Federal Bar Association
San Diego Chapter

Two-Part Criminal Legal Skills Series: Litigating and Advocating at Sentencing

Litigating and Advocating at Sentencing — Written Materials

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FCJ Federal Sentencing Guidelines Manual 1A1 Intro. (11/1/18)

United States Sentencing Commission | November 2018 Update

Guidelines Manual
Effective November 1, 1987, Including Amendments Effective January 15, 1988 through November 1, 2018 *

Chapter One. Introduction, Authority, and General Application Principles

Part A. Introduction and Authority

1. Original Introduction To The Guidelines Manual

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority
The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission
The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that

judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely

statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of § 5K2.12 (Coercion and Duress), and § 5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects

that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense …." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition

of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed "single acts of aberrant behavior" at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment -- sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic

substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of

unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

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Chapter Three. Adjustments

Part D. Multiple Counts

Introductory Commentary

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, e.g., racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (e.g., theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (e.g., many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct

taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (e.g., independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 121); November 1, 2007 (see Appendix C, amendment 707).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

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Chapter Three. Adjustments

Part D. Multiple Counts

§ 3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:
(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in § 3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

(b) Exclude from the application of §§ 3D1.2- 3D1.5 the following:
(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of § 5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

Commentary

Application Notes:

1. In General.—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.
2. Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under § 2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See § 5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; § 5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 348); November 1, 1998 (see Appendix C, amendment 579); November 1, 2000 (see Appendix C, amendment 598); November 1, 2005 (see Appendix C, amendments 677 and 680); November 1, 2007 (see Appendix C, amendment 707).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

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Chapter Three. Adjustments

Part D. Multiple Counts

§ 3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§ 2A3.5;

§§ 2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§ 2C1.1, 2C1.2, 2C1.8;

§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§ 2E4.1, 2E5.1;

§§ 2G2.2, 2G3.1;

§ 2K2.1;

§§ 2L1.1, 2L2.1;

§ 2N3.1;

§ 2Q2.1;

§ 2R1.1;

§§ 2S1.1, 2S1.3;

§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are: all offenses in Chapter Two, Part A (except § 2A3.5); §§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§ 2C1.5;

§§ 2D2.1, 2D2.2, 2D2.3;

§§ 2E1.3, 2E1.4, 2E2.1;

§§ 2G1.1, 2G2.1;

§§ 2H1.1, 2H2.1, 2H4.1;

§§ 2L2.2, 2L2.5;

§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§ 2P1.1, 2P1.2, 2P1.3;

§ 2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. See § 3D1.1(b)(1); id., comment. (n.1).
2. The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group "counts involving substantially the same harm."
3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to

be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under § 1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense characteristic … or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under § 3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see § 3D1.3(b). The "same general type" of offense is to be construed broadly.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to § 2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in § 3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of § 3D1.2(a) followed by an application of § 3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.

8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See § 1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under § 3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C, amendments 121, 253-256, and 303); November 1, 1990 (see Appendix C, amendments 309, 348, and 349); November 1, 1991 (see Appendix C, amendment 417); November 1, 1992 (see Appendix C, amendment 458); November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 1996 (see Appendix C, amendment 538); November 1, 1998 (see Appendix C, amendment 579); November 1, 2001 (see Appendix C, amendments 615, 617, and 634); November 1, 2002 (see Appendix C, amendment 638); January 25, 2003 (see Appendix C, amendment 648); November 1, 2003 (see Appendix C, amendment 656); November 1, 2004 (see Appendix C, amendment 664); November 1, 2005 (see Appendix C, amendments 679 and 680); November 1, 2007 (see Appendix C, amendment 701).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

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

Grouping Under Rule (d)

