THE OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE EASTERN DISTRICT OF VIRGINIA
AND
THE FEDERAL BAR ASSOCIATION’S CRIMINAL LAW SECTION
AND ITS CHAPTERS IN NORTHERN VIRGINIA,
RICHMOND, & TIDEWATER

PRESENT A CJA PANEL TRAINING PROGRAM

CURRENT TOPICS IN
FEDERAL CRIMINAL DEFENSE

Wednesday, November 18, 2015, 10:30 a.m. - 3:30 p.m.
Hilton Garden Inn, 501 East Broad Street, Richmond
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PROGRAM SCHEDULE

10:00 Program check-in begins

10:30 Opening remarks Geremy Kamens

10:35 Storytelling: Using the Art of Persuasion From Pretrial Through Appeal Sarah Gannett

11:35 Update on Federal Sentencing Matters Patrick Bryant Frances Pratt

12:35 Lunch (provided as part of program)

1:20 Ethical Quandaries in Criminal Cases James McCauley

2:20 Break


3:30 Complete evaluations and adjourn
FACULTY INFORMATION

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STORYTELLING*
From Pretrial Through Appeal

* (not just for bedtime or campfires)

The Power of a Story

Thugs who only want to incite violence ....

Poor Americans ... whose lives and dreams have been cut short ....
The 3 Components of a Persuasive Presentation

Technical
Substantive
Emotional

Types of Learners

- Visual: see it
- Auditory: hear it
- Kinesthetic: do it
Theory of the Case

“That combination of facts (beyond dispute) and law which, in a common sense and emotional way leads the jurors to conclude that a fellow person is wrongfully accused.”

– Tony Natale

CLIENT CENTERED

AUDIENCE DRIVEN
Points of Choice

Times when the client/witness had to make a choice

GOOD STUFF  BAD STUFF

WHAT DO YOU FEAR THE MOST?
JUROR STORIES

• What if
• Only if
• Common knowledge
• Personal knowledge
• Reasonable person
• What probably happened

-Prof. Sunwolf, Esq. PhD

HEADLINES
HOOKS

HEADLINE

QUESTIONS

TRILOGIES

SAYINGS

QUOTES FROM THE CASE

PRETRIAL MOTIONS

• Incorporate trial/sentencing themes, if possible

• Show & tell (use photos, maps, statements), e.g., image of client’s injuries after arrest

• Use vivid language: “Jane Doe is an alcoholic, a drug addict, a prostitute, an on-again-off-again patient at Eastern Shore Hospital, a manipulator, a liar, and a thief. She is also the government’s key witness.”
The Sentencing Story

“That combination of facts (beyond dispute) and law which, in a common sense and emotional way, leads the judge to conclude that a fellow person should be constructively punished and affirmatively directed on a path of atonement.”

- Tony Natale

Client centered
Judge driven
Future focus
Support-formed future

vs.

Fear-formed future

QUESTIONS

HOW DID HE GET HERE?

WHAT IS THE COST OF HIS WRONG-DOING?

WHERE CAN WE GO FROM HERE?
Acceptance
Accountability
Atonement

Recognition
Responsibility
Redemption

Crisis
Choice
Change/Commitment

The Appellate Story

Losing brief. Clearly.
What story do you tell on appeal?
Rethink Your Case and the Error(s) You Plan to Argue:

• What is unfair, sympathetic, human about it?
• Why was the error committed and in what context?
• What is the effect of failure to correct the error on
  – The client?
  – The community?
  – The legal profession?
  – Society?

→ YOUR THEME

Tell a Readable Story
Statement of Facts

• Whose story are you telling?
• Who committed the error?
• What organization promotes your theme?
  – Chronological by event
  – Chronological by trial
  – Perspective of a player
  – Flashback
• Primacy & Recency

Carry Theme Throughout Brief
Using Facts in Issue Statements

- The district court should have admitted evidence of M.E.'s prior sexual conduct given the exception in Federal Rule of Evidence 412 to protect the constitutional rights of the defendant and the close link between the testimony sought and the defense being presented at trial.

- The district court should have admitted evidence of M.E.'s prior false accusation of unwanted sexual advances – including that police previously dismissed charges her father attempted to press against an African-American teenager – under Federal Rule of Evidence 412(b)(1)(C)’s exception to protect the defendant’s constitutional rights.

Using Facts in Argument

POINT II

In repeatedly questioning him about other, unrelated robberies after he had confessed to the bank robbery and after he said “I didn't even want to do none of this at all,” police failed to scrupulously honor Mr. Client's right to remain silent.

A. The relentless questioning by the police did not “scrupulously honor” Mr. Client's right to remain silent.

B. Mr. Client's repeated requests to end the questioning were sufficiently clear that a reasonable officer would have suspected that he was asserting his Fifth Amendment right to remain silent and would have sought clarification as to his wishes.

C. Mr. Client's attempts to cut off questioning were a clear assertion of his right to remain silent, even under the *Davis* standard.
Using Facts in Requests for Relief

• For the foregoing reasons, Mr. Robinson respectfully requests that the Court remand for resentencing.

• Because the district court’s erroneous application of § XAY.Z resulted in a guideline range twice as high as it should have been, the Court should vacate Mr. Robinson’s sentence and remand for resentencing under the correct guideline range of P-Q (offense level C, at criminal history category D).

Sample Table of Contents

A. The Trial

1. Client worked for Kingpin in a drug conspiracy supplied by Bigger Kingpin
2. The Victims were murdered on the side of the Highway
3. The government could prove only that Client was present near the scene
4. The evidence showed no clear motive for the murders
5. The Kingpin conspiracy may have been providing counter-surveillance for Victim
6. The government relied on “Crackhead K” Cooperator to fill in some of the gaps in its case
7. A “wheelbarrow” of “other highly prejudicial evidence” was admitted during the trial
   a. The Shooting Evidence.
   b. The Drug-Trafficking Evidence
   c. Co-D’s Confessions
8. The government portrayed Client as a “Thug Enforcer,” based on the “other evidence”
DISCUSSION OVERVIEW

I. Amendments to the Sentencing Guidelines Effective Nov. 1, 2015

A. Mitigating role

B. Inflationary adjustments

C. Economic crimes
   1. Intended loss
   2. Victims
   3. Sophisticated means
   4. Fraud on the market

D. Jointly undertaken criminal activity

E. Hydrocodone
II. Proposed Amendments to the Sentencing Guidelines’ Definition of “Crime of Violence”

A. Elimination of residual clause

B. New enumerated offenses and definitions

C. “Felony” classification

D. Illegal reentry guideline

III. Proposed Legislation: S. 2123, the Sentencing Reform and Corrections Act of 2015

A. Section 851 enhancements

B. Safety valve changes

C. Section 924(c) reform

D. ACCA modification

E. Fair Sentencing Act

F. Risk assessment and recidivism reduction program
Amendments to the Sentencing Guidelines

April 30, 2015

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary submitted to Congress, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission’s website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.
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The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

The Commission specified an effective date of November 1, 2015, for the amendments listed above and included in this compilation.
1. JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

Reason for Amendment: This amendment is a result of the Commission’s effort to clarify the use of relevant conduct in offenses involving multiple participants.

The amendment makes clarifying revisions to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)). It restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under §1B1.3(a)(1)(B). The three-step analysis requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Prior to this amendment, the “scope” element of the three-step analysis was identified in the commentary to §1B1.3 but was not included in the text of the guideline itself. This amendment makes clear that, under the “jointly undertaken criminal activity” provision, a defendant is accountable for the conduct of others in a jointly undertaken criminal activity if the conduct meets all three criteria of the three-step analysis. This amendment is not intended as a substantive change in policy.

Amendment:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

1. all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

2. in the case of a 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), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity; all acts and omissions of others that were—

   1. within the scope of the jointly undertaken criminal activity,
   2. in furtherance of that criminal activity, and
   3. reasonably foreseeable in connection with that criminal activity.
that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. Accountability Under More Than One Provision.—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.]

2.3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—

(A) In General.—A “jointly undertaken criminal activity” is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a

* The bracketed text currently appears in the commentary in the illustration referring to Defendants A and B. The proposed amendment would place the text here, while also leaving it intact in the illustration.
defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) within the scope of the jointly undertaken criminal activity;

(A) in furtherance of the jointly undertaken criminal activity; and

(B) reasonably foreseeable in connection with that criminal activity.

[The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant meets all three criteria set forth in subdivisions (i) through (iii) (i.e., “within the scope,” “in furtherance,” and “reasonably foreseeable”) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.**]

Scope.—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the “jointly undertaken criminal activity”) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement).—

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant’s agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal

** The bracketed text was originally placed as part of the third paragraph of the current Application Note 2.
activities."

[A defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant’s offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant’s culpability; in such a case, an upward departure may be warranted."

(C) **In Furtherance.**—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

(D) **Reasonably Foreseeable.**—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all reasonably foreseeable quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity that he jointly undertook and were reasonably foreseeable in connection with that criminal activity.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e.,

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*** The bracketed text was originally placed as the last paragraph in example (c)(8) of the “Illustrations of Conduct for Which the Defendant is Accountable.”

**** The bracketed text was originally placed as the last paragraph of Application Note 2, before the “Illustrations of Conduct for Which the Defendant is Accountable.”
acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—

(aA) Acts and omissions aided or abetted by the defendant.—

Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the scope of which was the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.

(bB) Acts and omissions aided or abetted by the defendant; requirement that the conduct of
Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the jointly undertaken criminal activity he jointly undertook with Defendant D (i.e., the forgery of the $800 check).

Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of the jointly undertaken criminal activity, and was reasonably foreseeable in connection with that criminal activity.

Defendants H and I engaged in an ongoing marihuana importation conspiracy
in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to in furtherance of the importation of that shipment on the basis of subsection (a)(1)(B) that were reasonably foreseeable (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(4iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other’s criminal activity but operate independently. Defendant N is Defendant K’s assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K’s customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5vi) Defendant O knows about her boyfriend’s ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance within the scope of her jointly undertaken criminal activity (i.e., the one delivery).

(6vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast,
Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of the jointly undertaken criminal activity, and reasonably foreseeable in connection with that criminal activity.

(7vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S’s agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).

(8viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other’s actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).
§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

Commentary

Application Notes:

14. Application of Subsections (b)(6)(B) and (c)(1).—

(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

(i) Firearm Cited in the Offense of Conviction. Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 911 to §1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections
(b)(6)(B) and (c)(1). See §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

(ii) **Firearm Not Cited in the Offense of Conviction.** Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 911 to §1B1.3).

* * *

§2X3.1. **Accessory After the Fact**

* * *

**Commentary**

* * *

**Application Notes:**

1. **Definition.**—For purposes of this guideline, “underlying offense” means the offense as to which the defendant is convicted of being an accessory, or in the case of a violation of 18 U.S.C. § 2339A, “underlying offense” means the offense the defendant is convicted of having materially supported after its commission (i.e., in connection with the concealment of or an escape from that offense), or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), “underlying offense” means the violation of 18 U.S.C. § 2339B with respect to which the material support or resources were concealed or disguised. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1012 of the Commentary to §1B1.3 (Relevant Conduct).

* * *

§2X4.1. **Misprision of Felony**

* * *

**Commentary**

* * *

**Application Notes:**
1. “Underlying offense” means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1012 of the Commentary to §1B1.3 (Relevant Conduct).

*   *   *

- CJA 31 -
2. INFLATIONARY ADJUSTMENTS

Reason for Amendment: This amendment makes adjustments to the monetary tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine) to account for inflation. The amendment adjusts the amounts in each of the seven monetary tables using a specific multiplier derived from the Consumer Price Index (CPI), and then rounds—

- amounts greater than $100,000,000 to the nearest multiple of $50,000,000;
- amounts greater than $10,000,000 to the nearest multiple of $5,000,000;
- amounts greater than $1,000,000 to the nearest multiple of $500,000;
- amounts greater than $100,000 to the nearest multiple of $50,000;
- amounts greater than $10,000 to the nearest multiple of $5,000;
- amounts greater than $1,000 to the nearest multiple of $500; and
- amounts of $1,000 or less to the nearest multiple of $50.

In addition, the amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

Congress has generally mandated that agencies in the executive branch adjust the civil monetary penalties they impose to account for inflation using the CPI. See 28 U.S.C. § 2461 note (Federal Civil Penalties Inflationary Adjustment Act of 1990). Although the Commission’s work does not involve civil monetary penalties, it does establish appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. While some of the monetary values in the Chapter Two guidelines have been revised since they were originally established in 1987, none of the tables has been specifically revised to account for inflation.

Due to inflationary changes, there has been a gradual decrease in the value of the dollar over time. As a result, monetary losses in current offenses reflect, to some degree, a lower degree of harm and culpability than did equivalent amounts when the monetary tables were established or last substantively amended. Similarly, the fine levels recommended by the guidelines are lower in value than when they were last adjusted, and therefore, do not have the same sentencing impact as a similar fine in the past. Based on its analysis and widespread support for inflationary adjustments expressed in public comment, the Commission concluded that aligning the above monetary tables with modern dollar values is an appropriate step at this time.

The amendment adjusts each table based on inflationary changes since the year each monetary table was last substantially amended:

- Loss table in §2B1.1 and tax table in §2T4.1: adjusting for inflation from 2001 ($1.00 in 2001 = $1.34 in 2014);
- Loss tables in §§2B2.1 and 2B3.1 and fine table for individual defendants at §5E1.2(c)(3): adjusting for inflation from 1989 ($1.00 in 1989 = $1.91 in 2014);
- Volume of Commerce table in §2R1.1: adjusting for inflation from 2005 ($1.00 in 2005 = $1.22 in 2014); and
- Fine table for organizational defendants at §8C2.4(d): adjusting for inflation from 1991
Adjusting from the last substantive amendment year appropriately accounts for the Commission’s previous work in revising these tables at various times. Although not specifically focused on inflationary issues, previous Commissions engaged in careful examination (and at times, a wholesale rewriting) of the monetary tables and ultimately included monetary and enhancement levels that it considered appropriate at that time. The Commission estimates that this amendment would result in the Bureau of Prisons having approximately 224 additional prison beds available at the end of the first year after implementation, and approximately 956 additional prison beds available at the end of its fifth year of implementation.

Finally, the amendment adds a special instruction to both §§5E1.2 and 8C2.4 providing that, for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014, rather than the fine provisions as amended for inflation. This addition responds to concerns expressed in public comment that changes to the fine tables might create ex post facto problems. It ensures that an offender whose offense level is calculated under the current Guidelines Manual is not subject to the inflated fine provisions if his or her offense was committed prior to November 1, 2015. Such guidance is similar to that provided in the commentary to §5E1.3 (Special Assessment) relating to the amount of the special assessment to be imposed in a given case.

Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

*   *   *

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000$6,500, increase the offense level as follows:

<table>
<thead>
<tr>
<th>Multiplier Comparison to Current Table</th>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1.30]</td>
<td>(A) $5,000$6,500 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>[1.30]</td>
<td>(B) More than $5,000$6,500</td>
<td>add 2</td>
</tr>
<tr>
<td>[1.50]</td>
<td>(C) More than $10,000$15,000</td>
<td>add 4</td>
</tr>
<tr>
<td>[1.33]</td>
<td>(D) More than $20,000$40,000</td>
<td>add 6</td>
</tr>
<tr>
<td>[1.36]</td>
<td>(E) More than $70,000$95,000</td>
<td>add 8</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(F) More than $120,000$150,000</td>
<td>add 10</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(G) More than $200,000$250,000</td>
<td>add 12</td>
</tr>
<tr>
<td>[1.38]</td>
<td>(H) More than $400,000$550,000</td>
<td>add 14</td>
</tr>
<tr>
<td>[1.50]</td>
<td>(I) More than $1,000,000$1,500,000</td>
<td>add 16</td>
</tr>
<tr>
<td>[1.40]</td>
<td>(J) More than $2,500,000$3,500,000</td>
<td>add 18</td>
</tr>
<tr>
<td>[1.36]</td>
<td>(K) More than $7,000,000$9,500,000</td>
<td>add 20</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(L) More than $20,000,000$25,000,000</td>
<td>add 22</td>
</tr>
</tbody>
</table>

($1.00 in 1991 = $1.74 in 2014).
More than \$50,000,000\$65,000,000 add 24

More than \$100,000,000\$150,000,000 add 26

More than \$200,000,000\$250,000,000 add 28

More than \$400,000,000\$550,000,000 add 30.

* * *

§2B1.4. Insider Trading

* * *

(b) Specific Offense Characteristics

(1) If the gain resulting from the offense exceeded \$5,000\$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

* * *

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resource or paleontological resource (A) exceeded \$2,000\$2,500 but did not exceed \$5,000\$6,500, increase by 1 level; or (B) exceeded \$5,000\$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B2.1. Burglary of a Residence or a Structure Other than a Residence

* * *

(b) Specific Offense Characteristics

* * *

(2) If the loss exceeded \$2,500\$5,000, increase the offense level as follows:

<table>
<thead>
<tr>
<th>Multiplier Comparison to Current Table</th>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>14</td>
</tr>
</tbody>
</table>
§2B2.3. **Trespass**

* * *

(b) Specific Offense Characteristics

* * *

(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded $2,000$2,500 but did not exceed $5,000$6,500, increase by 1 level; or (ii) exceeded $5,000$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B3.1. **Robbery**

* * *

(b) Specific Offense Characteristics

* * *

(7) If the loss exceeded $10,000$20,000, increase the offense level as follows:

<table>
<thead>
<tr>
<th>Multiplier Comparison to Current Table</th>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>[2.00]</td>
<td>(A) $10,000$20,000 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>[2.00]</td>
<td>(B) More than $10,000$20,000</td>
<td>add 1</td>
</tr>
<tr>
<td>[1.90]</td>
<td>(C) More than $20,000$50,000</td>
<td>add 2</td>
</tr>
<tr>
<td>[2.00]</td>
<td>(D) More than $50,000$95,000</td>
<td>add 3</td>
</tr>
<tr>
<td>[1.88]</td>
<td>(E) More than $50,000$150,000</td>
<td>add 4</td>
</tr>
<tr>
<td>[2.00]</td>
<td>(F) More than $150,000$300,000</td>
<td>add 5</td>
</tr>
</tbody>
</table>
§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

(b) Specific Offense Characteristics

* * *

(2) If the greater of the amount demanded or the loss to the victim exceeded $10,000 but did not exceed $20,000, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

* * *

§2B3.3. Blackmail and Similar Forms of Extortion

* * *

(b) Specific Offense Characteristic

(1) If the greater of the amount obtained or demanded (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(b) Specific Offense Characteristics

(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *
§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

(1) If the face value of the counterfeit items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B5.3. Criminal Infringement of Copyright or Trademark

* * *

(b) Specific Offense Characteristics

(1) If the infringement amount (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

(b) Specific Offense Characteristics

(1) If the retail value of the motor vehicles or parts (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *
(b) Specific Offense Characteristics

* * *

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

* * *

(b) Specific Offense Characteristics

* * *

(2) If the value of the gratuity exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

* * *

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations
(b) Specific Offense Characteristics

* * *

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

(b) Specific Offense Characteristics

* * *

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

(b) Specific Offense Characteristics

* * *

(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

<table>
<thead>
<tr>
<th>Multiplier Comparison to Current Table</th>
<th>Volume of Commerce (Apply the Greatest)</th>
<th>Adjustment to Offense Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1.00]</td>
<td>More than $1,000,000</td>
<td>add 2</td>
</tr>
</tbody>
</table>

19
§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded $1,000-$1,500; or

(2) 5, if the tax loss exceeded $100-$200 but did not exceed $1,000-$1,500; or

(3) 4, if the tax loss did not exceed $100-$200.

