, §1B1.4.)
- Sentencing accountability is not always the same as criminal liability. In other words, a person convicted of conspiracy may not necessarily be held accountable for the whole conspiracy under the provisions of relevant conduct.
- Relevant conduct determines application of the base offense levels, specific offense characteristics, and cross references in Chapter Two and the adjustments in Chapter Three.
- The determination of the relevant conduct for Chapters Two and Three of a particular offense will also impact the determination of a single offense level for multiple counts of conviction (Chapter 3, Part D), the calculation of criminal history points (Chapter 4), and adjustments for undischarged terms of imprisonment (§5G1.3).
- Relevant conduct is unaffected by jurisdiction and the statute of limitations.

Key Terms

Defendant – acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant

Offense – the offense of conviction and all relevant conduct

Jointly Undertaken Criminal Activity – a criminal plan, scheme, endeavor, or enterprise undertaken

by the defendant in concert with others, whether or not charged as a conspiracy

Same Course of Conduct – acts or offenses sufficiently connected by similarity, regularity, and temporal

proximity to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.

Common Scheme or Plan – acts or offenses substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose or similar *modus operandi*



Relevant Conduct / §1B1.3

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The Relevant Conduct Analysis is Keyed to the Offense of Conviction, and Requires Determinations of “Who” and “When”

Who:

- Acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused **by the defendant**; and
- **Acts of others** that:
 - were within the scope of the jointly undertaken criminal activity,
 - in furtherance of that criminal activity, and
 - reasonably foreseeable in connection with that criminal activity

When:

- That occurred **during** the commission of the offense of conviction, **in preparation** for that offense, or to **avoid detection or responsibility** for the offense of conviction
- **Only for offenses listed as included at §3D1.2(d)**, Relevant Conduct includes acts of the defendant and acts of others within the jointly undertaken criminal activity that were the same course of conduct or common scheme or plan as the offense of conviction.

Relevant conduct also includes:

- All harm that resulted from the acts described above, and
- any other information outside of the above analysis that is specified in the applicable guideline.

*For more information or to ask the Commission a question,
please call our Helpline at 202-502-4545*

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



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

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?

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?

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?

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

INTRODUCTION TO RELEVANT CONDUCT

his co-participant, the officer shot and injured a customer in the bank. Will the §2B3.1 specific offense characteristic for “bodily injury” apply?

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?

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?

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?

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?

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?

ORGANIZATIONAL GUIDELINE SCENARIOS

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?

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?

ORGANIZATIONAL GUIDELINE SCENARIOS

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?

- 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?

ORGANIZATIONAL GUIDELINE SCENARIOS

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.