INCLUDED List

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

§2A3.5

§§2B1.1 · 2B1.4 · 2B1.5 · 2B4.1 · 2B5.1 · 2B5.3 · 2B6.1

§§2C1.1 · 2C1.2 · 2C1.8

§§2D1.1 · 2D1.2 · 2D1.5 · 2D4.1 · 2D1.11 · 2D1.13

§§2E4.1 · 2E5.1

§§2G2.2 · 2G3.1

§2K2.1

§§L1.1 · 2L2.1

§2N3.1

§2Q2.1

§2R1.1

§§2S1.1 · 2S1.3

§§2T1.1 · 2T1.4 · 2T1.6 · 2T1.7 · 2T1.9 · 2T2.1 · 2T3.1

EXCLUDED List

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

All offenses in Chapter 2, Part A except §2A3.5

§§2B2.1 · 2B2.3 · 2B3.1 · 2B3.2 · 2B3.3

§2C1.5

§§2D2.1 · 2D2.2 · 2D2.3

§§2E1.3 · 2E1.4 - 2E2.1

§§2G1.1 · 2G2.1

§§2H1.1 · 2H2.1 · 2H4.1

§§L2.2 · 2L2.5

§§M2.1 · 2M2.3 · 2M3.1 · 2M3.2 · 2M3.3 · 2M3.4 · 2M3.5 · 2M3.9

§§2P1.1 · 2P1.2 · 2P1.3

§2X6.1

Grouping Under Rule (c)

There are some commonly-occurring specific offense characteristics (SOC) and Chapter Three adjustments that will result in a Rule (c) grouping:

- An SOC for injury where an assault is also charged.
- A firearms SOC (such as in a robbery offense) where possession of the firearm is also charged.
- An increase for a firearm being used in a felony offense (such as in robbery or a drug trafficking offense) where the other felony offense is also charged.
- Tax evasion where the income was derived from criminal activity that is also charged.
- Money laundering where the defendant is also charged with the underlying offense from which the laundered funds were derived.
- An adjustment for obstruction of justice where obstruction is charged, and the offense with respect to which the obstructive conduct occurred is also charged.

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

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

See Application Notes 3 and 4 to §3D1.2 for examples of grouping under Rules (a) and (b).