For purposes of this guideline, the “tax loss” is the amount of the duty.

* * *

§2T4.1. Tax Table

<table>
<thead>
<tr>
<th>Multiplier Comparison to Current Table</th>
<th>Tax Loss (Apply the Greatest)</th>
<th>Offense Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1.25]</td>
<td>(A) $2,000-$2,500 or less</td>
<td>6</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(B) More than $2,000-$2,500</td>
<td>8</td>
</tr>
<tr>
<td>[1.30]</td>
<td>(C) More than $5,000-$6,500</td>
<td>10</td>
</tr>
<tr>
<td>[1.20]</td>
<td>(D) More than $12,500-$15,000</td>
<td>12</td>
</tr>
<tr>
<td>[1.33]</td>
<td>(E) More than $30,000-$40,000</td>
<td>14</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(F) More than $80,000-$100,000</td>
<td>16</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(G) More than $200,000-$250,000</td>
<td>18</td>
</tr>
<tr>
<td>[1.38]</td>
<td>(H) More than $400,000-$550,000</td>
<td>20</td>
</tr>
<tr>
<td>[1.50]</td>
<td>(I) More than $1,000,000-$1,500,000</td>
<td>22</td>
</tr>
<tr>
<td>[1.40]</td>
<td>(J) More than $2,500,000-$3,500,000</td>
<td>24</td>
</tr>
<tr>
<td>[1.36]</td>
<td>(K) More than $7,000,000-$9,500,000</td>
<td>26</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(L) More than $20,000,000-$25,000,000</td>
<td>28</td>
</tr>
<tr>
<td>[1.30]</td>
<td>(M) More than $50,000,000-$65,000,000</td>
<td>30</td>
</tr>
<tr>
<td>[1.50]</td>
<td>(N) More than $100,000,000-$150,000,000</td>
<td>32</td>
</tr>
<tr>
<td>[1.25]</td>
<td>(O) More than $200,000,000-$250,000,000</td>
<td>34</td>
</tr>
<tr>
<td>[1.38]</td>
<td>(P) More than $400,000,000-$550,000,000</td>
<td>36</td>
</tr>
</tbody>
</table>
§5E1.2. **Fines for Individual Defendants**

(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

(b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.

(c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.

<table>
<thead>
<tr>
<th>Offense Level</th>
<th>A Minimum</th>
<th>[Multiplier Comparison to Current Table]</th>
<th>B Maximum</th>
<th>[Multiplier Comparison to Current Table]</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 and below</td>
<td>$100 - $200</td>
<td>[2.00]</td>
<td>$5,000 - $9,500</td>
<td>[1.90]</td>
</tr>
<tr>
<td>4-5</td>
<td>$250 - $500</td>
<td>[2.00]</td>
<td>$5,000 - $9,500</td>
<td>[1.90]</td>
</tr>
<tr>
<td>6-7</td>
<td>$500 - $1,000</td>
<td>[2.00]</td>
<td>$5,000 - $9,500</td>
<td>[1.90]</td>
</tr>
<tr>
<td>8-9</td>
<td>$1,000 - $2,000</td>
<td>[2.00]</td>
<td>$10,000 - $20,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>10-11</td>
<td>$2,000 - $4,000</td>
<td>[2.00]</td>
<td>$20,000 - $40,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>12-13</td>
<td>$3,000 - $5,500</td>
<td>[1.83]</td>
<td>$30,000 - $55,000</td>
<td>[1.83]</td>
</tr>
<tr>
<td>14-15</td>
<td>$4,000 - $7,500</td>
<td>[1.88]</td>
<td>$40,000 - $75,000</td>
<td>[1.88]</td>
</tr>
<tr>
<td>16-17</td>
<td>$5,000 - $10,000</td>
<td>[2.00]</td>
<td>$50,000 - $95,000</td>
<td>[1.90]</td>
</tr>
<tr>
<td>18-19</td>
<td>$6,000 - $10,000</td>
<td>[1.67]</td>
<td>$60,000 - $100,000</td>
<td>[1.67]</td>
</tr>
<tr>
<td>20-22</td>
<td>$7,500 - $15,000</td>
<td>[2.00]</td>
<td>$75,000 - $150,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>23-25</td>
<td>$10,000 - $20,000</td>
<td>[2.00]</td>
<td>$100,000 - $200,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>26-28</td>
<td>$12,500 - $25,000</td>
<td>[2.00]</td>
<td>$125,000 - $250,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>29-31</td>
<td>$15,000 - $30,000</td>
<td>[2.00]</td>
<td>$150,000 - $300,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>32-34</td>
<td>$17,500 - $35,000</td>
<td>[2.00]</td>
<td>$175,000 - $350,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>35-37</td>
<td>$20,000 - $40,000</td>
<td>[2.00]</td>
<td>$200,000 - $400,000</td>
<td>[2.00]</td>
</tr>
<tr>
<td>38 and above</td>
<td>$25,000 - $50,000</td>
<td>[2.00]</td>
<td>$250,000 - $500,000</td>
<td>[2.00]</td>
</tr>
</tbody>
</table>

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000 - $500,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(h) **Special Instruction**
For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.

§8C2.4. Base Fine

* * *

(d) Offense Level Fine Table

<table>
<thead>
<tr>
<th>[Multiplier Comparison to Current Table]</th>
<th>Offense Level</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1.70]</td>
<td>6 or less</td>
<td>$5,000</td>
</tr>
<tr>
<td>[2.00]</td>
<td>7</td>
<td>$7,500</td>
</tr>
<tr>
<td>[1.50]</td>
<td>8</td>
<td>$10,000</td>
</tr>
<tr>
<td>[1.67]</td>
<td>9</td>
<td>$15,000</td>
</tr>
<tr>
<td>[1.75]</td>
<td>10</td>
<td>$20,000</td>
</tr>
<tr>
<td>[1.67]</td>
<td>11</td>
<td>$25,000</td>
</tr>
<tr>
<td>[1.75]</td>
<td>12</td>
<td>$40,000</td>
</tr>
<tr>
<td>[1.67]</td>
<td>13</td>
<td>$60,000</td>
</tr>
<tr>
<td>[1.76]</td>
<td>14</td>
<td>$85,000</td>
</tr>
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<td>[1.60]</td>
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</tr>
<tr>
<td>[1.71]</td>
<td>16</td>
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</tr>
<tr>
<td>[1.88]</td>
<td>23</td>
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</tr>
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<td>[1.67]</td>
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</tr>
<tr>
<td>[1.79]</td>
<td>25</td>
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</tr>
<tr>
<td>[1.76]</td>
<td>26</td>
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</tr>
<tr>
<td>[1.77]</td>
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</tr>
<tr>
<td>[1.59]</td>
<td>28</td>
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</tr>
<tr>
<td>[1.85]</td>
<td>29</td>
<td>$8,100,000</td>
</tr>
<tr>
<td>[1.90]</td>
<td>30</td>
<td>$10,500,000</td>
</tr>
<tr>
<td>[1.85]</td>
<td>31</td>
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</tr>
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<td>[1.71]</td>
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</tr>
<tr>
<td>[1.74]</td>
<td>37</td>
<td>$57,500,000</td>
</tr>
<tr>
<td>[2.07]</td>
<td>38 or more</td>
<td>$72,500,000</td>
</tr>
</tbody>
</table>
(e) Special Instruction

(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.

*   *   *

23
3. ECONOMIC CRIME

**Reason for Amendment:** This amendment makes several changes to the guideline applicable to economic crimes, §2B1.1 (Theft, Property Destruction, and Fraud), to better account for harm to victims, individual culpability, and the offender’s intent. This amendment is a result of the Commission’s multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate.

**Victims Table**

First, the amendment revises the victims table in §2B1.1(b)(2) to specifically incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders. As amended, the first tier of the victims table provides for a 2-level enhancement where the offense involved 10 or more victims or mass-marketing, or if the offense resulted in substantial financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, is also revised to refer to 10 rather than 50 victims.

In addition, the amendment adds a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial changes to employment; making substantial changes to living arrangements; or suffering substantial harm to the victim’s ability to obtain credit. Two conforming changes are also included. First, one factor — substantial harm to ability to obtain credit — was previously included in Application Note 20(A)(vi) as a potential departure consideration. The amendment removes this language from the Application Note. Second, the amendment deletes subsection (b)(16)(B)(iii), which provided for an enhancement where an offense substantially endangered the solvency or financial security of 100 or more victims.

The Commission continues to believe that the number of victims is a meaningful measure of the harm and scope of an offense and can be indicative of its seriousness. It is for this reason that the amended victims table maintains the 2-level enhancement for offenses that involve 10 or more victims or mass marketing. However, the revisions to the victims table also reflect the Commission’s conclusion that the guideline should place greater emphasis on the extent of harm that particular victims suffer as a result of the offense. Consistent with the Commission’s overall goal of focusing more on victim harm, the revised victims table ensures that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.

**Intended Loss**

Second, the amendment revises the commentary at §2B1.1, Application Note 3(A)(ii), which has defined intended loss as “pecuniary harm that was intended to result from the offense.” In interpreting this provision, courts have expressed some disagreement as to whether a subjective or an objective inquiry is
required. Compare United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011) (holding that a subjective
inquiry is required), United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this
determination, we look to the defendant’s subjective expectation, not to the risk of loss to which he may
have exposed his victims.”), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for
consideration of whether defendant had “proven a subjective intent to cause a loss of less than the
aggregate amount” of fraudulent loans), and United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003)
(“our case law requires the government prove by a preponderance of the evidence that the defendant had
the subjective intent to cause the loss that is used to calculate his offense level”), with United States v.
Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (“we focus our loss inquiry for purposes of determining a
defendant’s offense level on the objectively reasonable expectation of a person in his position at the time
he perpetrated the fraud, not on his subjective intentions or hopes”) and United States v. Lane, 323 F.3d
568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore
focuses on the conduct of the defendant and the objective financial risk to victims caused by that
conduct”).

The amendment adopts the approach taken by the Tenth Circuit by revising the commentary in
Application Note 3(A)(ii) to provide that intended loss means the pecuniary harm that “the defendant
purposely sought to inflict.” The amendment reflects the Commission’s continued belief that intended
loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements
predicated on intended loss, rather than losses that have actually accrued, should focus more specifically
on the defendant’s culpability.

Sophisticated Means

Third, the amendment narrows the focus of the specific offense characteristic at §2B1.1(b)(10)(C) to
cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated
means. Prior to the amendment, the enhancement applied if “the offense otherwise involved
sophisticated means.” Based on this language, courts had applied this enhancement on the basis of the
sophistication of the overall scheme without a determination of whether the defendant’s own conduct
was “sophisticated.” See, e.g., United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011); United States
v. Bishop-Oyedele, 480 Fed. App’x 431, 433-34 (7th Cir. 2012); United States v. Jenkins-Watt, 574 F.3d
950, 965 (8th Cir. 2009). The Commission concluded that basing the enhancement on the defendant’s
own intentional conduct better reflects the defendant’s culpability and will appropriately minimize
application of this enhancement to less culpable offenders.

Fraud on the Market

Finally, the amendment revises the special rule at Application Note 3(F)(ix) relating to the calculation of
loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or
commodity. When this special rule was added to the guidelines, it established a rebuttable presumption
that the specified loss calculation methodology provides a reasonable estimate of the actual loss in such
cases. As amended, the method provided in the special rule is no longer the presumed starting point for
calculating loss in these cases. Instead, the revised special rule states that the provided method is one
method that courts may consider, but that courts, in determining loss, are free to use any method that is
appropriate and practicable under the circumstances. This amendment reflects the Commission’s view
that the most appropriate method to determine a reasonable estimate of loss will often vary in these
highly complex and fact-intensive cases.
This amendment, in combination with related revisions to the mitigating role guideline at §3B1.2 (Mitigating Role), reflects the Commission’s overall goal of focusing the economic crime guideline more on qualitative harm to victims and individual offender culpability.

Amendment:

§2B1.1.  **Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

(a) Base Offense Level:

1. 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

2. 6, otherwise.

(b) Specific Offense Characteristics

1. If the loss exceeded $5,000, increase the offense level as follows:

<table>
<thead>
<tr>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) $5,000 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>(B) More than $5,000</td>
<td>add 2</td>
</tr>
<tr>
<td>(C) More than $10,000</td>
<td>add 4</td>
</tr>
<tr>
<td>(D) More than $30,000</td>
<td>add 6</td>
</tr>
<tr>
<td>(E) More than $70,000</td>
<td>add 8</td>
</tr>
<tr>
<td>(F) More than $120,000</td>
<td>add 10</td>
</tr>
<tr>
<td>(G) More than $200,000</td>
<td>add 12</td>
</tr>
<tr>
<td>(H) More than $400,000</td>
<td>add 14</td>
</tr>
<tr>
<td>(I) More than $1,000,000</td>
<td>add 16</td>
</tr>
<tr>
<td>(J) More than $2,500,000</td>
<td>add 18</td>
</tr>
<tr>
<td>(K) More than $7,000,000</td>
<td>add 20</td>
</tr>
<tr>
<td>(L) More than $20,000,000</td>
<td>add 22</td>
</tr>
<tr>
<td>(M) More than $50,000,000</td>
<td>add 24</td>
</tr>
<tr>
<td>(N) More than $100,000,000</td>
<td>add 26</td>
</tr>
<tr>
<td>(O) More than $200,000,000</td>
<td>add 28</td>
</tr>
<tr>
<td>(P) More than $400,000,000</td>
<td>add 30</td>
</tr>
</tbody>
</table>

2. (Apply the greatest) If the offense—

   (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
(B) involved 50 or more victims resulted in substantial financial hardship to five or more victims, increase by 4 levels; or 

(C) involved 250 or more victims resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

* * *

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

(16) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(16)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

* * *

Commentary

* * *

Application Notes:

* * *

27
3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

(A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) **Actual Loss.**—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) **Intended Loss.**—“Intended loss” means the pecuniary harm that was intended to result from the offense the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) **Pecuniary Harm.**—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) **Rules of Construction in Certain Cases.**—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) **Product Substitution Cases.**—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.

(II) **Procurement Fraud Cases.**—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) **Offenses Under 18 U.S.C. § 1030.**—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm,
regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) **Gain.**—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) **Estimation of Loss.**—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) **Exclusions from Loss.**—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) **Credits Against Loss.**—Loss shall be reduced by the following:
(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction’s tax assessment practices reflect factors not relevant to fair market value.

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

*   *   *

(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—

(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

(II) multiplying the difference in average price by the number of shares outstanding.
In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

* * *

4. **Application of Subsection (b)(2)** —

(A) **Definition.**—For purposes of subsection (b)(2), “mass-marketing” means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. “Mass-marketing” includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(B) **Applicability to Transmission of Multiple Commercial Electronic Mail Messages.**—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) **Undelivered United States Mail.** —

(i) **In General.**—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, “victim” means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) **Special Rule.**—A case described in subdivision (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar
receptacle.

(iii) **Definition.** — “Undelivered United States mail” means mail that has not actually been received by the addressee or the addressee’s agent (e.g., mail taken from the addressee’s mail box).

(D) **Vulnerable Victims.** — If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

(E) **Cases Involving Means of Identification.** — For purposes of subsection (b)(2), in a case involving means of identification “victim” means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

(F) **Substantial Financial Hardship.** — In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

(i) becoming insolvent;

(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);

(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;

(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;

(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and

(vi) suffering substantial harm to his or her ability to obtain credit.

* * *

9. **Sophisticated Means Enhancement under Application of Subsection (b)(10).** —

(A) **Definition of United States.** — For purposes of subsection (b)(10)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) **Sophisticated Means Enhancement under Subsection (b)(10)(C).** — For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates
sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

* * *

20. Departure Considerations.—

(A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a “protected computer”, as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further
a broader criminal purpose.

(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim’s reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation or a damaged credit record.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual’s identity.

* * *

* * *
4. HYDROCODONE

Reason for Amendment: This amendment changes the way the primary drug trafficking guideline calculates a defendant’s drug quantity in cases involving hydrocodone in response to recent administrative actions by the Food and Drug Administration and the Drug Enforcement Administration. The amendment adopts a marihuana equivalency for hydrocodone (1 gram equals 6700 grams of marihuana) based on the weight of the hydrocodone alone.

In 2013 and 2014, the Food and Drug Administration approved several new pharmaceuticals containing hydrocodone which can contain up to twelve times as much hydrocodone in a single pill than was previously available. Separately, in October 2014, the Drug Enforcement Administration moved certain commonly-prescribed pharmaceuticals containing hydrocodone from the less-restricted Schedule III to the more-restricted Schedule II. Among other things, the scheduling doubled the statutory maximum term of imprisonment available for trafficking in the pharmaceuticals that were previously controlled under Schedule III from 10 years to 20 years. The change also rendered obsolete the entries in the Drug Quantity Table and Drug Equivalency Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that set a marihuana equivalency for the pharmaceuticals that were previously controlled under Schedule III.

As a result of these administrative actions, all pharmaceuticals that include hydrocodone are now subject to the same statutory penalties. There is wide variation in the amount of hydrocodone available in these pharmaceuticals and in the amount of other ingredients (such as binders, coloring, acetaminophen, etc.) they contain. This variation raises significant proportionality issues within §2D1.1, where drug quantity for hydrocodone offenses has previously been calculated based on the weight of the entire substance that contains hydrocodone or on the number of pills. Neither of these calculations directly took into account the amount of actual hydrocodone in the pills.