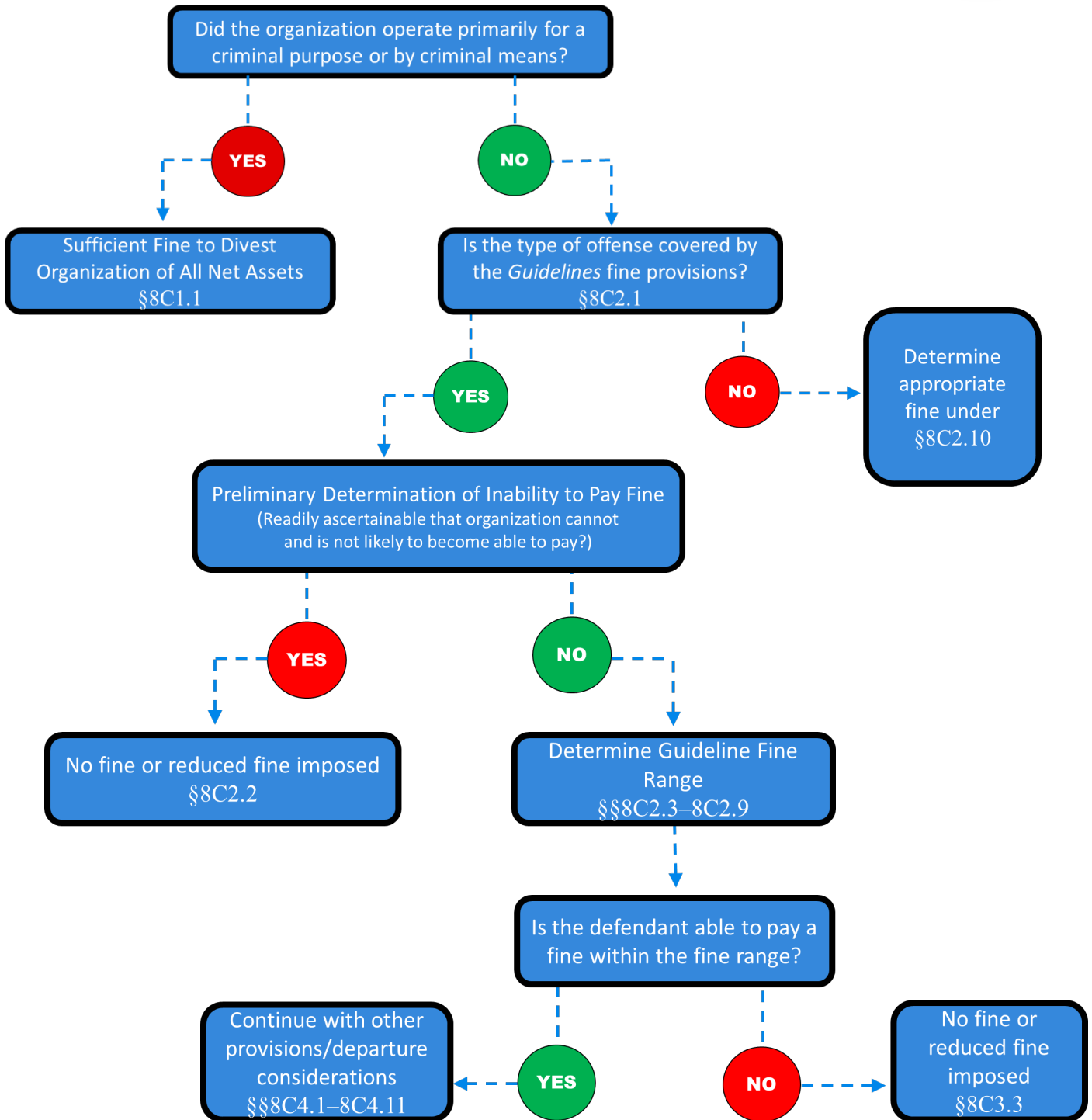
There is no evidence of other misconduct in the company's 15-year history. The current market value of the company's assets is approximately \$20 million. The company's annual net income is approximately \$1,750,000.

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

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

Organizational Guidelines

Determining the Fine



Organizational Worksheet A (Offense Level)

Defendant _____ Docket Number _____

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____

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

Guidelines Manual Edition Used: 20 _____ (NOTE: Worksheets keyed to the Manual effective November 1, 2015)

Preliminary Determination of Inability to Pay Fine:

1. If it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1, a determination of the guideline fine range is unnecessary (See §§8C2.2(a), 8C3.3(a)). In such a case, skip to Worksheet D, Item 1.
2. If it is readily ascertainable through a preliminary determination of the minimum guideline fine range that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary (See §8C2.2(b)). In such a case, skip to Worksheet D, Item 1.

Instructions:

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

Exceptions:

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

Offense Level (See §8C2.3).