Grouping Multiple Counts of Conviction

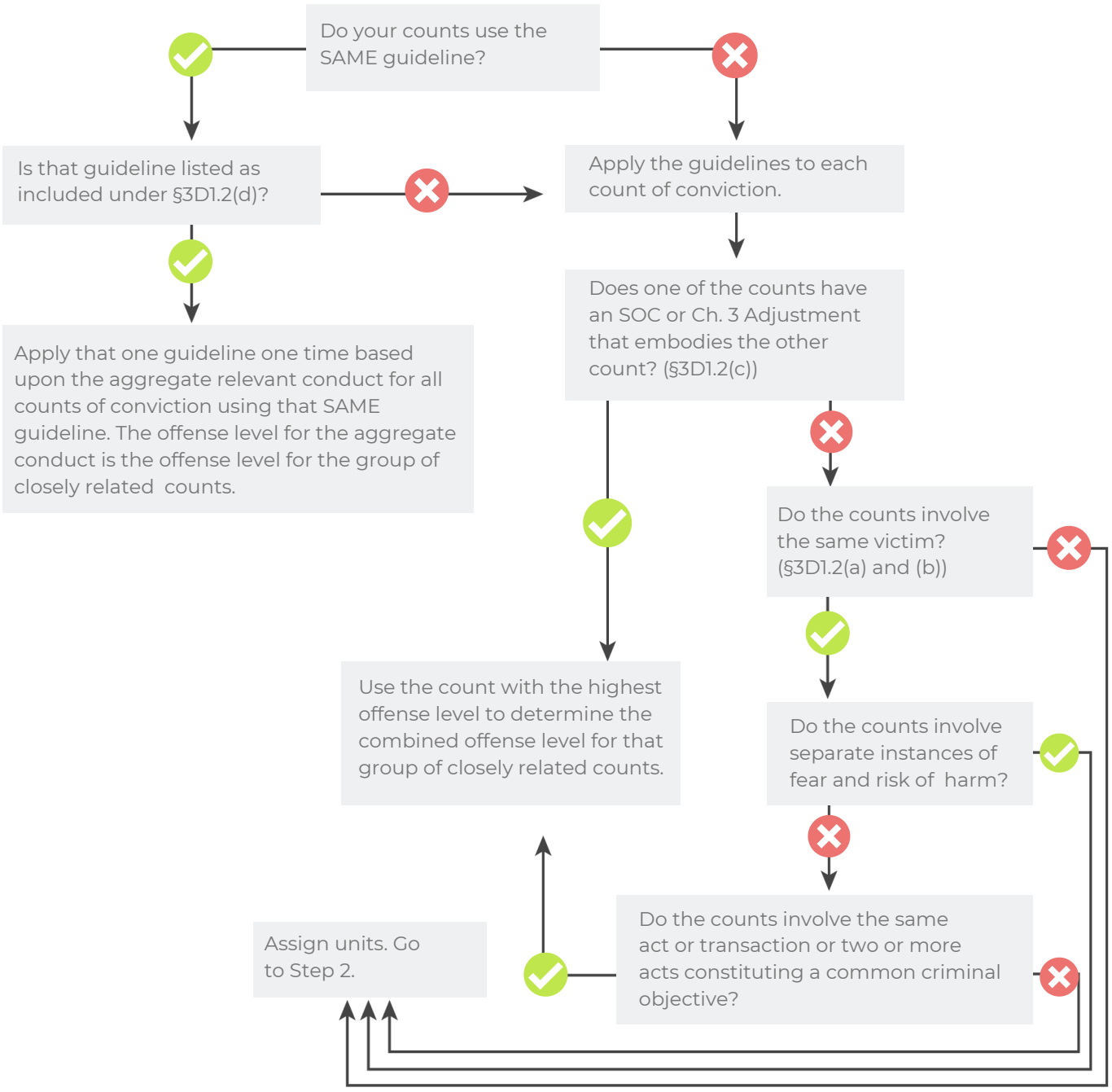
Decision Tree

Step 1:

Grouping Closely Related Counts (§3D1.2)

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

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



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Part D. Multiple Counts

§ 3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1. The "offense level" for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.
2. When counts are grouped pursuant to § 3D1.2(a)-(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.
3. When counts are grouped pursuant to § 3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome.
4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under § 3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§ 2A3.1) includes the most common aggravating factors, including injury, that data showed

to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. See § 5K2.5 (Property Damage or Loss).

Background: This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Part.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 257 and 303); November 1, 2001 (see Appendix C, amendment 617); November 1, 2004 (see Appendix C, amendment 674).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

FCJ Federal Sentencing Guidelines Manual § 3D1.4 (11/1/18)

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Chapter Three. Adjustments

Part D. Multiple Counts

§ 3D1.4. Determining the Combined Offense Level

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

Number of Units	Increase in Offense Level
1	none
1 1/2	add **1** level
2	add **2** levels
2 1/2 - 3	add **3** levels
3 1/2 - 5	add **4** levels
More than 5	add **5** levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.

(b) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Commentary

Application Notes:

1. Application of the rules in §§ 3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with § 3D1.3.
2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should

be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 350).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

Step 2:

Assignment of Units (§3D1.4)

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

Checklist to Determine a Single Combined Offense Level:

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

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

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

FCJ Federal Sentencing Guidelines Manual § 3D1.5 (11/1/18)

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Chapter Three. Adjustments

Part D. Multiple Counts

§ 3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).
Historical Note: Effective November 1, 1987.

Concluding Commentary to Part D of Chapter Three
Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group. § 3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§ 2B3.1(b)). In the fourth robbery $21,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of § 3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.
2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent $20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to converted drug weight (using the Drug Conversion Tables in the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of converted drug weight; the second count translates into 30 kilograms of converted drug weight; and the third count translates into 75 kilograms of converted drug weight. The total is 151 kilograms of converted drug weight. Under § 2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under § 3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by § 3C1.1, it becomes part of the same Group as the drug offenses pursuant to § 3D1.2(c). The combined offense level is 26 pursuant to § 3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).
3. Defendant C was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received $1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received $1,000 from subcontractor A relating to contract X (Commercial

Bribery).(3) The defendant received $1,000 from subcontractor A relating to contract Y (Mail Fraud).(4) The defendant received $1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by § 2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is $4,000, which results in an offense level of 9 under either § 2B1.1 (assuming the application of the "sophisticated means" enhancement in § 2B1.1(b)(10)) or § 2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 9.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303); November 1, 1990 (see Appendix C, amendment 350); November 1, 1991 (see Appendix C, amendment 417); November 1, 1995 (see Appendix C, amendment 534); November 1, 2001 (see Appendix C, amendment 617); November 1, 2009 (see Appendix C, amendment 737); November 1, 2011 (see Appendix C, amendment 760); November 1, 2014 (see Appendix C, amendment 782); November 1, 2015 (see Appendix C, amendment 796); November 1, 2018 (see Appendix C, amendment 808).

Footnotes

* Incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; August 1, 2016; November 1, 2016; and November 1, 2018.

Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendment 3); November 1, 1989 (amendments 76-78 and 303); November 1, 1990 (amendment 309); November 1, 1991 (amendment 389); November 1, 1992 (amendment 439); November 1, 1994 (amendment 503); November 1, 2001 (amendments 617 and 634); November 1, 2004 (amendment 674); November 1, 2010 (amendment 746); November 1, 2015 (amendments 790 and 797).