The amendment addresses these changed circumstances by setting a new marihuana equivalency for hydrocodone based on the weight of the hydrocodone alone. Without this change, defendants with less actual hydrocodone could have received a higher guideline range than those with more hydrocodone because pills with less hydrocodone can sometimes contain more non-hydrocodone ingredients, leading the lower-dose pills to weigh more.

In setting the marihuana equivalency, the Commission considered: potency of the drug, medical use of the drug, and patterns of abuse and trafficking, such as prevalence of abuse, consequences of misuse including death or serious bodily injury from use, and incidence of violence associated with its trafficking. The Commission noted that the Drug Enforcement Administration’s rescheduling decision relied in part on the close relationship between hydrocodone and oxycodone, a similar and commonly-prescribed drug that was already controlled under Schedule II. Scientific literature, public comment, and testimony supported the conclusion that the potency, medical use, and patterns of abuse and trafficking of hydrocodone are very similar to oxycodone. In particular, the Commission heard testimony from abuse liability specialists and reviewed scientific literature indicating that, in studies conducted under standards established by the Food and Drug Administration for determining the abuse liability of a particular drug, the potencies of hydrocodone and oxycodone when abused are virtually identical, even though some physicians who prescribe the two drugs in a clinical setting might not prescribe them in equal doses. Public comment indicated that both hydrocodone and oxycodone are among the top ten drugs most frequently encountered by law enforcement and that their methods of...
diversion and rates of diversion per kilogram of available drug are similar. Public comment and review of the scientific literature also indicated that the users of the two drugs share similar characteristics, and that some users may use them interchangeably, a situation which may become more common as the more powerful pharmaceuticals recently approved by the Food and Drug Administration become available.

Based on proportionality considerations and the Commission’s assessment that, for purposes of the drug guideline, hydrocodone and oxycodone should be treated equivalently, the amendment adopts a marihuana equivalency for hydrocodone (actual) that is the same as the existing equivalency for oxycodone (actual): 1 gram equals 6,700 grams of marihuana.

Amendment:

§2D1.1. **Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

* * *

(6) **DRUG QUANTITY TABLE**

Controlled Substances and Quantity* Base Offense Level

* * *

(5) • At least 1 KG but less than 3 KG of Heroin; • At least 5 KG but less than 15 KG of Cocaine; • At least 280 G but less than 840 G of Cocaine Base; • At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); • At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of “Ice”; • At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual); • At least 10 G but less than 30 G of LSD; • At least 400 G but less than 1.2 KG of Fentanyl; • At least 100 G but less than 300 G of a Fentanyl Analogue; • At least 1,000 KG but less than 3,000 KG of Marihuana; • At least 200 KG but less than 600 KG of Hashish; • At least 20 KG but less than 60 KG of Hashish Oil; • At least 1,000,000 but less than 3,000,000 units of Ketamine; • At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; • 1,000,000 units or more of Schedule III Hydrocodone; • At least 62,500 but less than 187,500 units of Flunitrazepam.

(6) • At least 700 G but less than 1 KG of Heroin; • At least 3.5 KG but less than 5 KG of Cocaine; • At least 196 G but less than 280 G of Cocaine Base;
**Notes to Drug Quantity Table:**

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms “PCP (actual)”, “Amphetamine (actual)”, and “Methamphetamine (actual)” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “Hydrocodone (actual)” and “Oxycodone (actual)” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) “Ice,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) “Cocaine base,” for the purposes of this guideline, means “crack.” “Crack” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “unit” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “unit” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.

* * *

**Commentary**

**Statutory Provisions:** 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

**Application Notes:**

- CJA 57 -
7. **Multiple Transactions or Multiple Drug Types.**—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

8. **Use of Drug Equivalency Tables.**—

(D) **Drug Equivalency Tables.**—

<table>
<thead>
<tr>
<th>Substance</th>
<th>Marihuana Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 gm of Heroin *</td>
<td>1 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Alpha-Methylfentanyl</td>
<td>10 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Dextromoramide</td>
<td>670 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Dipipanone</td>
<td>250 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 3-Methylfentanyl</td>
<td>10 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP=</td>
<td>700 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxyxypiperidine/PEPP=</td>
<td>700 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Alphaprodine</td>
<td>100 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)</td>
<td>2.5 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Hydromorphone/Dihydromorphinone</td>
<td>2.5 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Levorphanol</td>
<td>2.5 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Meperidine/Pethidine</td>
<td>50 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Methadone</td>
<td>500 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 6-Monoacetylmorphine</td>
<td>1 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Morphine</td>
<td>500 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Oxycodone (actual)</td>
<td>6700 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Oxymorphone</td>
<td>5 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Racemorphan</td>
<td>800 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Codeine</td>
<td>80 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Dextropropoxypheine/Propoxyphene-Bulk</td>
<td>50 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Ethylmorphine</td>
<td>165 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Hydrocodone/Dihydrocodeinone=</td>
<td>500 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Hydrocodone (actual)</td>
<td>6700 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Mixed Alkaloids of Opium/Papaveretum</td>
<td>250 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Opium</td>
<td>50 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Levo-alpha-acetylmethadol (LAAM)</td>
<td>3 kg of marihuana</td>
</tr>
</tbody>
</table>

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

---

<table>
<thead>
<tr>
<th>Substance</th>
<th>Marihuana Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 unit of a Schedule III Substance =</td>
<td>1 gm of marihuana</td>
</tr>
</tbody>
</table>

***Provided, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.
Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone = 1 gm of marijuana

****Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 2,999.99 kilograms of marijuana.

*   *   *

27. Departure Considerations.—

(A) Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

(B) Upward Departure Based on Drug Quantity.—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) Upward Departure Based on Unusually High Purity.—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant’s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

*   *   *
5. MITIGATING ROLE

Reason for Amendment: This amendment is a result of the Commission’s study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission’s study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered “integral” to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

Section 3B1.2 provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him or her “substantially less culpable than the average participant.” However, there are differences among the circuits about what determining the “average participant” requires. The Seventh and Ninth Circuits have concluded that the “average participant” means only those persons who actually participated in the criminal activity at issue in the defendant’s case, so that the defendant’s relative culpability is determined only by reference to his or her co-participants in the case at hand. See e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993). The First and Second Circuits have concluded that the “average participant” also includes “the universe of persons participating in similar crimes.” See United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004); see also United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). Under this latter approach, courts will ordinarily consider the defendant’s culpability relative both to his co-participants and to the typical offender.

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants “in the criminal activity.” Focusing the court’s attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B. See e.g., §3B1.2 (the adjustment is based on “the defendant’s role in the offense”); §3B1.2, comment. (n.3(C)) (a determination about mitigating role “is heavily dependent upon the facts of the particular case”); Ch. 3, Pt. B, intro. comment. (the determination about mitigating role “is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)”).

Next, the amendment addresses cases in which the defendant was “integral” or “indispensable” to the commission of the offense. Public comment suggested, and a review of case law confirmed, that in some
cases a defendant may be denied a mitigating role adjustment solely because he or she was “integral” or “indispensable” to the commission of the offense. See, e.g., United States v. Skinner, 690 F.3d 772, 783-84 (6th Cir. 2012) (a “defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme”); United States v. Panaigua-Verdugo, 537 F.3d 722, 725 (7th Cir. 2008) (defendant “played an integral part in the transactions and therefore did not deserve a minor participant reduction”); United States v. Deans, 590 F.3d 907, 910 (8th Cir. 2010) (“Numerous decisions have upheld the denial of minor role adjustments to defendants who . . . play a critical role”); United States v. Carter, 971 F.2d 597, 600 (10th Cir. 1992) (because defendant was “indispensable to the completion of the criminal activity . . . to debate which one is less culpable than the others . . . is akin to the old argument over which leg of a three-legged stool is the most important leg.”). However, a finding that the defendant was essential to the offense does not alter the requirement, expressed in Note 3(A), that the court must assess the defendant’s culpability relative to the average participant in the offense. Accordingly, the amendment revises the commentary to emphasize that “the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative” and that such a defendant may receive a mitigating role adjustment, if he or she is otherwise eligible.

The amendment also revises two paragraphs in Note 3(A) that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3. Specifically, the illustrations provide that certain types of defendants are “not precluded from consideration for” a mitigating role adjustment. The amendment revises these paragraphs to state that these types of defendants “may receive” a mitigating role adjustment. The Commission determined that the double-negative tone (“not precluded”) may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

Finally, the amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider the degree to which the defendant understood the scope and structure of the criminal activity, participated in planning or organizing the criminal activity, and exercised decision-making authority, as well as the acts the defendant performed and the degree to which he or she stood to benefit from the criminal activity. The Commission was persuaded by public comment and a detailed review of cases involving low-level offenders, particularly in fraud cases, that providing a list of factors will give the courts a common framework for determining whether to apply a mitigating role adjustment (and, if so, the amount of the adjustment) and will help promote consistency.

The amendment further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Amendment:

§3B1.2. **Mitigating Role**

Based on the defendant’s role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, “participant” has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

(A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the concerted criminal activity is not precluded from consideration for may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant’s personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for may receive an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For
example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
5. **Minor Participant.**— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants **in the criminal activity**, but whose role could not be described as minimal.

6. **Application of Role Adjustment in Certain Drug Cases.**— In a case in which the court applied §2D1.1 and the defendant’s base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

* * *
6. “SINGLE SENTENCE” RULE

Reason for Amendment: This amendment responds to a circuit conflict regarding the meaning of the “single sentence” rule, set forth in subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and its implications for the career offender guideline and other guidelines that provide sentencing enhancements for predicate offenses.

When the defendant’s criminal history includes two or more prior sentences that meet certain criteria specified in §4A1.2(a)(2), those prior sentences are counted as a “single sentence” rather than separately. Generally, this operates to reduce the cumulative impact of prior sentences in determining a defendant’s criminal history score. Courts, however, are divided over whether this “single sentence” rule also causes certain prior convictions that ordinarily would qualify as predicate offenses under the career offender guideline to be disqualified from serving as predicate offenses. See §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3).

In 2010, in King v. United States, the Eighth Circuit held that when two or more prior sentences are treated as a single sentence under the guidelines, all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences — specifically, the one that was the longest. King, 595 F.3d 844, 852 (8th Cir. 2010). Accordingly, only that prior sentence may be considered a predicate offense for purposes of the career offender guideline. Id. at 849, 852.

In 2014, in United States v. Williams, a panel of the Sixth Circuit considered and rejected King because it permitted the defendant to “evade career offender status because he committed more crimes.” Williams, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). See also United States v. Cornog, 945 F.2d 1504, 1506 n.3 (11th Cir. 1991) (“It would be illogical . . . to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence.”).

After the Williams decision, a different panel of the Eighth Circuit agreed with the Sixth Circuit’s analysis but was not in a position to overrule the earlier panel’s decision in King. See Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014). The Eighth Circuit has applied the analysis from King to a case involving the firearms guideline and to a case in which the prior sentences were consecutive rather than concurrent. See, e.g., Pierce v. United States, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (firearms); United States v. Parker, 762 F.3d 801, 808 (8th Cir. 2014) (consecutive sentences). This issue has also been addressed by other courts, some which have followed the Sixth Circuit’s approach in Williams. See, e.g., United States v. Carr, 2013 WL 4855341 (N.D. Ga. 2013); United States v. Agurs, 2014 WL 3795584 (W.D. Pa., July 28, 2014). Other decisions have been consistent with the Eighth Circuit’s approach in King. See, e.g., United States v. Santiago, 387 F. App’x 223 (3d Cir. 2010); United States v. McQueen, 2014 WL 3749215 (E.D. Wash., July 28, 2014).

The amendment generally follows the Sixth Circuit’s approach in Williams. It amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal history points. It also provides examples, including an example to illustrate the potential impact of the applicable time periods prescribed in §4A1.2(e). Finally, §§4A1.1 (Criminal History Category) and 4A1.2 are revised stylistically so that sentences “counted” as a single sentence are referred to instead as sentences “treated” as a single sentence.
The amendment ensures that those defendants who have committed more crimes, in addition to a predicate offense, remain subject to enhanced penalties under certain guidelines such as the career offender guideline. Conversely, by clarifying how the single sentence rule interacts with the time limits set forth in §4A1.2(e), the amendment provides that when a prior sentence was so remote in time that it does not independently receive criminal history points, it cannot serve as a predicate offense.

Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

* * *

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

* * *

Application Notes:

* * *


(A) “Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) “Three or more convictions” means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

* * *

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and
One month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c), up to a total of 3 points for this subsection.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

* * *

5. §4A1.1(e). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(e). For purposes of this guideline, “crime of violence” has the meaning given that term in §4B1.2(a). See §4A1.2(p).

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only
have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

(1) The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet
(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) Failure to Report for Service of Sentence of Imprisonment

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) Felony Offense

For the purposes of §4A1.2(c), a “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) Crime of Violence Defined

For the purposes of §4A1.1(e), the definition of “crime of violence” is that set forth in §4B1.2(a).

Commentary

Application Notes:

1. Prior Sentence. — “Prior sentence” means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are
counted only if they are of a specified type and length).

2. **Sentence of Imprisonment.**—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant’s twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant’s twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. **Application of “Single Sentence” Rule (Subsection (a)(2)).**—

(A) **Predicate Offenses.**—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) **Upward Departure Provision.**—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public.
In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

*   *   *

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term “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.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

   *   *   *

   A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance
offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be counted as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

*   *   *
7. TECHNICAL

Reason for Amendment: This amendment makes certain technical changes to the Guidelines Manual.

First, the amendment sets forth technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective February 2014, the Office of the Law Revision Counsel transferred provisions relating to voting and elections from titles 2 and 42 to a new title 52. It also transferred provisions of the National Security Act of 1947 from one place to another in title 50. To reflect the new section numbers of the reclassified provisions, changes are made to—

(1) the Commentary to §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property);

(2) the Commentary to §2H2.1 (Obstructing an Election or Registration);

(3) the Commentary to §2M3.9 (Disclosure of Information Identifying a Covert Agent);

(4) Application Note 5 to §5E1.2 (Fines for Individual Defendants); and

(5) Appendix A (Statutory Index).

Second, it makes stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment) captioned “Illustrations of the Operation of the Multiple-Count Rules” to better reflect its purpose as a concluding commentary to Part D of Chapter Three.

Finally, it makes clerical changes to—

(1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to correct a typographical error in a U.S. Reports citation;

(2) the Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), to correct certain United States Code citations to correspond with their respective references in Appendix A that were revised by Amendment 769 (effective November 1, 2012);

(3) subsection (e)(7) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to add a missing measurement unit to the line referencing Norpseudoephedrine; and

(4) Application Note 2 to §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), to correct a typographical error in an abbreviation.
On April 9, 2015, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2015. Barring congressional action, they will take effect November 1, 2015. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission’s website at: http://bit.ly/1ar7IMX.

Because none of these amendments will become effective until November 1, 2015, any arguments based upon them before that date must be done in the form of a variance. Although some of the amendments will reduce sentences, the Commission declined to consider whether they should be made retroactive.

1. Mitigating Role

The Commission made some modest changes to the mitigating role guideline that clarify its operation and that should result in more defendants receiving a mitigating role adjustment. First, it addressed a circuit split on the meaning of “average participant,” adopting the approach of the Seventh and Ninth, which defines “average participant” by reference to those persons who participated in the criminal activity at issue in the defendant’s case. It rejected the approach of the First and Second Circuits, which required a court to consider the defendant’s culpability relative to his co-participants and to the typical participant in a similar crime.

Second, it added a non-exhaustive list of factors for the court to consider in determining whether to apply a -4, -2, or intermediate adjustment:

   i. the degree to which the defendant understood the scope and structure of the criminal activity;
   ii. the degree to which the defendant participated in planning or organizing the criminal activity;
   iii. the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
   iv. the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
   v. the degree to which the defendant stood to benefit from the criminal activity.

1 Sentencing Resource Counsel Project is a national project of the Federal Public & Community Defenders.
Third, the commentary now states by way of example that “a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.” It also provides that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.” This latter change rejects the approach of many circuits, which have held that a defendant who plays an indispensable or essential role does not qualify for a mitigating role adjustment.

Fourth, the commentary discussing individuals who perform limited functions has been changed to state that they “may receive” a mitigating role adjustment rather than that they “are not precluded” from receiving an adjustment.

2. Jointly Undertaken Criminal Activity

The Commission voted to promulgate an amendment to §1B1.3, restructuring the guideline and its commentary to “set out more clearly the three-step analysis the court applies in determining whether the defendant is accountable for acts of others in the jointly undertaken criminal activity.”

The three step analysis requires that before a court may consider the acts and omissions of others under §1B1.3(a)(1)(B), it must find that those acts and omissions were (1) “within the scope of the jointly undertaken activity; (2) in furtherance of that criminal activity; and (3) reasonably foreseeable in connection with that criminal activity.” The commentary to §1B1.3 also makes clear that if one of those criteria is not met, the conduct is “not relevant conduct” under the “jointly undertaken provision.”

The Commission had requested commented on whether it should replace the reasonable foreseeability requirement with a higher mens rea, but it declined to take up the issue this amendment cycle. For a potential variance argument on why “reasonable foreseeability” is a negligence standard that does not satisfy the statutory purposes of sentencing, see the Defender comments to the Commission, available on fd.org at http://bit.ly/1yZ6nTw.

3. Inflationary Adjustments

The Commission, for the first time in the history of the guidelines, voted to amend the monetary tables to account for inflation. This means it will take larger loss amounts to trigger enhanced offense levels. For example, it will take a loss amount of more than $40,000 instead of $30,000 to trigger a +6 enhancement under USSG §2B1.1.

This amendment also increases the fines tables. The Commission added a special note to §5E1.2 providing that for “offenses committed prior to November 1, 2015, use the applicable guideline range that was set forth in the version of §5E.12(c) that was in effect on November 1, 2014.” This note presumably is intended to avoid ex post facto problems.

It is worth noting that with this amendment, the Commission treats the various monetary tables in the guidelines differently, using different time frames for different guidelines. For example, §2B1.1 is adjusted for inflation since 2001, whereas the monetary tables in §2B2.1 and §2B2.3 are adjusted for
inflation since 1989. The Commission claims this takes “into consideration the year each monetary table was last amended” but ignores, as the Commission has admitted, that the monetary values in the Chapter Two offense guidelines have “never been revised specifically to account for inflation.” For more on this, and arguments to use in support of variances in cases involving the monetary tables that received less favorable treatment, see the Statement of Michael Caruso.2

4. Economic Crime

a. Intended Loss

The Commission amended the definition of intended loss at §2B1.1 comment. (n.3(A)(ii)) to limit intended loss to the pecuniary harm “that the defendant purposely sought to inflict.”

b. Victims Table

The Commission made several changes to the victims table. First, with these amendments, the only enhancement based solely on the number of victims is now a +2 for 10 or more victims. The enhancements for 50 or more, and 250 will be eliminated effective Nov. 1, 2015. Second, the amendments brings new victim enhancements. Starting Nov. 1, 2015, when the offense resulted in “substantial financial hardship” to victims, the following enhancements will apply:

+2: substantial financial hardship to one or more victims.
+4: substantial financial hardship to five or more victims
+6: substantial financial hardship to twenty-five or more victims

It is important to note that these new enhancements for substantial financial hardship are not cumulative to the enhancement for 10 or more victims, but rather alternatives.