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum, the adjusted offense level, in the box provided below. **Note: Chapter Three Parts A, B, C and E, do not apply to organizational defendants.**

Guideline	Description	Level

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

Sum:
(Adjusted Offense Level)

Notes: _____

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

Organizational Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions:

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

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

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

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (½) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

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

Count number(s): _____

 _____(unit)

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

Count number(s): _____

 _____(unit)

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

Count number(s): _____

 _____(unit)

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

Count number(s): _____

 _____(unit)

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

Count number(s): _____

 _____(unit)

6. Total Units:

(Total units)

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

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

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

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

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

Organizational Worksheet C

(Base Fine, Culpability Score and Fine Range)

Defendant _____ Docket Number _____

1. Offense Level Total

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

2. Base Fine (See §8C2.4(d))

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

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

\$ _____

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

\$ _____

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

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

\$ _____

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

\$ _____

3. Culpability Score (See §8C2.5)

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

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

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

\$ _____

(c) Prior History (See §8C2.5(c))

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

\$ _____

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

Organizational Worksheet C, Page Two

Defendant _____

Docket Number _____

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

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

§ _____

- (e) Obstruction of Justice (See §8C2.5(e))
If no adjustment is applicable, enter "0".

§ _____

- (f) Effective Program to Prevent and Detect Violations of Law (See §8C2.5(f))
If no adjustment is applicable, enter "0".

§ _____

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

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

§ _____

4. Total Culpability Score

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

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

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

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

- (a) Minimum Multiplier _____

- (b) Maximum Multiplier _____

Organizational Worksheet C, Page Three

Defendant _____

Docket Number _____

6. Fine Range (See §8C2.7)

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

Minimum of fine range \$ _____

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

Maximum of fine range \$ _____

7. Disgorgement (See §8C2.9)

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

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

\$ _____

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

\$ _____

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

\$ _____

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

- (e) Subtract the sum of restitution and remedial costs (Item (d)) from the amount of pecuniary gain to the defendant (Item (a)) to determine undisgorged gain. Enter the result here and at Worksheet D, Item 4(b).

\$ _____

Note: If the amount of undisgorged gain is less than zero, enter zero

Organizational Worksheet D (Guideline Worksheet)

Defendant _____ Docket Number _____

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

1. Restitution (See §8B1.1)

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

- b. Enter whether restitution is statutorily mandatory or discretionary:

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

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

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

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

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

\$ _____

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

- (a) Enter the guideline fine range from Worksheet C, Item 6 \$ _____ to \$ _____

- (b) Disgorgement (See §8C2.9)

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

\$ _____

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

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

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

Organizational Worksheet D, Page Two (Guideline Worksheet)

Defendant _____

Docket Number _____

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

Check the applicable box(es):

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

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

7. Fine Offset (See §8C3.4)

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

\$ _____

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

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

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

Organizational Worksheet D, Page Three (Guideline Worksheet)

Defendant _____ Docket Number _____

(b) Length of Term of Probation (See §8D1.2)

If probation is imposed, the guideline for the length of such term of probation is:
(Check the applicable box)

(1) At least one year, but not more than five years if the offense is a felony

(2) No more than five years if the offense is a Class A misdemeanor

(c) Conditions of Probation (See §§8D1.3 and 8D1.4)

List any mandatory conditions (§8D1.3), recommended conditions (§8D1.4), and any other special conditions that may be applicable. _____

9. Special Assessments (See §8E1.1)

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

10. Additional Factors

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

Completed by _____ Date _____

Special Instruction for Organizational Guidelines Base Fine Calculation

USSG § 8C2.4(e)



- (1) 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 the offense level fine table set forth in subsection (d) above.

OFFENSE LEVEL FINE TABLE (EFFECTIVE NOV. 1, 2014)

OFFENSE LEVEL	AMOUNT
6 or less	\$5,000
7	\$7,500
8	\$10,000
9	\$15,000
10	\$20,000
11	\$30,000
12	\$40,000
13	\$60,000
14	\$85,000
15	\$125,000
16	\$175,000
17	\$250,000
18	\$350,000
19	\$500,000
20	\$650,000
21	\$910,000
22	\$1,200,000
23	\$1,600,000
24	\$2,100,000
25	\$2,800,000
26	\$3,700,000
27	\$4,800,000
28	\$6,300,000
29	\$8,100,000
30	\$10,500,000
31	\$13,500,000
32	\$17,500,000
33	\$22,000,000
34	\$28,500,000
35	\$36,000,000
36	\$45,500,000
37	\$57,500,000
38 or more	\$72,500,000

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?

