

# USSC Update:

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## Proposed Guideline Amendments and Other Sentencing Issues

# Discussion Topics

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- Proposed guideline amendments
- Recent Supreme Court decisions
- Proposed Commission priorities

# Highlights of Proposed Guideline Amendments Submitted to Congress

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To Become Effective November 1, 2013  
Unless Rejected by Legislation

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# §3E1.1(b) – Acceptance of Responsibility

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## Addressing “Circuit Splits”

- The government’s discretion to withhold the motion for the third level of Acceptance
- The court’s discretion to deny the third level of Acceptance when the government has made the motion

# The Government's Discretion to Withhold the Motion for the Third Level of Acceptance

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§3E1.1(b), App. Note 6

- The government ***should not*** withhold the motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his/her right to appeal

# The Court's Discretion to Deny the Third Level of Acceptance When the Government Has Made the Motion

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## §3E1.1(b)

- The sentencing court will decide whether to grant the government's motion by determining that the notification to plead guilty was timely and thereby
  - permitted the government to avoid preparing for trial and
  - permitted the government and the court to allocate their resources efficiently

# Pre-Retail Medical Products

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## 18 U.S.C. § 670

- Applicable guideline: §2B1.1
- New SOC:
  - +2 if the offense involves conduct described in 18 U.S.C. § 670; or
  - +4 for defendants associated with an organization in the supply chain



# Pre-Retail Medical Products

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18 U.S.C. § 670

- Upward departure if the offense resulted in death or serious bodily injury.

# Trade Secrets

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## §2B1.1

- Revised SOC:
  - +2 if the defendant knew or intended that the trade secret would be transported or transmitted out of the United States; or
  - +4 if the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.
  - Minimum offense level of 14

# Counterfeit Military Parts

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## §2B5.3

- New SOC:
  - +2 if the offense involves a counterfeit military good or service, the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security
  - Minimum offense level: 14

# Counterfeit and Adulterated Drugs

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- New SOC at §2B5.3:
  - +2 if the offense involves a counterfeit drug
- Reference to §2N1.1 for offenses under 21 U.S.C. § 333(b)(7)

# §2T1.1 – Tax Offenses

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## New Application Note 3

- In determining tax loss the court should account for
  - Standard deductions and personal and dependent exemptions to which the defendant was entitled
  - Any unclaimed credit, deduction, or exemption needed to ensure a reasonable estimate of tax loss, **but only** within the limitations outlined in the new application note

# §5G1.3 - Consecutive Sentence Authority

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*Setser v. U.S.*  
132 S. Ct. 1463 (2012)

- A District Court has discretion under 18 U.S.C. § 3584(a) to order that a defendant's sentence run consecutively to his anticipated, but not yet imposed, state sentence

# Recent Supreme Court Cases

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# *U.S. v. Peugh*

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133 S.Ct. 2072  
(2013)



# *U.S. v. Peugh*

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## *Ex Post Facto*

- Question Presented:

Whether a sentencing court violates the *Ex Post Facto* Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence

# *U.S. v. Peugh*

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## *Ex Post Facto*

- Holding:

There is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.

# *Alleyne v. U.S.*

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133 S. Ct. 2151  
(2013)

# *Alleyne v. U.S.*

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## Mandatory Minimums

- Question presented:

Whether this Court's decision in *Harris v. United States*, holding that the Constitution does not require facts which increase a mandatory minimum sentence to be determined by a jury, should be overruled

# Alleyne v. U.S.

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## Mandatory Minimums

- Holding:
  - Any fact that increases a mandatory minimum sentence for crime is an “element” of the crime, not a “sentencing factor,” that must be submitted to a jury; overruling *Harris v. US*, 536 U.S. 545 (2002)
  - Finding as to whether defendant brandished a gun is an element of the offense and must be submitted to the jury

# *Descamps v. U.S.*

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133 S. Ct. 2276  
(2013)

# *Descamps v. U.S.*

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## ACCA & Modified Categorical Approach

- Question Presented:

Whether, in a case under the Armed Career Criminal Act, when a state crime does not require an element of the federal crime of burglary, the federal court may find the existence of that element by examining the record of the state proceedings under the modified categorical approach

# *Descamps v. U.S.*

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## ACCA & Modified Categorical Approach

- Holding:

Sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements



# Proposed Commission Priorities

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- Continued work with Congress on mandatory minimum penalties, including consideration of the safety valve
- Review of drug guidelines
- Continued work on recommendations from Booker report

# Proposed Commission Priorities (cont.)

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- Review of economic crimes offenses
- Continuation of multi-year study of “crimes of violence”, etc.
- Multi-year study of recidivism
- Multi-year review of violations of probation and supervised release

# Proposed Commission Priorities (cont.)

- Review of “compassionate release” (§1B1.13)
- Review of firearms guidelines
- Implementation of legislation
- Resolution of circuit conflicts

# Proposed Commission Priorities (cont.)

- Continuation of work on child pornography offenses
- Miscellaneous guideline application issues

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