The Commission also amended the commentary to provide a list of factors the “court shall consider, among other factors” in determining whether the offense “resulted in substantial financial harm to a victim.” Specifically, whether the offense resulted in the victim:

i. becoming insolvent;
ii. filing for bankruptcy;
iii. suffering substantial loss of a retirement, education or other savings or investment fund;
iv. making substantial changes to his or her employment, such as postponing his or her retirement plans;
v. making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and

2 Attached to Defender comments to the Commission, available on fd.org at http://bit.ly/1yZ6nTw.
vi. suffering substantial harm to his or her ability to obtain credit.

The amendments made three other victim related changes:

- The Commission removed the 4-level enhancement at 2B1.1(b)(16) for offenses that “substantially endangered the solvency or financial security of 100 or more victims”

- The Commission changed one of the special rules for undelivered United States Mail. An undelivered mail case that involved a relay box, collection box, or the other listed containers shall be considered to have involved at least 10, instead of 50, victims. This lowers the increase in offense level from +4 to +2.

- Because substantial harm to a person’s credit record is now a factor to be considered for purposes of the victim enhancements, the Commission deleted the upward departure provision based on substantial harm to a victim’s credit record, or the inconvenience of repairing that record.

c. Sophisticated Means

The Commission’s amendment “narrows the scope of the specific offense characteristic to cases in which the defendant intentionally engaged in or caused (rather than the offense involved) sophisticated means.” USSG §2B2.1(b)(10)(C) as amended provides: “the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.”

d. Fraud on the Market

Although the Commission just amended the guidelines in 2012 to add a rebuttable presumption that loss should be calculated in a specific way in cases involving the fraudulent inflation or deflation of a publicly traded security or commodity, this year, the Commission changed course. With these amendments, the Commission now advises courts to “use any method that is appropriate and practicable under the circumstances.” The previously recommended method is now just “one… method the court may consider.”

5. “Single Sentence” Rule

The Commission voted to promulgate an amendment that makes several changes to USSG §4A1.2, addressing a circuit split between the Eighth and Sixth Circuits about whether sentences counted as a “single sentence” qualify as a predicate conviction under the career offender guideline, §2K1.3 (explosives), and §2K2.2 (firearms). While the Eighth Circuit had the better approach,\(^3\) the Commission voted to “generally follow[]” the Sixth Circuit. This means that a prior considered as part

\(^3\) See Statement of Jon M. Sands, attached to Defender comments to the Commission, available on fd.org, here: http://bit.ly/1yZ6nTw.
of a “single sentence” for purposes of criminal history points counts as a predicate for career offender and other guidelines “if it independently would have received criminal history points.” If more than one prior within a group of offenses considered as a single sentence is a “crime of violence” or a controlled substance offense under §4B1.2, only one may count as a predicate offense.

In addition to this change, the Commission made several stylistic changes to §4A1.1 and 4A1.2 so that references to sentences “counted” as a single sentence” are changed to “treated” as a single sentence.

6. Hydrocodone

In response to the DEA’s rescheduling of hydrocodone from Schedule III to Schedule II and the FDA’s approval of “single-entity” hydrocodone products that are not combined with acetaminophen or similar substances, the Commission decided to change the drug equivalency table so that hydrocodone is treated like oxycodone: 1 gram of hydrocodone (actual) is equivalent to 6700 grams of marijuana.

The Commission adopted this amendment despite substantial evidence that the oxycodone guideline is not based on empirical evidence and other evidence that hydrocodone does not have the same abuse potential as oxycodone. For information that may help challenge the new hydrocodone guideline, see the Defender comments and Statement of Lex Coleman, available on fd.org at http://bit.ly/1yZ6nTw.
Proposed Amendment to the Sentencing Guidelines

August 12, 2015

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendment can be found on the Commission’s website at www.uscc.gov and will appear in a forthcoming edition of the Federal Register.

Written public comment should be received by the Commission not later than November 12, 2015, and should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@uscc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs. For further information, see the full contents of the official notice published in the Federal Register (available at www.uscc.gov).
AMENDMENT

1. “CRIME OF VIOLENCE” AND RELATED ISSUES

SUPPLEMENTARY INFORMATION

The proposed amendment as presented in this notice contains bracketed text to indicate a heightened interest on the Commission’s part in comment and suggestions regarding alternative policy choices and on whether the proposed provision is appropriate. The Commission has also highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendment, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), the proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

Publication of a proposed amendment requires the affirmative vote of at least three voting members and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission’s Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. § 994(p).

Additional information pertaining to the proposed amendment described in this notice may be accessed through the Commission’s website at www.ussc.gov.
Proposed Amendment: “Crime of Violence” and Related Issues

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). See United States Sentencing Commission, “Notice of Final Priorities,” 79 FR 49378 (Aug. 20, 2014); “Proposed Priorities for Amendment Cycle,” 80 FR 36594 (June 25, 2015).

The proposed amendment is also informed by the Supreme Court’s recent decision in Johnson v. United States, __ U.S. __, 135 S. Ct. 2551 (2015), relating to the statutory definition of “violent felony” in 18 U.S.C. § 924(e), which held that an increased sentence under the “residual clause” of that definition violates due process. As the Court explained in Johnson, the term “residual clause” refers to the closing words of the statutory definition of “violent felony.” Under those closing words, a crime is a “violent felony” if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” See 18 U.S.C. § 924(e)(2)(B)(ii) [emphasis added]. This clause, the Court held in Johnson, is unconstitutionally vague. The Court’s holding did not implicate other parts of the statutory definition; a crime may still qualify as a “violent felony” under the statute if, for example, it “has as an element the use, attempted use, or threatened use of physical force against the person of another” (sometimes referred to as the “elements” clause) or if it “is burglary, arson, or extortion” (sometimes referred to as the “enumerated” clause).

Procedure

The Commission’s ordinary practice with amendments to the sentencing guidelines is to publish proposals for comment in January, hold hearings in February or March, promulgate amendments in April, and submit final amendments to Congress on or shortly before May 1, to take effect on November 1. However, the Commission’s organic statute authorizes the Commission to promulgate and submit amendments at any point after the beginning of a session of Congress and to specify an effective date sooner than November 1. See 28 U.S.C. § 994(p). Publishing this proposed amendment at this time allows for the possibility that an amendment could be promulgated and submitted to Congress earlier than May 1 and could take effect earlier than November 1.

Accordingly, the Commission anticipates that in Fall 2015 it will hold a hearing on the proposed amendment and that in January 2016 it may, if appropriate, promulgate a final amendment and submit it to Congress (to take effect earlier than November 1) or publish a revised version of this proposed amendment for an additional period of comment.

Parts of the Proposed Amendment

The proposed amendment contains several parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. Issues for comment are also included.

A. Elimination of “Crime of Violence” Residual Clause and Related Revisions to Definition of “Crime of Violence”

The guidelines definition of “crime of violence” in §4B1.2(a) was modeled after the statutory definition of “violent felony.” This guidelines definition is used in determining whether a defendant is a career offender under §4B1.1 (Career Offender), and is also used in certain other guidelines. See, e.g., §§2K1.3...
(Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms and Ammunitions), 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 5K2.17 (Semiautomatic Firearms Capable of Accepting Large Quantity Magazine (Policy Statement)).

While the statutory definition of “violent felony” in section 924(e) and the guidelines definition of “crime of violence” in §4B1.2 are not identical in all respects — for example, they have different “enumerated” clauses — their residual clauses are identical. The proposed amendment amends §4B1.2 to delete the residual clause.

In addition, the proposed amendment amends §4B1.2 to clarify and revise the list of “enumerated” offenses. While some offenses covered by the definition are listed in the guideline (such as burglary of a dwelling, arson, and extortion), many other offenses covered by the definition are listed in the commentary instead (e.g., murder, kidnapping, aggravated assault, robbery). The proposed amendment makes some revisions to the list of enumerated offenses, moves all enumerated offenses to the guideline, and provides definitions for the enumerated offenses in the commentary.

B. Use of the State Felony Classification in Determining Whether an Offense Qualifies as a “Felony” Under §4B1.2

Under the career offender guideline, the court must analyze both the instant offense of conviction and the defendant’s prior offenses of conviction. To be a career offender, the court must find (1) that the instant offense is a felony that is a crime of violence or a controlled substance offense, and (2) that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. See §4B1.1(a), 4B1.2; see also 28 U.S.C. § 994(h).

To implement the requirement that the offense be a “felony,” the definitions in §4B1.2(a) and (b) specify that the instant offense (whether a “crime of violence” or a “controlled substance offense”) must have been an offense under federal or state law, punishable by imprisonment for a term exceeding one year. The proposed amendment adds an additional requirement: the offense must also have been classified at the time defendant was initially sentenced as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted. If the jurisdiction does not have a “felony” classification, the offense must have been given a classification comparable to a felony classification.

C. Corresponding Changes to the Illegal Reentry Guideline, §2L1.2

The definition of “crime of violence” in §4B1.2 is not the only definition of “crime of violence” in the guidelines. In particular, §2L1.2 (Unlawfully Entering or Remaining in the United States) sets forth a definition of “crime of violence” that contains a somewhat different list of “enumerated” offenses and does not contain a “residual” clause. It also sets forth a definition of “drug trafficking offense” that is somewhat different from the definition of “controlled substance offense” in §4B1.2.

The proposed amendment would revise the definitions of “crime of violence” and “drug trafficking offense” in §2L1.2 to bring them more into parallel with the definitions in §4B1.2. Under the proposed amendment, the definitions in §2L1.2 would generally follow the definitions in §4B1.2, as revised by Parts A and B of the proposed amendment.

Proposed Amendment:
(A) “Crime of Violence” in §4B1.2

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, burglary of a dwelling, arson, or extortion, or involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term “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.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense
of conviction is the unlawful possession of a firearm by a felon. §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense, and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a “crime of violence”.

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Enumerated Offenses under Subsection (a).—For purposes of subsection (a):

(A) “Murder” is (i) the unlawful killing of a human being with malice aforethought (including killing a human being purposefully, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life); or (ii) causing the death of a human being in the course of committing another felony offense.

(B) “Voluntary manslaughter” is (i) the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion; or (ii) causing the death of a human being through actions intended to cause serious physical injury to another human being.
(C) “Kidnapping” is an offense that includes at least (i) an act of restraining, removing, or
confining another; (ii) an unlawful means of accomplishing that act; and (iii) at least one or
more of the following aggravating factors: (I) the offense was committed for a nefarious
purpose; (II) the offense substantially interfered with the victim’s liberty; or (III) the offense
exposed the victim to a substantial risk of bodily injury, sexual assault, or involuntary
servitude.

(D) “Aggravated assault” is (i) attempting to cause serious or substantial bodily injury to
another, or causing such injury purposefully, knowingly, or recklessly; or (ii) attempting to
cause, or purposefully, knowingly, or recklessly causing, bodily injury to another through use
of a deadly weapon.

(E) A “forcible sex offense” is any offense requiring a sexual act or sexual contact to which
consent to the actor’s conduct (i) is not given, or (ii) is not legally valid, such as where
consent to the conduct is involuntary, incompetent, or coerced. The terms “sexual act” and
“sexual contact” have the meaning given in 18 U.S.C. § 2246.

(F) “Robbery” is the misappropriation of property under circumstances involving immediate
danger to the person of another.

(G) “Burglary of a dwelling” is an unlawful or unprivileged entry into or remaining in a
dwelling with intent to commit a crime.

(H) “Burglary” is an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a
crime.

(I) “Arson” is the intentional damaging, by fire or the use of explosives, of any building, vehicle,
or other real property.

(J) “Extortion” is obtaining something of value from another by the wrongful use of (i) force, (ii)
fear of physical injury, or (iii) threat of physical injury.

Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be
crimes of violence or controlled substance offenses of which the defendant was convicted.
Therefore, in determining whether an offense is a crime of violence or controlled substance for the
purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the
defendant was convicted) is the focus of inquiry.

The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are
applicable to the counting of convictions under §4B1.1.

* * *

(B) Requirement That Offense Be Classified as Felony Under State Law

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable
by imprisonment for a term exceeding one year and classified [at the time the defendant
was initially sentenced] as a felony (or comparable classification) under the laws of the
jurisdiction in which the defendant was convicted, that—
(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, 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.

* * *

Commentary

Application Notes:

1. For purposes of this guideline—

* * *

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year and classified [at the time the defendant was initially sentenced] as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

(C) Corresponding Revisions to §2L1.2

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—
(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):
(i) “Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) “Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) “Crime of violence” has the meaning given that term in §4B1.2(a). However, for purposes of subsection (b)(1)(E), which applies to misdemeanor crimes of violence, the requirements in §4B1.2(a) that the offense be a felony (i.e., punishable by a term more than one year and classified as a felony) do not apply means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) “Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.

(v) “Firearms offense” means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).


(IV) A violation of 18 U.S.C. § 924(c).


(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) “Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under
any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) “Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.

(viii) “Terrorism offense” means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. § 2332b(g)(5).

(C) Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

2. Definition of “Felony”.—For purposes of subsection (b)(1)(A), (B), and (D), “felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year. In addition, a crime of violence or a drug trafficking offense is a “felony” only if it was classified as a felony (or comparable classification) under the laws of the jurisdiction in which the defendant was convicted.

3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), “aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).


(A) “Misdemeanor” means a federal or state offense, punishable by a term of imprisonment, that is not a “felony” as defined in Application Note 2 any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) “Three or more convictions” means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

*   *   *

- CJA 89 -
Issues for Comment:

1. The Commission invites broad comment on the “residual clause” in the definition of “crime of violence” in §4B1.2. Should the residual clause be eliminated, as proposed by the proposed amendment? If so, what other changes, if any, should be made to the guidelines definition of “crime of violence”?

In the alternative, should the residual clause be revised? If so, how should it be revised? Should the Commission consider a different type of residual clause, such as the residual clause in 18 U.S.C. § 16?

2. The Commission similarly invites broad comment on the list of “enumerated” offenses in the definition of “crime of violence” in §4B1.2. Should the list of enumerated offenses be clarified and revised, as proposed by the proposed amendment? What offenses should be enumerated, and how (if at all) should they be defined?

For example, should the list of enumerated offenses be limited to common law offenses against the person? Should the list also include any offense resulting in death or bodily injury to another if the defendant’s conduct was knowing, intentional, or reckless?

Should the list of enumerated offenses include offenses where harm did not result, but could have resulted because of the risk involved? If so, what offenses should be included on the list, and how (if at all) should they be defined?

3. The Commission seeks comment on offenses against property and the extent to which they should be included in the guidelines definition of “crime of violence.” Statutory definitions relating to “violent” offenses account for property offenses in various ways. For example, the statutory definition of “crime of violence” in 18 U.S.C. § 16 does not enumerate any specific property offenses, but its elements clause extends to offenses that have as an element the use, attempted use, or threatened use of physical force against the property of another, and its residual clause extends to offenses that involve a substantial risk of physical force against the property of another. In contrast, the statutory definition of “violent felony” in 18 U.S.C. § 924(e) enumerates arson and burglary, but its elements clause and residual clause do not extend to property offenses. How, if at all, should the guidelines definition of “crime of violence” apply to property offenses?

4. The proposed amendment seeks comment on the enumerated offense definitions, as set forth in Part A of the proposed amendment. The definitions were derived from broad contemporary, generic definitions of the elements for the listed offenses. The Commission seeks comment generally on whether providing definitions for enumerated offenses is appropriate and specifically on whether the definitions provided are appropriate. Are there offenses that are covered by the proposed definitions but should not be? Are there offenses that are not covered by the proposed definitions but should be?

In addition, the Commission seeks specific comment on the following:

(A) The proposed definition of “murder” would include offenses in which the defendant causes the death of another in the course of committing any felony. This definition is worded more broadly than felony murder statutes in some states to minimize complexity and avoid difficulties with differing state law definition. The Commission seeks comment on whether such a definition is appropriate.
The proposed definition of “kidnapping” attempts to capture the kinds of aggravating factors that some courts have held are present in state statutes. The Commission seeks comment on whether there are other factors that should be included as possible elements of kidnapping.

The proposed definition of “aggravated assault” does not include as an aggravating factor that the victim has a special status, such as law enforcement, elderly, or minor. Should those type of assaults qualify as “aggravated assault”? In particular, the Commission seeks comment on whether the definition of “aggravated assault” should include, as a possible alternative element, attempting to cause, or purposefully, knowingly, or recklessly causing, bodily injury to a person classified as a special victim under the statute of conviction (including public servants, minors, the elderly, pregnant women, and any other similar group).

The proposed definition of “forcible sex offense” incorporates the definitions of “sexual act” and “sexual contact” in 18 U.S.C. § 2246. Are there types of sex offenses that would be included in the definition of “forcible sex offense” set forth in the proposed amendment that should not be considered “crimes of violence”? Are there types of sex offenses that would not be included under this definition, but should be? Should statutory rape be expressly included? Should it be expressly excluded?

The proposed definition of “aggravated assault” does not include as an aggravating factor that the victim has a special status, such as law enforcement, elderly, or minor. Should those type of assaults qualify as “aggravated assault”? In particular, the Commission seeks comment on whether the definition of “aggravated assault” should include, as a possible alternative element, attempting to cause, or purposefully, knowingly, or recklessly causing, bodily injury to a person classified as a special victim under the statute of conviction (including public servants, minors, the elderly, pregnant women, and any other similar group).

The proposed amendment defines “robbery” as the misappropriation of property under circumstances involving immediate danger to the person of another. The Commission seeks comment on whether this definition is adequately clear and on whether it is appropriate in scope. Are there types of offenses that would be included in the definition set forth in the proposed amendment that should not be considered “crimes of violence”? Are there types of offenses that would not be included under this definition, but should be? For example, in some jurisdictions the elements of robbery may be established by a taking of property from a person or person’s presence by fear (rather than, for example, by force or by injury). If the defendant was convicted of such a taking by fear, would it qualify as “robbery” as defined by the proposed amendment? In the alternative, would it qualify as “extortion” as defined by the proposed amendment? Should such a robbery (i.e., the taking of property from a person or person’s presence by fear) qualify as a crime of violence?