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

These transactions are not listed in the indictment

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

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?

1(d): Mr. Smith argues that he is eligible for safety valve. 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?

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 in violation of § 18 U.S.C. 924(c) – mandatory minimum 5 years

RELEVANT CONDUCT IN DRUG AND FIREARMS CASES

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

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?

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

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 his vehicle and found a .40 caliber pistol which is the pistol in the 18 U.S.C. §922(g) violation. A subsequent search of his home resulted in the discovery of six additional firearms. These firearms are not listed in the indictment. 2 of the firearms were stolen and one firearm had a obliterated serial number. 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.

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

RELEVANT CONDUCT IN DRUG AND FIREARMS CASES

3(b): Does the specific offense characteristic for stolen firearm and/or obliterated serial number apply pursuant to 2K2.1(b)(4) apply?

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

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

Question 1

The defendant was convicted of health care fraud. In this case, the defendant recruited 7 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?

Question 2

Defendants 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?

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?

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?

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, Victim 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?

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

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. USPO 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 4 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?

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?

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?

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 an amount of loss of \$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 \$548,000 actual loss, because he was incarcerated from September 2009 to August 2011, then again from August 2012 to August 2013.

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

Was the court's ruling correct?

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

Question 10

Actual v. intended loss? 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?

What is the loss amount?

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?

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?

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.

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?

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.

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?

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

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?

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?

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

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?

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.

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?

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)."

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?

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?



RICO

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

Relevant Statutes

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

Predicate Acts

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

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

VS.

Overt Acts

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

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

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

Frequently Asked Questions

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

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

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

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

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

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

RICO

Relevant Case Law

Burden of Proof for Uncharged Underlying Offenses

Preponderance of the Evidence

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

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

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

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

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

Beyond a Reasonable Doubt

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

Analogizing State Crimes

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

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

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

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

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

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

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



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

RICO OFFENSES

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?

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

Sentencing Procedure at a Glance

Information at Sentencing

- No limitation shall be placed on the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. 18 USC § 3661; USSG §1B1.4.
- Burden of proof at sentencing is preponderance of evidence. *Witte v. United States*, 115 S.Ct. 2199 (1995).
- The rules of evidence do not apply at sentencing. Fed. R. Evid. 1101(d)(3).
- Information considered must have sufficient indicia of reliability to support probable accuracy. USSG §6A1.3(a).
- Uncharged conduct may be used. *Witte v. United States*, 515 U.S. 389 (1995).
- Conduct of which the defendant was acquitted may be used. *United States v. Watts*, 519 U.S. 148 (1997).
- The defendant retains a right to remain silent at sentencing. *Mitchell v. United States*, 526 U.S. 314 (1999).
- Victims have certain rights before and at sentencing. 18 USC § 3771(a)-(b).

Departure

A sentence outside the guideline range in accordance with the *Guidelines Manual*. Chapter Five, Part K lists factors that may constitute grounds for departure, and other departures are located throughout the *Guidelines Manual*. However, there may be other grounds for departure that are not mentioned in the guidelines. Departures can be above or below the guideline range. The most commonly applied departure is the downward departure based on the defendant's substantial assistance to the government in the investigation or prosecution of others. The substantial assistance departure is found at §5K1.1 of the *Guidelines Manual*.

Variance

A sentence outside the applicable guideline range (above or below) for any reason that is not in accordance with the guidelines or policy statements, after considering factors at 18 USC § 3553(a).

Procedure for Departures and Variances

- The Court may vary from the guidelines based on case-specific circumstances, including factors that are taken into consideration by the guidelines (e.g., criminal history) or that are discouraged or forbidden grounds for departures (e.g., a defendant's family circumstances). *Gall v. United States*, 552 U.S. 38 (2007).
- The Court may, in appropriate cases vary from the guidelines based on a policy disagreement. Such a sentence "may attract greatest respect when it is based on the particular facts of a case." *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *United States v. Spears*, 129 S. Ct. 840 (2009); *Pepper v. United States*, 131 S. Ct. 1229 (2011).
- Notice is required for a **departure** (a sentence pursuant to the *Guideline Manual*). *Burns v. United States*, 501 U.S. 129 (1991); Fed. R. Crim. Pro. 32(h).
- Notice is NOT required for a **variance** (a sentence outside the *Manual*, pursuant to 18 USC § 3553(a)). *Irizarry v. United States*, 553 U.S. 708 (2008).
- Best practice? Give the parties an adequate opportunity to respond to any intended variance.