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in

do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendment 4); November 1, 1989 (amendment 303); November 1, 2000 (amendment 604); November 1, 2004 (amendment 674).

§1B1.5. Interpretation of References to Other Offense Guidelines

(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).

(b) (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.

(2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera

in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub.L. 115-391, Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). >

Notes of Decisions (2890)

Footnotes

1 So in original. The period probably should be a semicolon.
2 So in original. No subpar. (B) has been enacted.
3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

The First Step Act of 2018: An Overview

March 4, 2019

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SUMMARY

R45558

March 4, 2019

Nathan James
Analyst in Crime Policy

The First Step Act of 2018: An Overview

On December 21, 2018, President Trump signed into law the First Step Act of 2018 (P.L. 115-391). The act was the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety. This report provides an overview of the provisions of the act.

The act has three major components: (1) correctional reform via the establishment of a risk and needs assessment system at the Bureau of Prisons (BOP), (2) sentencing reform via changes to penalties for some federal offenses, and (3) the reauthorization of the Second Chance Act of 2007 (P.L. 110-199). The act also contains a series of other criminal justice-related provisions.

The First Step Act requires the Department of Justice (DOJ) to develop a risk and needs assessment system to be used by BOP to assess the recidivism risk of all federal prisoners and to place prisoners in programs and productive activities to reduce this risk. Prisoners who successfully complete recidivism reduction programming and productive activities can earn additional time credits that will allow them to be placed in prerelease custody (i.e., home confinement or a Residential Reentry Center) earlier than they were previously allowed. The act prohibits prisoners convicted of any one of dozens of offenses from earning additional time credits, though these prisoners can earn other benefits, such as additional visitation time, for successfully completing recidivism reduction programming. Offenses that make prisoners ineligible to earn additional time credits can generally be categorized as violent, terrorism, espionage, human trafficking, sex and sexual exploitation, repeat felon in possession of firearm, certain fraud, or high-level drug offenses.

The act makes changes to the penalties for some federal offenses. The act modified mandatory minimum prison sentences for some drug traffickers with prior drug convictions by increasing the threshold for prior convictions that count toward triggering higher mandatory minimums for repeat offenders, reducing the 20-year mandatory minimum (applicable where the offender has one prior qualifying conviction) to a 15-year mandatory minimum, and reducing a life-in-prison mandatory minimum (applicable where the offender has two or more prior qualifying convictions) to a 25-year mandatory minimum. The act made the provisions of the Fair Sentencing Act of 2010 (P.L. 111-220) retroactive so that currently incarcerated offenders who received longer sentences for possession of crack cocaine than they would have received if sentenced for possession of the same amount of powder cocaine before the enactment of the Fair Sentencing Act can submit a petition in federal court to have their sentences reduced. The act also expands the safety valve provision, which allows courts to sentence low-level, nonviolent drug offenders with minor criminal histories to less than the required mandatory minimum for an offense. Finally, the act eliminated the stacking provision, which allowed prosecutors to charge offenders with a second and subsequent use of a firearm in furtherance of a drug trafficking or violent offense in the same criminal incident, which, if the offender is convicted, carries a 25-year mandatory minimum. Now, the mandatory minimum will only apply when the offender has a prior conviction for use of a firearm in furtherance of a drug trafficking or violent crime from a previous criminal prosecution.

The First Step Act contains the Second Chance Reauthorization Act of 2018. This act reauthorizes appropriations for and expands the scope of some grant programs that were initially authorized under the Second Chance Act of 2007 (P.L. 110-199). The reauthorized programs include the Adult and Juvenile State and Local Offender Demonstration Program, Grants for Family-Based Substance Abuse Treatment, Careers Training Demonstration Grants, the Offender Reentry Substance Abuse and Criminal Justice Collaboration Program, and the Community-Based Mentoring and Transitional Service Grants to Nonprofit Organizations Program. The act also reauthorized and modified a pilot program that allows BOP to place certain elderly and terminally ill prisoners on home confinement to serve the remainder of their sentences.