The Supreme Court has determined that burglary under section 924(e) includes structures other than dwellings, but the Commission has included only burglaries of dwellings under the current definition of “crime of violence” at §4B1.2. The Commission seeks comment on whether burglaries of buildings and other structures that are not dwellings should be included as “crimes of violence.”

Many states define “arson” to include burning of personal property. The proposed amendment does not include that type of arson in its definition of arson. The Commission seeks comment on whether the exclusion of such type of arson is appropriate. In those states that punish burning of personal property under arson statutes, what type of conduct is covered? Is it conduct that should be considered a crime of violence? Does it typically pose a risk of injury to a person?

Extortion has been defined in case law as including non-violent threats, such as a threat to reveal embarrassing personal information. The definition of “extortion” in the proposed amendment requires the threat to be a “threat of physical injury” against the person. Similarly, extortion has been defined in case law as including fear, and the definition of “extortion” in the proposed amendment requires the fear to be a “fear of physical injury.”
The Commission seeks comment on whether including these limitations in the “extortion” definition is appropriate.

5. Some commentators have suggested that the definition of “crime of violence” should not provide a list of enumerated offenses (e.g., murder, voluntary manslaughter, aggravated assault), but should contain only an elements clause (i.e., the use, attempted use, or threatened use of physical force against the person or property of another). The Commission seeks comment on whether such a single-prong approach would provide a sufficient and appropriate definition of “crime of violence.” If so, what should the “elements clause” provide?

6. The Commentary to §4B1.2 states that “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. The Commission seeks comment on whether the definitions of “crime of violence” and “controlled substance offense” should include attempts, conspiracies, and aiding and abetting. If so, should any limitations apply?

7. Part B of the proposed amendment would amend §4B1.2 to revise the definition of “felony.” The Commission seeks comment on the advantages and disadvantages of using different definitions of “felony” in the guidelines. Should the Commission adopt a single definition of “felony” throughout the guidelines?

8. The revisions made by Part B would add a requirement that the offense have been classified as a felony under the laws of the jurisdiction in which the defendant was convicted. The Commission seeks comment on how this principle should apply to states that do not classify offenses as felonies, and to states (such as California) in which some offenses may be classified as either a felony or a misdemeanor at initial sentencing and the classification may change based on later events (such as a revocation of probation). The proposed amendment includes the parenthetical phrase “(or comparable classification)” and the bracketed phrase “[at the time the defendant was initially sentenced]” to address these situations. Do these phrases adequately address these situations? If not, how, if at all, should the Commission address these situations?

9. Part C of the proposed amendment would adopt for the illegal reentry guideline the same definition of “crime of violence” used in the career offender guideline. The Commission seeks comment on the advantages and disadvantages of using different definitions for these guidelines. Should the Commission have separate definitions for “crime of violence” in these guidelines?

10. The Commission seeks comment on whether any other guidelines that involve terms such as “crime of violence,” “controlled substance offense,” and “drug trafficking offense” should be revised to conform to the definitions used in the career offender guideline or the illegal reentry guideline (as revised by the proposed amendment). For example, what changes, if any, should be made to the firearms and explosives guidelines, §§2K2.1 and 2K1.3, to conform to the revisions made by the proposed amendment? What changes, if any, should be made to guidelines that use the term “crime of violence” but do not define it by reference to §4B1.2 (such as guidelines that define it by reference to 18 U.S.C. § 16)? Should the Commission revise those guidelines to promote a single definition of “crime of violence” (and terms such as “controlled substance offense”) throughout the guidelines?
THE SENTENCING REFORM AND CORRECTIONS ACT of 2015

TITLE 1: SENTENCING REFORM

Section 101. Reforms and Targets Enhanced Mandatory Minimum Sentences for Prior Drug Felons. The enhanced mandatory minimums for prior drug felons are reduced: the three-strike penalty is reduced from life imprisonment to 25 years, and the 20-year minimum is reduced to 15 years. The offenses that trigger these enhanced minimum sentences are also reformed. Currently, those offenses could be any prior drug felony. This bill would both limit them to serious drug felonies and expand them to include serious violent felonies. This provision may be applied retroactively to reduce a defendant’s sentence, but only after a court considers sentencing factors, including any danger and prison misconduct.

Section 102. Broadens the Existing Safety Valve. The existing safety valve is expanded to include offenders with up to four criminal history points. However, offenders with prior “3 point” felony convictions or prior “2 point” violent or drug trafficking offenses will not be eligible for the safety valve. The safety valve will also adopt an existing mechanism under the Sentencing Guidelines to permit a court to waive those disqualifying prior convictions if the court specifies in writing that those prior convictions substantially over-represent the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes. This provision is subject to appellate review, like other sentencing determinations, and offenders with prior serious drug or violent convictions are ineligible for relief. This provision is not retroactive.

Section 103. Creates a Second Safety Valve that Preserves but Targets the 10-Year Mandatory Minimum to Certain Drug Offenders. A second safety valve is created that preserves but targets the existing 10-year mandatory minimum to (1) offenders who performed an enhanced role in the offense or (2) otherwise served as an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer. Consistent with the existing safety valve, the offender must not have used violence or a firearm or been a member of a continuing criminal enterprise, and the offense must not have resulted in death or serious bodily injury. The defendant must also truthfully “proffer” with the government and provide any and all information and evidence the defendant has about the offense. This provision also excludes offenders with prior serious drug or serious violent convictions or offenders who distributed drugs to or with a person under the age of 18. This provision is not retroactive.

Section 104. Clarifies and Reduces the Enhanced Mandatory Minimum Sentence for Certain Firearm Offenses but Expands its Application to Similar Prior State Convictions. In response to a Supreme Court decision, the bill clarifies that the enhanced mandatory minimum sentence for using a firearm during a crime of violence or drug crime is limited to offenders who have previously been convicted and served a sentence for such an offense. The bill also reduces that enhanced mandatory minimum from 25 years to 15 years. But the bill expands the applicable predicate offenses to include similar prior state-level convictions in which the offender carried, brandished, or used a firearm. This provision may be applied retroactively, but only after a court considers sentencing factors, including any danger and prison misconduct.

Section 105. Raises the Statutory Maximum for Unlawful Possession of a Firearm and Creates an Overlapping Range by Reducing the Enhanced Mandatory Minimum for Armed
**Career Criminals.** The statutory maximum for the unlawful possession of a firearm by a convicted felon and certain other offenders is increased from 10 to 15 years. It also eliminates a significant gap in current sentencing laws by reducing the enhanced mandatory minimum for armed career criminals from 15 to 10 years. This provision may be applied retroactively, but only after a court considers sentencing factors, including any danger and prison misconduct.

**Section 106. Retroactive Application of Fair Sentencing Act.** The Fair Sentencing Act of 2010 reduced the disparity in sentencing between crack and powder cocaine. This provision ensures the retroactive application to offenders sentenced under those provisions before they were modified.

**Section 107. New Mandatory Minimum for Interstate Domestic Violence**

**Section 108. New Mandatory Minimum for Certain Export Control Offenses**

**Section 109. Report and Inventory of All Federal Criminal Offenses**

**Title 2: The Corrections Act**

**Section 202. Recidivism Reduction Programming and Productive Activities.** This section requires BOP to make statistically validated recidivism reduction programming available to all eligible prisoners within six years. As an incentive for successfully completing recidivism reduction program, eligible inmates may receive time credit of up to five days for each period of 30 days of programming that they successfully complete. Inmates classified as low risk may receive an additional credit of up to five days for each period of 30 days of program completion. Inmates serving sentences for a second or subsequent federal offense and those with 13 or more criminal history points under the sentencing guidelines are ineligible for time credits. Inmates serving sentences for certain offenses are excluded, including crimes of terrorism and violence.

**Section 203. Post-Sentencing Risk and Needs Assessment System.** The Attorney General is required to develop a risk and needs assessment system that will determine the recidivism risk of all federal inmates and classify inmates as having a high, moderate, or low risk of recidivism. The assessment system must also identify each inmate’s programmatic needs and identify appropriate programming. The system must measure indicators of progress such that each inmate (other than those already classified as low risk) has a meaningful opportunity to progress to a lower risk level during the time of the inmate’s incarceration through changes in dynamic risk factors, and that each inmate on prerelease custody (other than those already classified as low risk) has a meaningful opportunity to progress to a lower risk classification through changes in dynamic risk factors.

**Section 204. Prerelease Custody.** This section allows prisoners to serve an amount of time equal to the credit they have earned for recidivism reduction programming in prerelease custody, provided that the prisoner’s most recent risk assessment determined that the prisoner was low or moderate risk and, if moderate risk, that the prisoner’s risk of recidivism has declined. It provides that a prisoner permitted to spend a portion of the prisoner’s sentence in prerelease custody as a result of completing recidivism reduction programming may spend such time in a residential reentry center, on home confinement, or on community supervision. Inmates placed in home confinement shall be subject to monitoring and be required to remain in their residence, with exceptions for employment and other specified activities. BOP may revoke a prisoner’s prerelease
custody and require the prisoner to serve the remainder of the prisoner’s term of incarceration in prison if the prisoner violates the conditions.

**Section 205. Reports.** This section requires reports about best practices and notice for veterans.

**Section 206. Additional Tools.** This section requires presentence investigation reports to include information about the defendant’s history of substance abuse and addiction, the defendant’s prior service in the Armed Forces, and a detailed plan to reduce the defendant’s likelihood to abusing drugs or alcohol, address the defendant’s risk of recidivism, and prepare the inmate for reentry.

**Section 207. Eric Williams Correctional Officer Protection Act.** This section permits officers and employees of BOP to carry oleoresin capsicum spray (pepper spray). BOP officers and employees are required to complete a training course prior to being issued pepper spray, and may use pepper spray to reduce acts of violence.

**Section 208. Promoting Successful Reentry.** This section requires the Attorney General to submit a report evaluating best practices for reentry, and to carry out reentry demonstration projects in judicial districts in consultation with the Administrative Office of the Courts.

**Section 209. Parole for Juveniles.** The Supreme Court has ruled that the Constitution requires that juveniles convicted as adults and sentenced to life terms must be eligible for parole. The bill creates a system whereby such juveniles in the federal system will be eligible to seek parole after they have served 20 years of their sentence. A judge would apply a range of specified factors in deciding whether to grant parole. If parole were denied, the inmate could apply twice more for parole after five years had elapsed after denial. The provision applies as well to juveniles sentenced as adults to terms longer than 20 years.

**Section 210. Compassionate release.** The bill would allow certain individuals with no record of violence who are older than 60, as well as terminally ill offenders and those in nursing homes who have served a large portion of their sentences, to be released from prison.

**Section 211. Juvenile sealing and expungement.** This section permits nonviolent juveniles who are tried as juveniles in federal court, other than for misdemeanor domestic violence offenses, to obtain sealing or expungement of their convictions in certain circumstances. The goal is to enable youthful offenders who live a crime free life to seek employment without regard to earlier errors in their life.

**Section 212. Juvenile solitary confinement.** The bill would impose limitations on the use of solitary confinement for juveniles housed in federal prison.

**Section 213. Accuracy of federal criminal records.** Under this section, the Attorney General would establish and enforce procedures for individuals who are to undergo background checks for employment to challenge the accuracy of their federal criminal records, in particular, of arrests without dispositions.
ETHICAL QUANDARIES IN CRIMINAL CASES

James M. McCauley

NOTES
HYPOTHETICALS

Hypothetical 1

You are trying to compile as much information as possible about a questionable government source who might be also be a witness against your client, to use in defending your client and/or as a plea bargaining chip. You have received approval from the court to engage an investigator.

(a) Before allowing the investigator to start her work, must you instruct her on the ethical and legal limits on her activities?

(b) May you use the fruits of the investigator’s work without assuring yourself that the private investigator has not used illegal means to obtain it?

(c) May you use the fruits of the investigator’s work when the only conceivable way she could have obtained the information involved wrongful conduct (such as violation of health privacy laws)?

Hypothetical 2

Your investigator had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming suppression hearing.

May you continue to act as an advocate in the motion hearing if your investigator will testify about the conversation?

1 Hypotheticals 1-4 and 7 and some portions of the analyses contained in this paper are the work of Tom Spahn, Esquire, and are used with his permission.
Hypothetical 3

Your local federal court appointed you to represent a criminal defendant. Your client wants to appeal his recent conviction, and insists that you pursue every possible argument—including some arguments that you believe have no merit.

May you include in an appeal of a criminal conviction arguments that lack any factual support?

Hypothetical 4

Under the “no good deed goes unpunished” rule, you should have seen this one coming. After diligently but unsuccessfully seeking to defend your court-appointed client from serious criminal charges, he has now claimed “ineffective assistance of counsel” in a §2255 motion. Within just a few hours of your ungrateful former client’s filing, the prosecutor calls you to ask for a meeting to discuss the case.

May you meet with the prosecutor, and disclose protected client information to defend yourself from your former client’s allegation of “ineffective assistance”?

Hypothetical 5

You have been appointed to represent a client who filed a 2255 motion alleging that his former counsel was ineffective. Upon review of the record, you determine that the motion is without merit.

(a) Should you advise the court that the motion should be denied?

(b) What if the court directs you to advise the court as to the merits of the motion?
Hypothetical 6

Your client is out on bail pending trial. The client has now fled the jurisdiction and has told you that he has no intent to return for trial. The client has advised you of his whereabouts but has stated his intent to remain a fugitive and leave the United States.

(a) Must you disclose the client’s whereabouts?

(b) Must you disclose the client’s whereabouts if you are subpoenaed to testify in court?

(c) May you disclose the client’s whereabouts if you are ordered by the judge to do so?

Hypothetical 7

The government just filed its response to your motion to suppress evidence. Amazingly, it missed an important case from the Fourth Circuit that directly supports its position (and therefore is directly adverse to your position).

Must you disclose the unfavorable Fourth Circuit decision in a written reply, rather than wait to see if the government mentions the case at the suppression hearing?
HYPOTHETICALS WITH ANALYSES

Hypothetical 1

You are trying to compile as much information as possible about a questionable government source who might be also be a witness against your client, to use in defending your client and/or as a plea bargaining chip. You have received approval from the court to engage an investigator.

(a) Before allowing the investigator to start her work, must you instruct her on the ethical and legal limits on her activities?

ANSWER: No.

The answer Tom Spahn gives is “no (probably).” But both Virginia and ABA Model Rule 5.3 require lawyers to “make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the non-lawyer’s conduct is compatible with the professional obligations of the lawyer.” How does a lawyer discharge that duty without providing direction and instruction on the ethical and legal limits of the investigator’s activity? Moreover, Comment 1 says in part “a lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment.”

Isn’t proper instruction and training of non-lawyer assistants a part of the requirement of Rule 5.3(a)?

Does the lawyer have “direct supervisory authority” over the investigator or is the latter an “independent contractor?”

My view is that paragraph (a) requires lawyers with managerial authority in a law firm to establish proactive policies to require non-lawyer staff to behave in a manner compatible with the professional obligations of the lawyer. These would be general policies and procedures as opposed to specific instructions on a particular investigation.

The issue of “direct supervisory control” over the non-lawyer is not relevant until you apply paragraphs (b) and (c) which address when a lawyer may be subject to discipline for misconduct committed by a non-lawyer assistant. Managing attorneys in a law firm, law office or legal department have duties to implement procedures to insure that all non-lawyer staff are properly trained and supervised to reasonably insure that their conduct is compatible with the lawyer’s professional obligations.

Does this mean that a lawyer must, in all cases, instruct and train a seasoned investigator beforehand to insure that the investigator does not use any means or procedures that may be
illegal or unethical? I agree with Tom’s answer “probably not.” I think the lawyer would be obliged to instruct and train an investigator if he or she were new or inexperienced, or if the lawyer knows that the investigator has used questionable means or practices in past investigations.

(b) May you use the fruits of the investigator’s work without assuring yourself that the private investigator has not used illegal means to obtain it?

ANSWER: Yes.

Tom’s answer to this question is “yes, probably.” Implicit in this question is that the investigator conducted their investigation with little or very limited direction or supervision by the lawyer. So it is possible that you will not know the means or methods used by the investigator to acquire the information. A lawyer that actively supervises an investigation is more likely to have knowledge about the means and methods used by a non-lawyer investigator to gather information. Obviously, a lawyer may not order or direct a non-lawyer assistant to engage in conduct which, if engaged in by the lawyer, would violate the Rules of Professional Conduct. See Rule 8.4(a)(violation of the Rules of Conduct through the actions of another). See also Rule 5.3(c)(lawyer with supervisory authority over non-lawyer may not order, direct or ratify conduct by the non-lawyer that would violate the Rules of Professional Conduct if engaged in by the lawyer).

So, for example, suppose the investigator obtained useful information as a result of communicating with a party that is represented by counsel. See, e.g., Rule 4.2. If the lawyer did not order, direct or ratify the investigator’s conduct, or did not know that the investigator obtained that information by contacting a represented party, the lawyer cannot be held ethically accountable for the investigator’s conduct under Rule 5.3(c), even assuming the investigator was under the lawyer’s “direct supervisory control.” See ABA Formal Op. 396 holding that lawyer is not foreclosed from using information obtained by investigator from a party represented by counsel unless the lawyer has actual knowledge of the investigator’s misconduct.

Taking the inquiry further: Does the lawyer have an ethical duty to inquire of the investigator regarding the means or methods used by the investigator to gather information or evidence? May the lawyer use the information without making such an inquiry? Tom’s answer to this question is “no, probably.” This seems correct to me in most instances.

Rule 4.4 of the Rules of Professional Conduct states: “[i]n representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” A lawyer
may not circumvent Rule 4.4 by having an investigator employ means that would violate Rule
4.4. See Rule 8.4(a)(cannot violate a rule of conduct through the actions of another).

But if the lawyer is unaware of the means used by the investigator, and does not ask, this
“don’t ask, don’t tell” policy allows the lawyer to use information that the investigator may
have obtained in violation of the legal rights of a third party. This “don’t ask, don’t tell” policy
may not be proper if the lawyer knows that the investigator has used illegal or improper tactics
to obtain information in the past.

What happens if the lawyer asks the investigator and is informed of the illegal or improper
means used by the investigator to obtain the information? Then the lawyer will not be able to
use the information. The lawyer will have “ratified” the non-lawyer’s misconduct by using the
information with actual knowledge that the investigator obtained the information illegally,
 fraudulently (i.e., by pretext) or in violation of the person’s legal rights. Instead, Rule 5.3 (c)
requires that the lawyer take reasonable remedial action to mitigate the consequences of the
investigator’s misconduct.

