

CASE LAW UPDATE - HOT TOPICS

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?

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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).

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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?