Sentencing Procedure at a Glance*

Guilty Plea/Conviction at Trial

35 days before sentencing parties receive the PSR.

(Optional) Parties & probation may meet to resolve disputes.

(Optional) Parties file sentencing memorandum.

Within 14 days of sentencing, defendant may file notice of appeal.

90 days or more after sentencing, Court may order restitution.

14 days later, parties object to the PSR.

7 days before sentencing, probation officer submits the report to the Court, including unresolved objections.

Day of Sentencing, Court rules on objections & imposes sentence, which may include imprisonment, supervised release, fines, restitution, probation, etc.

Within 30 days of entry of judgment, the Chief Judge submits documents to the Commission.

Probation Officer

- Conducts the presentence investigation
- Interviews the defendant regarding history & characteristics
- Determines advisory guideline range
- Identifies the kinds of sentences available & any basis for departing or varying from the guidelines range
- Includes a confidential sentencing recommendation for the judge
- May meet with the parties to resolve objections to the PSR
- Supervising officer determines appropriate level of supervision upon release
- Supervising officer authorizes travel outside the supervising district

Defense Attorney

- Attends the presentence interview
- Reviews the PSR with the defendant
- Bears the burden of proof on factors decreasing the guidelines range

AUSA

- Provides information about the offense to the probation officer
- Bears the burden of proof on factors increasing the guidelines range
- Makes "best efforts" to notify crime victims of their rights

Law Clerk

- Performs legal research on objections & any other issues as directed by the Court

Judge

- Applies preponderance of evidence standard at USSG § 6A1.3 to rule on factual disputes, or determines a ruling is not necessary
- Rules on issues of law
- May allow the parties to introduce evidence & call witnesses
- May disclose the probation officer's sentencing recommendation
- Must give parties advance notice of any intent to depart & may give notice of intent to vary from the guidelines range
- Allows defendant to allocute
- Determines adjustments for time served
- Explains on the record the reasons for the sentence
- May recommend BOP programs & placement
- Completes the Statement of Reasons (Form AO 245B)
- Grants or denies inmate motions for compassionate release

Bureau of Prisons

- Determines the defendant's security level
- Designates the offender to a specific correctional institution
- Determines whether the offender is eligible for programs and treatment options
- Decides furlough & halfway house eligibility
- Determines custody credit
- Grants or denies inmate requests for compassionate release

* Sources include F.R.Crim.Pro. 32, US Sentencing Guidelines, Case Law, First Step Act.



SENTENCING SCENARIOS

Scenario 1: Sentencing Liability

Defendant Smith has pled guilty to one count of possession with intent to distribute 150 grams of methamphetamine (actual) on June 18, 2018. The June 18 transaction was a controlled-buy using a government informant and was audio-recorded. Smith was arrested after driving away from the sale and had the buy money in the glove compartment.

The discovery given to the defense and the probation officer contains a report that details the informant's statement upon his own arrest for drug trafficking. During this interview, the informant claims he met with Smith on four previous occasions (before the June 18 transaction) to buy drugs from Smith. When asked what quantity of drugs he bought from Smith, the informant estimated that he bought 150 grams of meth on each occasion, for a total of 600 grams. The informant has never testified in any hearing and his identity has not been revealed.

Probation Officers: What would you do with this information?

Defense Attorneys: What arguments would you make to keep this information out of the PSR?

Prosecutors: Do you need to do further investigation to confirm the additional amounts? What steps would you take?