(c) May you use the fruits of the investigator’s work when the only conceivable way
she could have obtained the information involved wrongful conduct (such as
violation of health privacy laws)?

ANSWER: No.

The answer is probably no, although there have been some ethics opinions, typically older
ones, that have concluded otherwise. Virginia LEO 1141 (10/17/88) (a lawyer representing a
widow in a medical malpractice/wrongful death action may use files taken by the widow from
the treating physician's office; the files are not "fruits of a crime" but the lawyer should advise
the widow to return the original of the file; the lawyer could keep and use a copy of it); Virginia
LEO 278 (1/29/76) (a client's wife stole a document from the client's employer to use in a
lawsuit; as long as the client's lawyer was not involved in the theft, the lawyer may continue to
represent the client and use the document).

The last cited LEO, however, was later overruled by LEO 1702 which would require the lawyer
to return the stolen document. The older LEOs, in my view, do not offer good or proper
guidance.

It seems clear that if the lawyer knows or has good reason to believe the information obtained
by the investigator violated the law or the legal rights of another, the lawyer may not ethically
use the information even though the lawyer did not instruct nor advise the investigator
regarding the means used to obtain the information.
Allen v. International Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720, at *1-2, *25 (S.D. Ind. Sept. 6, 2006) (lawyer knew or should have known private investigator used impermissible ex parte contacts with represented adversaries; lawyer failed to affirmatively advise or instruct investigator to prevent contacts with represented employees and contacts with unrepresented employees under false pretenses).

North Carolina LEO 2003-4 (7/25/03) (explaining that a lawyer may not use a private investigator’s testimony about conversations the investigator had with the plaintiff in a workers’ compensation case, which tended to show that the plaintiff was not as severely injured as he claimed; explaining that the lawyer "instructed the private investigator not to engage Plaintiff in conversation," but that "[d]uring the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation"; concluding that "to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence").

North Carolina LEO 192 (1/13/95) (addressing the lawyer’s obligation upon receiving from a client an illegal tape recording of the client’s spouse and paramour; holding that the lawyer may not even listen to the tape; "The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(D). See also Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, et seq., particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.").

Virginia LEO 1786 (12/10/04)(whistleblowing employee’s lawyer may not use documents stolen from former employer and may have to return stolen documents to former employer; privileged documents must be returned “unread” with notice to opposing counsel as per LEO 1702).
Hypothetical 2

Your investigator had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming suppression hearing.

May you continue to act as an advocate in the motion hearing if your investigator will testify about the conversation?

ANSWER: Yes.

A lawyer who needs to call a non-lawyer assistant as a witness to testify on behalf of a client is not required to withdraw under the “lawyer as a witness” rule—Rule 3.7(a). That is because the rule applies only to lawyers. M.K.B. v. Eggleston, 414 F. Supp. 2d 469, 471 (S.D.N.Y. 2006)([a]s for the paralegals and interns, they are in principle no different from the office investigators that law firms typically call to testify to disputed facts.).

Restatement (Third) of Law Governing Lawyers § 108 cmt. j (2000) ("Testimony by nonlawyer employee or agent of an advocate. The rule of Subsection (1) does not apply to an advocate's nonlawyer employees or agents who do not sit at counsel table or otherwise visibly function in support of advocacy before the factfinder. The exception applies to paralegals, investigators, secretaries, accountants, or other nonlawyer employees, agents, or independent contractors such as investigators. Under rules of evidence, the relationship between such a witness and an advocate may be shown to impeach the person's testimony.")

Virginia LEO 1668 (2/28/96) (A law firm may represent the defendant beneficiaries in a will contest even though a lawyer at the firm prepared the will and nonlawyer employees witnessed the will, because (1) the lawyer preparing the will was no longer at the firm, and the witness-advocate rule only applies if the lawyer/witness still practices at the firm; and (2) the witness-advocate rule does not apply when nonlawyer employees are called as witnesses.); Virginia LEO 1521 (5/11/93) (A lawyer may represent a developer in litigation in which an employee of a title company (of which the lawyer is part owner) may have to testify, because the witness-advocate rule applies only when a lawyer must testify.)

One might wonder why courts are so quick to apply a totally different rule to nonlawyer employees? To the extent that the jury would either give extra credit or less credit to a lawyer's testimony because the lawyer is representing the client, one might wonder why the jury would not have exactly the same reaction to testimony by the paralegal assisting the lawyer.
Note that even if it were necessary for a lawyer to testify, another lawyer in the same office could try the case. Certainly the bias of the lawyer or non-lawyer testifying, while under examination by a lawyer in the same firm, might reasonably be suspected by a judge or jury.

**Hypothetical 3**

Your local federal court appointed you to represent a criminal defendant. Your client wants to appeal his recent conviction, and insists that you pursue every possible argument—including some arguments that you believe have no merit.

May you include in an appeal of a criminal conviction arguments that lack any factual support?

**ANSWER:** Yes, provided you follow a judicially proscribed process.

This hypothetical presents a clash between ethical and constitutional mandates. Rule 3.1 prohibits a lawyer from asserting frivolous claims or positions, but provides some latitude in criminal cases:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment 3 to ABA MR Rule 3.1 also discusses criminal representation: “[t]he lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.”

The *Restatement (3d) of the Law Governing Lawyers* provides more extensive discussion of the special considerations in criminal representation:

As in the ABA Model Rules, the Restatement contains what amounts to an exception for criminal lawyers:

(1) A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.
(2) Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.

Restatement (Third) of Law Governing Lawyers § 110 (2000). Comment f addresses the special considerations in the criminal context.

The rules in this Section apply generally to criminal-defense lawyers. However, as stated in Subsection (2), a lawyer defending a person accused of crime, even if convinced that the guilt of the offense charged can be proved beyond a reasonable doubt, may require the prosecution to prove every element of the offense, including those facts as to which the lawyer knows the accused can present no effective defense. A criminal-defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. With respect to propositions of law, a criminal-defense lawyer may make any nonfrivolous argument. Under decisions of the United States Supreme Court, a lawyer representing a convicted person on appeal may be required to file a so-called Anders brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained.


The Restatement’s reference to Anders refers to Anders v. California, 386 U.S. 738 (1967). That case defined an elaborate process in which criminal lawyers thread the needle between pursuing frivolous arguments on appeal and falling short of their constitutional representation requirements. In essence, Anders allows appointed criminal defense lawyers to seek a withdrawal from the representation if they conclude that any appeal would be completely frivolous. Oddly, their motion to withdraw must be accompanied by a brief that carefully points out (with record citations) any conceivably meritorious claim. The lawyer seeking to withdraw must provide a copy of the brief to the client, who has the opportunity to file a supplemental brief pro se. After the appellate court reviews the brief and the record, it then decides whether to (1) dismiss the appeal as frivolous, and allow the criminal defense lawyer to withdraw; or (2) substitute another lawyer to pursue any arguably meritorious points. In other words, the original lawyer drops out of the case either way. Significantly, the Anders process does not represent constitutionally mandated procedure. Instead, it suggests one way that criminal defense lawyers may adequately represent their clients while avoiding ethical violations and wasting courts’ time and resources.

Not surprisingly, the Anders process has proven easier to articulate than to apply. For instance, in United States v. Burnett, 989 F.2d 100 (2d Cir. 1993), the Second Circuit received an inadequate Anders brief from a criminal defense lawyer seeking to withdraw. The court noted that the Anders brief provided less than two pages of argument about possibly meritorious
claims. The Second Circuit held that "[a]cceptance of a nonconforming Anders belief is akin to a constructive denial of counsel." Id. at 104. The Second Circuit ultimately replaced the deficient lawyer with a new criminal counsel, and denied the first lawyer's fee petition.

Some courts have developed variations on the Anders theme. For instance, in State v. Balfour, 814 P.2d 1069 (Or. 1991), the Oregon Supreme Court held that a criminal lawyer who concludes that any appeal would be frivolous does not need to withdraw. We conclude that an appointed attorney in an appeal in Oregon who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation. Id. at 1078. The Oregon Supreme Court instead indicated that the lawyer could file an elaborate brief containing two parts -- the second of which (Section B) addresses claims that the client wants the lawyer to pursue. If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client. Id. at 1080. The criminal defense lawyer signs Section A of the brief, while the client signs Section B of the brief. Because the criminal defense lawyer does not sign the frivolous part of the brief, the lawyer does not fall short of the ethical standards.

Several years later, the New Hampshire Supreme Court also adopted a variation of Anders:

Counsel first must discuss with the defendant whether to appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel should so inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses, notwithstanding counsel's advice, to proceed with the appeal, counsel must prepare and file the notice of appeal, including all arguable issues. For cases in which a transcript is required, . . . a transcript shall be prepared and provided to the defendant. After appellate counsel is ordered to file a statement of reasons why the appeal should be accepted, . . . or a brief, counsel must thoroughly examine the record and again determine whether any nonfrivolous arguments exist. If counsel concludes that the appeal is frivolous, counsel should again advise the defendant to withdraw the appeal. If the defendant decides not to withdraw the appeal, counsel must file a statement of reasons or a brief that argues the defendant's case as well as possible. Counsel cannot concede that the appeal is frivolous. If an appeal is truly frivolous, counsel's accurate summary of the facts and law will make that obvious. Thereafter, the appeal will proceed to the normal course.

State v. Cigic, 639 A.2d 251, 254 (N.H.1994). Courts continue to debate the nuances of the Anders process. For instance, in In re Schulman, 252 S.W. 3d 403 (Tex. Crim App. 2008), the
court rejected a criminal defense lawyer's effort to file an Anders brief without a motion to withdraw.

Mr. David Schulman, the appointed appellate attorney for Maryln Solanas, filed an application for a writ of mandamus with this Court claiming that the Seventh Court of Appeals violated a ministerial duty when it ordered him to file a motion to withdraw as counsel along with his Anders brief. That brief concludes, as all Anders briefs conclude, that his client's appeal is "frivolous," but Mr. Schulman argues that, while counsel for the defense may file an Anders brief, he is not obligated to simultaneously file a motion to withdraw from representation. This is backwards. Under both Supreme Court and Texas precedent, when counsel files a motion to withdraw because he believes the appeal is frivolous, he may simultaneously file an Anders brief. An Anders brief may not be filed without a motion to withdraw, as the sole purpose of an Anders brief is to explain and support the motion to withdraw. The court of appeals did not err, much less violate a ministerial duty. We therefore deny relief on this application for a writ of mandamus.

Id. at 404 (footnote omitted). The court explained the reason for the Anders rule, and why a criminal defense lawyer must file a motion to withdraw along with the Anders brief.

The Anders brief reflects the fact that the appointed attorney has adequately researched the case before requesting to withdraw from further representation. It also sets out the attorney's due diligence investigation on behalf of his client. It has an additional use for the appellate courts: it provides them with a roadmap for their review of the record because the court itself must be assured that the attorney has made a legally correct determination that the appeal is frivolous. It has additional use for the defendant: it provides him with appropriate citations to the record if he wishes to exercise his right to file a pro se brief. And it has an additional use for the appointed attorney: it protects him "from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." Despite its helpfulness to all concerned, the Anders brief is the only proverbial "tail"; the motion to withdraw is "the dog."

Id. at 407-08 (footnotes omitted). The court noted that Anders is "not constitutional dogma," but instead provides a suggestion of one way in which courts and appointed defense counsel can meet their constitutional requirements. The court nevertheless adopted the Anders approach, and described what would happen under that process.
The court of appeals will either agree that the appeal is wholly frivolous, grant the attorney's motion to withdraw, and dismiss the appeal, or it will determine that there may be plausible grounds for appeal. If the court of appeals decides that there are any colorable claims for appeal, it will: (1) grant the original attorney's motion to withdraw; and (2) abate the case and send it back to the trial court to appoint a new attorney with directions to file a merits brief.

Id. at 409 (footnote omitted).

Recently, the Virginia State Bar’s Standing Committee on Legal Ethics took appointed defense counsel’s ethical obligations even further. In LEO 1882 (7/23/15) the committee was faced with this inquiry:

1. Is it ethically permissible for a court-appointed attorney to file an appeal following his client’s guilty plea if the attorney believes such appeal to be frivolous?

2. Is a court-appointed attorney ethically obligated to advise his indigent client that the client has an opportunity to file an appeal under federal constitutional law to a conviction or sentence based on a plea of guilty when the attorney believes that no grounds for appeal exist?

3. Must a court-appointed attorney petition for an appeal if his client so requests when the attorney believes such appeal would be frivolous?

In LEO 1880, the committee concluded:

A court-appointed attorney must file petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia, or the applicable federal appellate court, when directed to do so by an indigent client, even when such an appeal is to a conviction entered following a guilty plea, and is deemed frivolous by the attorney. A court-appointed attorney must advise his indigent client that he has a right to appeal, even under those circumstances, but must also identify to the client the risks which may attend asserting such a right. A court-appointed attorney who follows the procedure set forth in the Rules of Court which embody the constitutional requirements of Anders and Akbar does not violate the ethical prohibition regarding non-meritorious claims and contentions.

LEO 1880 is driven in part by not only a constitutional right to an appeal and assistance of counsel but also a statutory mandate interpreted by the Virginia courts as requiring court-appointed counsel to provide representation from trial to throughout the direct appeal process.

All references to court-appointed attorneys include public defenders.

All references to guilty pleas in this Opinion include pleas of nolo contendere.
Thus, even when a court-appointed attorney believes his indigent client’s appeal would be wholly frivolous, he is not free to reject his client’s request for an appeal following a guilty plea by maintaining that the client has waived the right to appeal. An appeal from a conviction and sentence following a plea of guilty may be every bit as frivolous as an appeal following an error-free trial at which the client has confessed in open court to the commission of the crime charged. The procedures called for in Anders and Akbar are applicable to an appeal on behalf of an indigent defendant of any conviction, regardless of how and why the final order of conviction was issued.

With that said, the court-appointed attorney must go beyond merely identifying the client’s constitutional right to file an appeal. He must advise his client competently as required by Rule 1.1. The court-appointed attorney should advise his client of the potentially adverse consequences of prevailing on appeal. In the case of a guilty plea, followed by conviction and imposition of an anticipated sentence, a court-appointed client would rarely choose to embark on a course to unravel his conviction and sentence via an appeal only to expose himself to a more severe outcome on retrial or resentencing. For example, an indigent federal criminal defendant who directs his court-appointed attorney to appeal a conviction following a plea wherein the “right” to appeal has been waived exposes himself to potentially grave consequences: In the federal system, when the grounds for appeal which have been waived can be shown to fall within the “right to appeal” the government may attempt to treat the appeal as a breach of the defendant’s promise contained in the plea agreement, seek to reopen the case and to pursue the original charges, and use facts contained in the plea agreement in a subsequent trial. See, e.g., the discussion contained in U.S. v. Poindexter, 492 F.3d 263 (4th Cir., 2007). A defendant in state court might be exposed to similar risks. These risks must be adequately explained to the client by the court-appointed attorney when the client is being advised of his rights under Anders.

Even so, having advised his client, the court-appointed attorney must follow the client’s direction to appeal because it is the client’s prerogative under Rule of Professional Conduct 1.2(a) to determine the objectives of representation. Indeed, disregarding the client’s direction to file a notice of appeal is professionally unreasonable even “in a case where the defendant signed, as part of his plea agreement, a limited waiver of his right to appeal his sentence.” Gomez-Diaz v. United States, 433 F.3d 788, 790, 791-93 (11th Cir. 2005); see also United States

Although the range of potential grounds for appeal following a guilty plea is limited in Virginia, a defendant who has pled guilty still retains the statutory right to file a notice of appeal and present a petition for appeal to the Court of Appeals of Virginia. See Code §§ 17.1-406 and -407.
Thus, when a defendant who has waived certain appellate rights as part of a plea agreement requests that defense counsel file a notice of appeal, counsel should file the notice of appeal and should subsequently brief the validity of the waiver of appellate rights and file a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), when there is no basis to contest the validity of the waiver. See *United States v. Gomez-Perez*, 215 F.3d 315, 319-20 (2d Cir. 2000); *see also Gomez-Diaz*, 433 F.3d at 793 (defendant entitled to out-of-time appeal if he requested that defense counsel file notice of appeal, even where he waived certain appellate rights); *Garrett*, 402 F.3d at 1267 (same); *cf. United States v. Story*, 439 F.3d 226, 230 (5th Cir. 2006) (holding that appeal waivers do not deprive the appellate court of jurisdiction).

Hypothetical 4

Under the “no good deed goes unpunished” rule, you should have seen this one coming. After diligently but unsuccessfully seeking to defend your court-appointed client from serious criminal charges, he has now claimed “ineffective assistance of counsel” in a §2255 motion. Within just a few hours of your ungrateful former client’s filing, the prosecutor calls you to ask for a meeting to discuss the case.

May you meet with the prosecutor, and disclose protected client information to defend yourself from your former client’s allegation of “ineffective assistance”?

**ANSWER:** No.

As Tom Spahn explains, both ABA and Virginia versions of Rule 1.6 would appear on their face to allow you to make disclosures of information to the lawyer defending your former client’s habeas petition alleging your ineffective assistance of counsel:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the
client, to establish a defense to a criminal charge or civil claim against the lawyer
based upon conduct in which the client was involved, or to respond to
allegations in any proceeding concerning the lawyer's representation of the
client.

ABA Model Rule 1.6(b)(5); Virginia Rule 1.6(b)(2). This is sometimes referred to as the lawyer’s
“self-defense exception” to the duty of confidentiality owed to a former client. A disgruntled
former criminal client's "ineffective assistance of counsel" allegation might not constitute a
"claim or defense," or a "criminal charge or civil claim," but would seem to fit the third scenario
-- allowing lawyers "to respond to allegations in any proceeding concerning the lawyer's
representation of the client." In fact, this third scenario's use of the term "allegations" seems to
describe different circumstances from a "claim" mentioned in the first scenario or a "civil claim"
mentioned in the second scenario. And certainly a “proceeding” has been commenced by the
former client having filed his §2255 motion.

In addition to the apparent clear applicability of the black letter rule's self-defense exception to
a former client's ineffective assistance of counsel allegations, the accompanying ABA Model
Rule comment seems to permit lawyers' disclosure of protected client information outside the
formal proceeding:

Paragraph (b)(5) does not require the lawyer to await the commencement of an
action or proceeding that charges such complicity, so that the defense may be
established by responding directly to a third party who has made such an
assertion. The right to defend also applies, of course, where a proceeding has
been commenced.