SENTENCING SCENARIOS

SCENARIO 2: A Presentence Interview with Sensitive Topics

Defendant Andrea Cross pleaded guilty to one count of possession with intent to distribute crack under 21 U.S.C. §§ 841(a) and (b)(1)(B). She is facing a five-year mandatory minimum and is not eligible for safety valve because of her criminal history. All of her prior convictions involve either simple possession of drugs or distributing small amounts of drugs. After her guilty plea, Ms. Smith meets with her attorney and a probation officer for the presentence interview. The interview is going fine until the subject of sexual abuse comes up. At that time, she clams up and refuses to talk. While her attorney does his best to help, Cross gets more and more agitated until she stops the interview altogether.

Probation officers and defense attorneys: Has this happened to you? How can you salvage this interview? What are other ways you can get this information? Why is this information important?

SENTENCING SCENARIOS

Scenario 3: Acceptance of Responsibility

Defendant Jones pled guilty to mail fraud. The applicable guideline is §2B1.1. Jones falsely represented that her husband was still living in order to continue collecting his veteran's benefits after his death. This continued for three years, and the total loss to the government is just above \$30,000.

Jones pled guilty one month after arraignment and remained on bond. She is 50 years old and lives with three of her grandchildren whom she supports. Jones works as a cashier at a large grocery-store chain – a job she obtained after being arrested on the mail fraud offense.

The probation officer initially awarded a two-level reduction for acceptance of responsibility based on her plea of guilty and a signed statement that she accepted responsibility for the offense. Two weeks before sentencing, however, Jones tested positive for marijuana. When confronted by the supervising officer, Jones admitted the drug use and said the stress of the upcoming sentencing caused her to lapse into reuse. She had begun smoking marijuana when her husband began purchasing it from a dispensary to calm his PTSD symptoms. Jones also told the supervising officer that she does not feel it's fair that she is in federal court over "money the government owed me anyway."

Probation Officers: What would you do with this information? Do you revise the report to take away the acceptance of responsibility reduction?

Defense Attorneys: What arguments would you make to keep the acceptance of responsibility reduction?

Prosecutors: Would you argue against granting the acceptance of responsibility reduction? Why?

SENTENCING SCENARIOS

Scenario 4: Departures and Variances

Defendants, the Browns, are husband and wife. They each pleaded guilty to one count of conspiracy to distribute methamphetamine (actual) and each faces a ten-year mandatory minimum penalty due to drug quantity. The case arose when Ms. Brown was pulled over on the highway while driving a truck with a hidden compartment and a kilogram of meth (actual) hidden inside. Mr. Brown was in the passenger seat. Both admitted to knowingly transporting meth from their home in Texas to Denver, Colorado on multiple occasions.

The Browns have worked at Houston-area oil refineries for more than ten years. Two years ago, for their eldest son's 16th birthday, they bought him a motorbike. Within 4 months, he crashed and was left a quadriplegic. Through internet searches, the Browns sought treatment all over the world but could not afford an experimental \$50,000 treatment in Germany. They started a GoFundMe page but only collected \$5,000. Delaying the treatment would render it less effective, according to doctors, so the Browns accepted a friend's offer to introduce them to someone who could help them make money in a hurry. The Browns met with the meth supplier and agreed to drive for him in exchange for cash payments of \$5,000 per trip.

Both have cooperated with the government pursuant to cooperation agreements. Pursuant to a different investigation, the supplier was arrested. The Browns were scheduled to testify against him, but on the morning of the trial, the supplier pled guilty. The government has filed motions under §5K1.1 and § 3553(e).

Mr. Brown has one prior assault conviction that is too old to count toward his criminal history, therefore, he is eligible for safety valve relief. Ms. Brown has a prior conviction for embezzlement, for which she was sentenced to 18 months in prison. Because she has three criminal history points, she is not eligible for safety valve relief under the guidelines or the First Step Act.

The guidelines range for Mr. Brown is 120-135 months. Because of her criminal history, Ms. Brown's range is 121-151 months.

Attorneys: What sentence will you seek and what factors will you point to justify it?

Probation Officers: What, if any, additional investigation would you conduct regarding possibly mitigating factors? What sentence would you recommend to the court?