ABA Model Rule 1.6, Comment 10.

So what’s the problem here?

In 2010, ABA LEO 456 (7/14/10) analyzed this issue. The opinion focused on lawyers' ability to
disclose protected client information in a non-judicial setting.

This opinion addresses whether a criminal defense lawyer whose former client
claims that the lawyer provided constitutionally ineffective assistance of counsel
may, without the former client's informed consent, disclose confidential
information to government lawyers prior to any proceeding on the defendant's
claim in order to help the prosecution establish that the lawyer's representation
was competent. This question may arise, for example, because a prosecutor or
other government lawyer defending the former client's ineffective assistance
claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the 'self-defense exception' of Rule 1.6(b)(5), which provides that '[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.' The self-defense exception grows out of agency law and rests on considerations of fairness. Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b)(5) do not apply. The lawyer may not respond in order 'to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,' because the legal controversy is not between the client and the lawyer. Nor is disclosure justified 'to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved,' because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is necessary to do so. It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.

Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist
law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers. Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information. If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since Strickland [Strickland v. Washington, 466 U.S. 668 (1984)], the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.

Significantly, the Virginia State Bar's Standing Committee on Legal Ethics has adopted the ABA position.

Virginia LEO 1859 (6/6/12) (explaining that criminal defense lawyers whose clients have claimed ineffective assistance of counsel may not disclose client confidences to defend themselves immediately upon the filing of the habeas petition, because it is "unlikely that it is reasonably necessary for the lawyer to disclose confidential information at the time the petition is filed, when the court has not made a determination whether the petition is legally and procedurally sufficient."; concluding that the lawyer would be justified in disclosing confidential information
under the Rule 1.6 self-defense exception "under judicial supervision at a formal proceeding, after a full determination of what information should be revealed.").

Other jurisdictions have rejected the ABA position.

District of Columbia LEO 364 (1/2013) ("D.C. Rule 1.6(e)(3) permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance.").

North Carolina LEO 2011-16 (1/27/12) (declining to adopt the reasoning of ABA LEO 456 (2010). Rule 1.6(b)(6), which applies to state and federal criminal representations, specifically provides that a lawyer may reveal confidential information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary to respond to allegations concerning the lawyer's representation of the client. Rule 1.6(b)(6) also affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a 'court-supervised setting."

The North Carolina opinion points out that the ABA opinion, if adopted, would contradict the North Carolina legislature’s enactment of a statute that declares that the attorney-client privilege is waived when a defendant files for post-conviction relief alleging ineffective assistance of counsel.

Virginia Code §8.01-654(B)(6) provides that a petitioner who alleges ineffective assistance of counsel as a ground for habeas relief is deemed to waive the attorney-client privilege with respect to communications between counsel and himself “to the extent necessary to permit a full and fair hearing” of the allegation. In LEO 1859, the committee concluded that this statute alone is not dispositive of the lawyer’s ethical duties, however, because the duty of confidentiality is broader than the attorney-client privilege. See Rule 1.6 Comments [3] and [12]. Rule 1.6 not only prohibits a lawyer from disclosing information protected under the attorney-client privilege, but any other information which if disclosed would likely be detrimental or embarrassing to the client.

Trial counsel’s revelations to the prosecutor in this hypothetical would likely be detrimental to the former client’s habeas proceeding.

Moreover, the statute itself suggests a court supervised proceeding is required “to permit a full and fair hearing” of the allegation. Further, acts or omissions alleged by the former client to have constituted “ineffective assistance” may not necessarily involve “communications” between lawyer and client. Finally, the ethical duty of confidentiality under Rule 1.6 is not
subject to any “waiver” doctrine. Disclosure is permitted or required only if the client consents or pursuant to the exceptions set out under paragraphs (b) and (c) of Virginia Rule 1.6.

Hypothetical 5

You have been appointed to represent a client who filed a §2255 motion alleging that his former counsel was ineffective. Upon review of the record, you determine that the motion is without merit.

(a) Should you advise the court that the motion should be denied?

ANSWER: No. However, you should file a motion to withdraw.

(b) What if the court directs you to advise the court as to the merits of the motion?

ANSWER: You should respond that it is the court that decides whether the client’s motion has merit and decline to answer. If ordered by the court to answer, you may reveal this information under Rule 1.6(b)(1).

This scenario is interesting because indigent prisoners are not entitled to or guaranteed legal counsel to assist them in filing §2255 motions. One wonders if the court or its staff did any screening of the motion before appointing counsel? Rule 4(a) calls for referral of the inmate’s papers to the judge who conducted the trial or imposed sentence, if possible, or another judge under the court’s assignment procedure. Rule 4(b) requires the judge to review the motion to determine whether the movant is entitled to relief. The judge may either dismiss the motion or direct the United States attorney to file an answer or other appropriate response.

A court has discretion to appoint counsel at any stage of the proceeding if the interest of justice so requires. 18 U.S.C. §3006A(a)(2)(B); Fed.R.Gov. §2255 Proc. 8(c). Appointment of counsel is required only if the court grants an evidentiary hearing (Rule 8(c)) or if the court permits discovery and deems counsel “necessary for the effective utilization of discovery procedures.”

(a) Once appointed, counsel has an obligation to be an advocate for the petitioner. Counsel cannot voluntarily advise the court that the §2255 motion lacks merit. Rule 1.3(c) provides: “(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship.” Further, the voluntary disclosure that the client’s motion lacks merit would violate Rule 1.6(a) because the disclosure would be detrimental to the client. However, if counsel believes the §2255 motion is frivolous, counsel should move to withdraw. See Rules 3.1 and 1.16.
(b) You should remind the court (politely) that your role is to serve as an advocate for the client and the Rules of Professional Conduct do not permit you to intentionally damage the client by disclosing information that is detrimental to the client. The issue of whether the client’s motion has merit is for the court to decide, not court-appointed counsel. Even so, if the court insists that you answer and orders you to do so, Rule 1.6(b)(1) would allow it.

**Hypothetical 6**

Your client is out on bail pending trial. The client has now fled the jurisdiction and has told you that he has no intent to return for trial. The client has advised you of his whereabouts but has stated his intent to remain a fugitive and leave the United States.

(a) Must you disclose the client’s whereabouts?

**ANSWER:** Maybe. Although the best answer seems to be that you should keep this information confidential at least until you appear in court for a hearing or trial, at which point the judge is going to require you to disclose the client’s whereabouts.

(b) Must you disclose the client’s whereabouts if you are subpoenaed to testify in court?

**ANSWER:** Maybe. I would move to quash the government’s subpoena asserting that the information is protected by the attorney-client privilege. Then let the judge rule on whether you have to disclose the client’s whereabouts.

(c) May you disclose the client’s whereabouts if you are ordered by the judge to do so?

**ANSWER:** Yes. You do not have to go to jail with your client. Rule 1.6(b)(1) allows a lawyer to reveal confidential information when required by law or ordered by a court to do so.

Michael Sokolow, an assistant federal public defender for the Southern District of Texas, wrote this somewhat humorous passage:

Public defenders are frequently confronted with the situation of standing in court, clientless, trying to explain why the court should not issue a warrant and revoke and forfeit the posted bond when a client does not show up for a scheduled hearing. It is not uncommon for the court to call my case and say, “Nick Thornton appears for the defense, but the defendant is not personally present in the courtroom. Counsel, where is your client?” or “What can we
anticipate doing today?” When put in that position, what can you say while still maintaining attorney-client confidences? Is it different if the attorney has prior knowledge that a client is not going to show up? How about, “Uhhhh. Ummmm. Uhhhh. I’d love to be able to tell you, your honor, but I can’t....” How about, “Judge, my client was in to see me this week and has had great contact with my office. I expected him to be here. He may have overslept or had a flat tire or something. Can we continue the case?” While I found it very hard to believe, I have heard a lawyer say, “Your honor, I haven’t heard from my client. I can’t tell you what he looks like. I’d ask that you issue a warrant for his arrest.”

There is no single, clear and universal answer to this question. Almost everything depends, initially, upon whether the jurisdiction considers bail-jumping and the like to be “continuing” crimes. If so, then a communication between attorney and client about whereabouts almost certainly falls within the crime-fraud exception, and so the lawyer's answer “can” be compelled (if limited to whereabouts only).

Secondly, a lot depends on whether lawyers in this jurisdiction have a duty or discretion to disclose the intention of their clients to commit “all” crimes, or only some. Moreover, in many situations, the lawyer could have a duty to disclose, because not disclosing is the same as assisting. The answer, therefore, is that there is no single simple answer. See The Law of Lawyering, Illustrative Case 1.6:114, and some of the sections it refers to.

Flight to avoid prosecution is clearly a crime. See 18 U.S.C. §1073. Virginia’s Rule 1.6(c)(1) requires that a lawyer reveal a client’s stated intent to commit any crime. So, a Virginia lawyer would be required to report a future crime, based on the client’s stated intent to commit that crime, unless the lawyer can persuade the client to abandon his intent.

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, is charged, or (3) to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined under this title or imprisoned not more than five years, or both. For the purposes of clause (3) of this paragraph, the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.
But what is the lawyer’s duty if the client is already a fugitive? The ABA has taken conflicting positions on this question. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) (attorney must reveal whereabouts of client who jumps bail); ABA Comm. on Professional Ethics and Grievances, Formal Op. 23 (1930) (attorney should not reveal fugitive client’s whereabouts). In 1980, the ABA took the position that an attorney did not have a duty to report to authorities that his client remained free on bond long after sentencing when the client and the attorney were not under a court order concerning surrender and when the attorney had advised the client to surrender to the proper authority. ABA Formal Op. 1453 (1980). In 1984, the ABA withdrew Formal Opinion 155 (1936) because it was “inconsistent with both the Model Rules of Professional Conduct and the former Model Code of Professional Responsibility.” ABA Formal Op. 84-349 (1984). The 1984 opinion does not address the subject of whether a lawyer must or may disclose a fugitive client’s whereabouts.

An old Virginia LEO says that the lawyer is bound to keep the client’s whereabouts confidential and cannot reveal this information. VA LEO 929 (6/24/1987). An attorney’s client has failed to appear for trial on eight felony counts, a capias has been issued, and the attorney has subsequently received an unsolicited letter with no return address but bearing the post mark of a major city outside Virginia. Client has stated his intention to remain a fugitive and leave the United States and stated that the attorney can contact the client through a member of the client’s family. It is improper, given the above, for the attorney to reveal the intention of his client to leave the country. The committee opines that a "continuing wrong," as in this situation, does not fall into the category of DR:4-101(D)(1) and, therefore, is a privileged communication. It is proper, and the committee does advise, that the attorney advise his client of the additional legal consequences of his continued actions and to urge the client not to continue the wrong. [DR:4-101(B), DR:4-101(D)(1); ABA Formal Opinion 155, Commonwealth v. Maguigan, 511 At. 2d 1327, 1333 (Pa) (Pa. 1986)]

Interestingly, LEO 929 cites ABA Formal Op. 155 which says that the lawyer must reveal the fugitive client’s whereabouts. Further, the question of whether the client’s fugitive status is a “continuing wrong” is a legal issue that the Ethics Committee typically declines to address as being outside its purview.

Other jurisdictions’ ethics opinions have also “flip-flopped” on this question. For example, the Florida State Bar at first unanimously followed the position that an attorney was required to disclose that his client had left the state with the intention of jumping bail, Florida Ethics Op. 72-34 (1973), but it later withdrew that opinion for reconsideration. See United States v. Del Carpio-Cotrina, 733 F. Supp. 95, 98 n.8 (S.D. Fla. 1990). Ultimately, the Florida State Bar decided that a criminal defense lawyer who learns that his client has left the state for the purpose of avoiding a court appearance may not, under most circumstances, divulge such
information until required to do so by the court at the time of the scheduled appearance. Florida Ethics Op. 90-1 (1990), amended (1996). The opinion notes that counsel would be ethically obliged to step forward and advise the court of the situation when, prior to the date of the court appearance, counsel knows to a reasonable certainty that the client’s avoidance of the court’s authority is a willful and an irreversible fact or when the client has violated some other specific condition of bond such as a condition that he not leave the state. Id.

The New York State Bar, however, has opined that information respecting a client’s whereabouts gained in the professional relationship that the client has requested be held inviolate squarely falls within the general ethical obligation of preserving the confidentiality of client secrets and that a lawyer may postpone testifying to such information pending further review. New York Ethics Op. 528 (1981); see also New York City Bar Ass’n Comm. on Professional and Judicial Ethics, Formal O. No. 99-02 (1999) (concluding that attorney may sell property of fugitive client and pay client’s creditors as long as the attorney does not know that the sale of the property or the disposition of the proceeds is unlawful).

Other states take a position similar to the position of the New York State Bar. See, e.g., Utah State Bar Ethics Advisory Op. Comm., Op. No. 97-02 (1997) (concluding that an attorney may not reveal the phone number of a fugitive client to authorities who have an arrest warrant for the client and that refusing to do so does not constitute assisting the client in conduct that is illegal or fraudulent); Illinois State Bar Advisory Op. 89-13 (1990) (stating that an attorney at a docket call who has a client who has disappeared or has cut off all contact cannot disclose such information if it is a secret or in confidence unless ordered to do so, in which event the attorney may disclose such information, or appeal the order, or test the law, or seek permission to withdraw from representation); Nebraska State Bar Advisory Op. 90-2 (stating that an attorney may not reveal the whereabouts of a former client to the United States Marshal where such information was received during the course of the professional relationship, but also stating that the attorney may ethically do so when the attorney determines that the client intends to commit a crime in the future, when the client has consented, or when the attorney is required to do so by law or court order). Georgia State Bar Disc. Bd. Advisory Op. 17 (1974)(attorney has no ethical duty to disclose fugitive client’s whereabouts but cannot counsel client to remain a fugitive at law, and must advise client of the negative consequences and attempt to persuade the client to surrender to authorities).

However, some courts have held that the lawyer has a duty to disclose the whereabouts of the bail jumping client. In United States v. Del Carpio-Cotrina, 733 F. Supp. 95 (S.D. Fla. 1990), for example, the district court held that a lawyer has a duty to advise the court that the client has jumped bond and will not appear for trial when the lawyer has a firm factual basis (equating to proof beyond a reasonable doubt and actual knowledge) for believing such to be true. Id. at 99-
100. The court did not sanction counsel for failing to inform the court and moving for a continuance because the court determined that the law on this issue had been unclear up to that point in time. Id. at 100. See also Commonwealth v. Maguigan, 511 A.2d 1327, 1337 (Pa. Sup. Ct. 1986) (holding that, when a client is under conditions of bail and defies a lawful court order to appear, “his ‘whereabouts’ are not unqualifiedly protected by the attorney-client privilege, and the attorney may be compelled to disclose information of the client’s whereabouts”); In re Doe, 420 N.Y.S.2d 996, 998-99 (N.Y. Sup. Ct. 1979) (holding that attorney must disclose the whereabouts of the client who breached her plea agreement by leaving state psychiatric hospital, but relying on the later withdrawn ABA Formal Opinion 155 (1936)).

On the other hand, other courts have held that the client’s whereabouts are protected by the attorney-client privilege. In In re Nackson, 555 A.2d 1101 (N.J. Sup. Ct. 1989), for example, the New Jersey Supreme Court held that the bail jumping client’s whereabouts were privileged and not covered by the crime-fraud exception when the client had phoned the attorney from out of state in order to have him negotiate a plea agreement before he would return to New Jersey and when the authorities had used no other means to find the client than subpoenaing his lawyer to testify before the grand jury. Id. at 1103-07. See also In re Grand Jury Subpoenas Served Upon Field, 408 F.Supp. 1169 (S.D.N.Y. 1976) (holding that, when grand jury subpoenas were served on the client’s lawyers and the client had consulted with his lawyers concerning which jurisdiction he should relocate to from Milan, Italy, the client’s address was privileged because it was communicated to the lawyers for the purpose of receiving legal advice); In re Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975) (holding that client’s address and telephone number were protected by the attorney-client privilege when the client had disclosed this information to get legal advice concerning the FBI’s desire to question him and when the grand jury and the FBI sought the information to question the client about the whereabouts of a third person suspected of having violated federal law).

Hypothetical 7

The government just filed its response to your motion to suppress evidence. Amazingly, it missed an important case from the Fourth Circuit that directly supports its position (and therefore is directly adverse to your position).

Must you disclose the unfavorable Fourth Circuit decision in a written reply, rather than wait to see if the government mentions the case at the suppression hearing?

ANSWER: Maybe.
Virginia Rule 3.3(a)(3) states that a lawyer shall not knowingly “fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.”

This hypothetical raises a question about the “timing” of the disclosure. Rule 3.3 (a)(3) does not explicitly say when the disclosure obligation arises, but rule speaks to when the legal authority is not disclosed by the opposing party. It seems like you can wait and see if the AUSA comes up with the legal authority at the suppression hearing first, before making any disclosure to the court. Comment 4 to the rule says the same thing: “an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.”

A comment in the Restatement of the Law (3d) Governing Lawyers seems to support this approach:

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Restatement of the Law (3d) Governing Lawyers §111, cmt. c (2000)(emphasis added). Since the Government still has an opportunity to assert the adverse authority at the suppression hearing, you should not be required to make a disclosure before then.

However, some courts require counsel to make the disclosure when the opportunity first presents, and are not redeemed by opposing counsel’s subsequent citation to the adverse authority. The Eleventh Circuit said that a lawyer’s duty to disclose controlling adverse case law was not affected by the adversary’s subsequent citation to the law:

> The appellants are not redeemed by the fact that opposing counsel subsequently cited the controlling precedent. The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent, particularly where, as here, a temporary restraining order might have been issued ex parte.

Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988)(upholding Rule 11 sanctions). Under this strict interpretation, lawyers can be sanctioned for failing to disclose law even if the court ultimately has the pertinent law before it (because the adversary raises it later).
JOHNSON V. UNITED STATES: ITS IMPACT AND IMPLICATIONS

Paresh S. Patel

DISCUSSION OVERVIEW

I. Pre-Johnson world

II. Summary of Johnson

III. Implications

A. 18 U.S.C. § 924(e), Armed Career Criminal Act

B. U.S.S.G. §§ 4B1.1, 4B1.2, Career Offender

C. U.S.S.G. § 2K2.1, Firearms, and § 7B1.1, Supervised Release

D. 18 U.S.C. § 16(b), Crime of Violence Defined

E. 18 U.S.C. § 924(c), Use or Possession of Firearm in Crime of Violence
JOHNSON V. UNITED STATES,
135 S. Ct. 2551 (2015): Its Impact and Implications

Richmond, Virginia
November 18, 2015

Paresh S. Patel,
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Overview

I. Pre-Johnson world

II. Summary of Johnson

III. Implications:
   A. Armed Career Criminal Act
   B. Career Offender
   C. U.S.S.G. §§ 2K2.1, 7B1.1
   D. 18 U.S.C. § 16(b) (which is used for U.S.S.G. § 2L1.2(b)(1)(C)) and other federal statutes)
   E. 18 U.S.C. § 924(c)

I. Pre-Johnson World
Armed Career Criminal Act: 18 U.S.C. § 924(e)

15-year mandatory minimum for felon-in-possession offense if client has three prior convictions for a “violent felony” or “serious drug offense”

“Violent felony” => Three-Part Definition

- Force Clause: offense "has as an element the use, attempted use, or threatened use of physical force against the person of another”
- Enumerated offenses: burglary, arson, extortion, use of explosives
- Residual Clause: offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Pre-Johnson Residual Clause Analysis

Inquiry under James, Begay, Chambers, Sykes: categorical approach

Do elements of offense in ordinary case:

a. present risk of injury at similar level to enumerated offenses (generic burglary, arson, extortion, use of explosives)? +

b. require purposeful, violent, and aggressive conduct?
II. Summary of Johnson

Johnson: Residual Clause Void for Vagueness

Reasons turn on uncertainty of ordinary case inquiry:

1. Grave uncertainty about how to estimate risk because no one knows how to determine what the ordinary case of a crime is: Gut instinct, common sense, statistics, google search – not sufficient guides.

2. Grave uncertainty about how to determine quantum of risk (i.e., how much risk). Enumerated offenses not sufficient guide because in order to even begin comparing risk of relevant prior offense to enumerated offenses, must determine ordinary enumerated offenses. Again, back to ordinary case problem.

Denies fair notice and invites arbitrary enforcement
Johnson: Expressly overrules precedent

James (2007): Florida attempted burglary qualifies as a "violent felony" under the residual clause

Sykes (2011): Indiana offense of vehicular flight from an officer qualifies as a "violent felony" under the residual clause

III. Implications: ACCA
What's left of the ACCA?

ACCA “violent felony” =

1. Force Clause: Has an element the use, attempted use, or threatened use of physical force against a person, or

2. Enumerated offenses: burglary, arson, extortion, use of explosives (determined by generic definition).

If “most innocent conduct” or “full range of conduct” covered by the statute does not match these definitions, prior cannot qualify as “violent felony.” United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012).

ACCA Force Clause: Be Careful

Almost Nothing Counts As “Violent Felony”
Fighting Against the Force Clause

Four Key Issues to look for:

- Requires “violent force,” not “unwanted touching”
- Force must be directed against a person, not property
- Requires the use of force, not merely the causation of physical injury.
- Force must be used intentionally, not recklessly or negligently

Practice Point: Many of the best force-clause cases have been litigated under U.S.S.G. 2L1.2.

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Issue 1: “Violent Force” Requirement

“Violent Force” means “strong physical force” that is “capable of causing physical injury or pain” to another person. *Johnson v. United States*, 559 U.S. 133 (2010)

Examples of “Unwanted touching” or “offensive touching”:

- Assault or Battery.
  - *Johnson*, 559 U.S. 133 (Florida); *United States v. Holloway*, 630 F.3d 252 (Massachusetts); *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) (Maryland).
- Resisting arrest
  - *United States v. Aparico-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc) (Maryland); *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (Arizona); *United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (Massachusetts).
- Battery on a law enforcement officer; Battery on pregnant woman.
  - *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013) (Virginia); *United States v. Braun*, __ F.3d __, 2015 WL 5201729 (11th Cir. 2015) (Florida);
Issue 1: “Violent Force” Requirement

Don’t be deceived by labels: Sometimes offense will have element labeled “force or violence,” but that does not mean it has element of ACCA “violent force.”

Examples:

- California battery. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (“force or violence” defined by case law to include “offensive touching”).

- D.C. robbery. *United States v. In re Sealed*, 548 F.3d 1085 (D.C. 2008) (“force or violence” defined by statute to include purse-snatching offenses: “sudden or stealthy seizure or snatching”)
  - Note: same argument excludes similar offenses, such as “larceny from the person” or “pickpocketing”

Issue 1: “Violent Force” Requirement

Kidnapping / False Imprisonment: “physical restraint” does not automatically equal “physical force”

- *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th 2012) (California kidnapping does not satisfy force clause because restraint can be accomplished through “any means of instilling fear”)

- *United States v. Gonzalez-Perez*, 472 F.3d 1158 (11th Cir. 2012) (Florida false imprisonment does not satisfy force clause because restraint can be accomplished “secretly”)

- *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988) (Model Penal Code definition of kidnapping does not require force because it covers kidnapping by trickery or deceit)
Issue 1: “Violent Force” Requirement

Offenses based on absence of legally valid consent do not qualify under the force clause.

- Statutory Rape
  - United States v. Rangel-Castaneda, 709 F.3d 373 (4th Cir. 2013) (Tennessee aggravated statutory rape); United States v. Daye, 571 F.3d 225 (2d Cir. 2009) (Vermont statutory rape); United States v. Madrid, __ F.3d__, 2015 WL 6647060 (10th Cir. 2015).

- Involuntary or Incompetent Consent
  - United States v. Shell, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape of victim who is “mentally disabled, mentally incapacitated, or physically helpless”)

If “force” is an element, look for state case law extending the provision to “constructive force” situations.

Issue 2: Property vs. Person

Force, even violent, against property does not qualify under ACCA force clause.

Examples: Hobbs Act robbery includes threatening to injure one’s property. That automatically disqualifies Hobbs Act robbery from qualifying under the force clause.


Issue 3: Using Force vs. Causing Injury

Offenses with elements requiring physical injury, serious physical injury, or even death do not equal "violent force."

This is true because physical injury can be committed without use of strong physical force:

- poisoning,
- laying a trap,
- exposing someone to hazardous chemicals,
- standing guard while confederate injures another,
- locking someone in car on a hot day,
- starving someone to death, neglecting a child, etc.
- placing a barrier in front of a car, which causes an accident
- leaving an unconscious person in middle of road

Issue 3: Using Force vs. Causing Injury

Examples: Offenses with physical injury, serious physical injury, or even death elements that do not qualify as violent felonies under the force clause:

Assault Offenses

- Texas aggravated assault requiring intentionally causing physical injury. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008).


- New Jersey aggravated assault requiring a defendant to cause significant bodily injury. *United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013).

- Arizona aggravated assault requiring attempt to cause injury with use of dangerous weapon or attempt to cause serious bodily injury. *United States v. Gomez-Hernandez*, 680 F.3d 1171 (9th Cir. 2012);

- Arizona endangerment requiring action that creates risk of imminent death or physical injury. *United States v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir. 2002).
Issue 3: Using Force vs. Causing Injury

Examples: Offenses with physical injury, serious physical injury, or even death elements that do not qualify as violent felonies under the force clause:

Threat Offenses


Child Abuse Offenses


Manslaughter Offenses

- *United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (Florida manslaughter).

Issue 3: Using Force vs. Causing Injury

Examples continued: Common offenses with physical injury, serious physical injury, or even death elements that do not qualify as violent felonies under the force clause:

- Murder
- Robbery (because can be done by putting in fear of injury)
- Robbery with a dangerous weapon (dangerous weapon can be poison, mace, or tear gas)
- Carjacking (can be done by putting in fear of injury)
- Possession of a dangerous weapon with intent to injure.
- Sexual offenses requiring actual or threat of physical injury.
Issue 3: Using Force vs. Causing Injury

Examples Continued: Common offenses with physical injury, serious physical injury, or even death elements that do not qualify as violent felonies under the force clause:

Federal crimes: Hobbs Act robbery, Bank robbery, VICAR, Carjacking, Murder, Assault

- All can be accomplished by putting someone in fear of physical injury or actual causing physical injury or death, but violent force not required.

Issue 4: Intentional vs. Reckless Conduct

All offenses must require intentional use of violent force or intentional threat of violent force; reckless mens rea will not suffice.

- See Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006) (assault requiring defendant to recklessly cause serious physical injury using a deadly weapon); United States v. McMurray, 653 F.3d 367, 374-75 (6th Cir. 2011) (aggravated assault requiring defendant to recklessly cause serious bodily injury); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (assault statute requiring reckless physical injury to another).

Argue that even if some intent exists, a crime satisfies the force clause only if it specifically requires an intent to use or threaten violent force.

- See Flores-Lopez v. Holder, 685 F.3d 857, 863 (9th Cir. 2012); Covarrubias Teposte v. Holder, 632 F.3d 1049 (9th Cir. 2011); United States v. Coronado, 603 F.3d 706 (9th Cir. 2010) (intentionally discharging a firearm in a negligent manner that creates a risk of injury or death); Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013).
Issue 4: Intentional vs. Reckless Conduct

Threats: Argue intimidation/putting someone in fear of bodily injury does not equal intentional threat if statute does not require defendant to have intent to put another in fear of bodily injury. See United States v. King, 979 F.2d 801, 803 (10th Cir. 1992) (threat under force clause "means both an intent to use force and a communication of that threat").

Example of statute that does not qualify: Federal bank robbery, which can be committed without proof of intent to intimidate, even though specific intent to steal must exist - United States v. Yockel, 320 F.3d 818 (8th Cir. 2003); United States v. Kelley, 412 F.3d 1240 (11th Cir. 2005); United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996).

Even armed bank robbery does not require intent to intimidate – United States v. Martinez-Jimenez, 864 F.2d 664 (9th Cir. 1989).

ACCA Enumerated Offenses:
Be Careful
ACCA Enumerated Offenses: Must Be Generic

Generic Burglary: 3 elements

1. unlawful entry or remaining

2. in a building (not in a vehicle, boat, or telephone booth)
   - Maryland first degree burglary, *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); Oregon first & second degree burglary, *United States v. Mayer*, 560 F.3d 948 (9th Cir. 2009); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc)

3. with intent to commit a crime
   - Maryland fourth degree burglary, *United States v. Martin*, 753 F.3d 485 (4th Cir. 2014)

Other non-generic crimes

- Delaware third degree arson (*Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013) (lacks the generic requirement of malicious or willful mens rea)

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Final ACCA Issue - Conspiracies and Attempts:

Be Careful
Final ACCA Issue:

Conspiracy Offenses

- Never qualifies under the force clause or as an enumerated offense. *United States v. White*, 571 F.3d 365 (4th Cir. 2009); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007); *United States v. Gore*, 636 F.3d 728 (5th Cir. 2011); *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (implies conspiracy does not satisfy force clause or enumerated offenses). *United States v. Gonzalez-Ruiz*, 794 F.3d 832 (7th Cir. 2015) (post-Johnson finding conspiracy to commit armed robbery not violent felony); *United States v. Melvin*, 2015 WL 6445433 (4th Cir. 2015) (post-Johnson finding conspiracy to commit robbery with a dangerous weapon not violent felony).

Attempt Offenses


- Qualify under force clause if (1) the object of the attempt satisfies the force clause and (2) the attempt statute requires a "substantial step." *United States v. James*, 550 U.S. 192 (2007); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014).

III. Implications: Career Offender
Career Offender: U.S.S.G. § 4B1.1 and 4B1.2

Enhancement applies if defendant’s current offense is a “crime of violence” or “controlled substance offense” and defendant has two prior convictions for “crime of violence” or “controlled substance offense.”

“Crime of violence” => Three-Part Definition

- Force Clause: offense “has as an element the use, attempted use, or threatened use of physical force against the person of another.”

- Enumerated offenses: burglary of a dwelling, arson, extortion, use of explosives.

- Residual Clause: offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Johnson Voids Career-Offender Residual Clause

Johnson should apply to render career offender residual clause (U.S.S.G. § 4B1.2(a)(2)) void for vagueness because it has identical language as that of ACCA residual clause in defining "crime of violence."


Johnson Voids Career-Offender Residual Clause

Beware: Some cases hold that guidelines can’t be unconstitutional: *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012); *United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990).

But these cases should be no longer good law in light of *Peugh v. United States*, 133 S. Ct. 2072 (2013), which found advisory guidelines are subject to Ex Post Clause rooted in notice.

- See also *United States v. Gallagher*, 99 F.3d 329 (9th Cir. 1996) (vague sentencing provisions may pose constitutional questions); *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003); *United States v. Taylor*, __ F.3d__, 2015 WL 5918562 (8th Cir. 2015) (*Johnson* casts doubt on guidelines residual clause).

But see: *United States v. Matchett*, __F.3d__, 2015 WL 5515439 (11th Cir. 2015) (holding post-*Johnson* that vagueness doctrine does not apply to advisory guidelines) – Petition for rehearing pending.

Career Offender:
*Johnson* Challenges to Instant Offense

Be Careful: Make *Johnson* challenge to instant federal offense as well as priors. If instant offense does not qualify as “crime of violence” under *Johnson*, then can’t be career offender no matter what the priors are.
What's left of the Career Offender provision?

Almost same as ACCA:

1. Force Clause: Has an element the use, attempted use, or threatened use of physical force against a person, or

2. Enumerated offenses: burglary of a dwelling, arson, extortion, use of explosives (determined by generic definition).

If "most innocent conduct" or "full range of conduct" covered by the statute does not match these definitions, prior cannot qualify as "crime of violence." United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012).

Career Offender Commentary

Be Careful with commentary enumerated offenses:

The commentary to U.S.S.G. § 4B1.2 lists numerous enumerated offenses that do not appear in text: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, and extortionate extension of credit, etc.

This commentary cannot expand the text of the guideline because it is not a freestanding exception. United States v. Shell, ___ F.3d ___, 2015 WL 3644036 (4th Cir. 2015); United States v. Stinson, 508 U.S. 36 (1993); United States v. Armijo, 651 F.3d 1226 (10th Cir. 2011); United States v. Litzy, ___ F.3d ___, 2015 WL 5895199 (S.D.W.V. 2015).

This means that enumerated offenses in commentary can now only qualify as "crimes of violence" if they have an element of "violent force" against a person.
Be Careful with commentary enumerated offenses:

Alternatively, argue that commentary offenses must still satisfy generic definition. *See United States v. Peterson*, 629 F.3d 432 (4th Cir. 2011).

Be Careful with commentary inchoate offenses: conspiracy and attempt

Under *Shell* and *Stinson*, conspiracies and attempts can’t qualify as enumerated offenses because text of career offender guideline only includes completed enumerated offenses. Conspiracy and attempt only included in commentary.

Also, conspiracies noted in commentary can’t qualify under force clause because not included in text of force clause. However, attempts are included in text of force clause. Nonetheless, make sure attempt is generic, i.e., requires substantial step toward commission of crime.
III. Implications: U.S.S.G. §§ 2K2.1 and 7B1.1
“crime of violence” residual clause

Same analysis as career offender, but it only applies to prior convictions - not instant federal offense.

III. Implications:

18 U.S.C. § 16(b) crime of violence residual clause (used for determining 8-level “aggravated felony” bump in U.S.S.G. § 2L1.2(b)(1)(C) and many other federal provisions).
18 U.S.C. § 16
Crime of violence definition: two clauses

1. 18 U.S.C. § 16(a) – Force Clause

2. 18 U.S.C. § 16(b) – Residual Clause

Note: No Enumerated Offenses

18 U.S.C. § 16(b)
Crime of violence definition under residual clause

Residual Clause: Offense qualifies as crime of violence if "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

_Dimaya v. Lynch_, __ F.3d__, 2015 WL 6123546 (9th Cir. 2015) holds 16(b) void for vagueness because:

1) same categorical ordinary case inquiry applies here that was struck down in _Johnson_. See _United States v. Avila_, 770 F.3d 2014 (4th Cir. 2014); _United States v. Keelan_, 786 F.3d 865 (11th Cir. 2015); _Rodriguez-Castellon v. Holder_, 733 F.3d 847 (9th Cir. 2013).

2) Same uncertainty about how to determine quantum of risk – substantial risk of injury.
What’s left of 18 U.S.C. § 16?

16(a) “crime of violence” force clause same as career offender/ACCA but has element of force against property:

Force Clause: Has an element the use, attempted use, or threatened use of physical force against a person, or property of another.

But still must be violent force against property, not just injury to property - so, for example, Hobbs Act robbery, which can be violated by injury to property - even intangible property - does not qualify.

If “most innocent conduct” or “full range of conduct” covered by the statute does not match this definition, prior cannot qualify as “crime of violence.” United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012).

Elements of 18 U.S.C. § 924(c)

Section 924(c) provides in pertinent part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - [be sentenced to a certain number of years depending on the facts of the crime] . . . .

18 U.S.C. § 924(c)(3)
Crime of violence definition: two clauses

Identical to 18 U.S.C. § 16, but looking at instant offense rather than prior conviction:

1. 18 U.S.C. § 924(c)(3)(A) – Force Clause

2. 18 U.S.C. § 924(c)(3)(B) – Residual Clause

Note: No Enumerated Offenses
Crime of violence definition under residual clause

Same language as 18 U.S.C. § 16(b)

Residual Clause: Offense qualifies as crime of violence if “by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Void for vagueness for same reasons noted under §16(b). Same categorical ordinary case inquiry applies to § 924(c)(3)(B).

See United States v. Serafin, 562 F.3d 1105 (10th Cir. 2009); United States v. Amparo, 68 F.3d 1222 (9th Cir. 1995).

What’s left of 18 U.S.C § 924(c)(3)?

Same as 18 U.S.C. § 16(a):

Force Clause (18 U.S.C. § 924(c)(3)(A)): Has an element the use, attempted use, or threatened use of physical force against a person, or property of another (But still must be violent force against property, not just injury to property).

Examples of underlying offenses that don’t fall under force clause for reasons previously noted: All conspiracies, Hobbs Act robbery, carjacking, kidnaping, bank robbery, armed bank robbery, assault.

If “most innocent conduct” or “full range of conduct” covered by the statute does not match this definition, prior cannot qualify as “crime of violence.” United States v. Torres-Miguel, 701 F.3d 165 (4th Cir. 2012).
Beware: Badly reasoned unpublished § 924(c) cases:

Wrong use of United States v. Castleman, 134 S. Ct. 1405 (2014), modified categorical approach, etc.


NOTE:

United States v. McNeal/Stoddard – No. 14-4871(L) (4th Cir.) –

Appeal pending on whether § 924(c) residual clause is void for vagueness, and whether armed robbery qualifies as a “crime of violence” under remaining “force” clause.
RESOURCES

SAMPLE PLEADINGS:

WWW.SRC-PROJECT.ORG