Finally, the First Step Act includes a series of other criminal justice-related provisions. These provisions include a prohibition on the use of restraints on pregnant inmates in the custody of BOP and the U.S. Marshals Service; a change to the way good time credit is calculated so prisoners can earn 54 days of good time credits for each year of imposed sentence rather than for each year of time served; a requirement for BOP to provide a way for employees to safely store firearms on BOP grounds; a requirement for BOP to try to place prisoners within 500 driving miles of their primary residences; authority for the Federal Prison Industries to sell products to public entities for use in correctional facilities, disaster relief, or emergency response, to the District of Columbia government, and to nonprofit organizations; a prohibition against the use of solitary confinement for juvenile delinquents in federal custody; and a requirement that BOP aid prisoners with obtaining identification before they are released.

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On December 21, 2018, President Trump signed into law the First Step Act of 2018 (P.L. 115-391). The act was the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.

Correctional and sentencing reform was an issue that drew interest from many Members of Congress. Some Members took it up for fiscal reasons; they were concerned that the increase in the Bureau of Prisons' (BOP) budget would take resources away from the Department of Justice's (DOJ) other priorities. Other Members were interested in correctional reform due to concerns about the social consequences (e.g., the effects incarceration has on employment opportunities and the families of the incarcerated, or the normalizing of incarceration) of what some deem *mass incarceration*, or they wanted to roll back some of the *tough on crime* policy changes that Congress put in place during the 1980s and early 1990s.

This report provides an overview of the provisions of the First Step Act. The act has three major components: (1) correctional reform via the establishment of a risk and needs assessment system at BOP, (2) sentencing reform that involved changes to penalties for some federal offenses, and (3) the reauthorization of the Second Chance Act of 2007 (P.L. 110-199). The act also contains a series of other criminal justice-related provisions that include, for example, changes to the way good time credits are calculated for federal prisoners, prohibiting the use of restraints on pregnant inmates, expanding the market for products made by the Federal Prison Industries, and requiring BOP to aid prisoners with obtaining identification before they are released.

Correctional Reforms

The correctional reform component of the First Step Act involves the development and implementation of a risk and needs assessment system (system) at BOP.[1]

Development of the Risk and Needs Assessment System

The act requires DOJ to develop the system to be used by BOP to assess the risk of recidivism of federal prisoners and assign prisoners to evidence-based recidivism reduction programs[2] and productive activities[3] to reduce this risk. DOJ is required to develop and release the system within 210 days of enactment of the First Step Act. The system is to be used to

- determine the risk of recidivism of each prisoner during the intake process and classify each prisoner as having a minimum, low, medium, or high risk;

[1] For more information on the use of risk and needs assessment in prisons, see CRS Report R44087, *Risk and Needs Assessment in the Federal Prison System*.

[2] The act defines *evidence-based recidivism reduction program* as a group or individual activity that (1) has been shown through empirical evidence to reduce recidivism or is based on research indicating that it is likely to be effective in reducing recidivism; (2) is designed to help prisoners succeed in their communities upon release from prison; and (3) may include social learning and communication, interpersonal, anti-bullying, rejection response, and other life skills; family relationship building, structured parent-child interaction, and parenting skills; classes on morals or ethics; academic classes; cognitive behavioral treatment; mentoring; substance abuse treatment; vocational training; faith-based classes or services; civic engagement and reintegrative community services; a prison job, including through a prison work program; victim impact classes or other restorative justice programs; and trauma counseling and trauma-informed support programs.

[3] The act defines *productive activities* as a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating.

- assess and determine, to the extent practicable, the risk of violent or serious prison misconduct of each prisoner;
- determine the type and amount of recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to programming based on the prisoner's specific *criminogenic needs*;[4]
- periodically reassess the recidivism risk of each prisoner;[5]
- reassign prisoners to appropriate recidivism reduction programs or productive activities based on their reassessed risk of recidivism to ensure that all prisoners have an opportunity to reduce their risk classification, that the programs address prisoners' criminogenic needs, and that all prisoners are able to successfully participate in such programs;
- determine when to provide incentives and rewards for successful participation in recidivism reduction programs or productive activities;
- determine when a prisoner is ready to transfer into prerelease custody or supervised release; and
- determine the appropriate use of audio technology for program course materials to accommodate prisoners with dyslexia.

DOJ is authorized to use existing risk and needs assessment instruments, validated annually, to meet the requirements of the act.

When developing the system, the Attorney General is required to consult with

- the Director of BOP;
- the Director of the Administrative Office of the United States Courts;
- the Director of the Office of Probation and Pretrial Services;
- the Director of the National Institute of Justice;
- the Director of the National Institute of Corrections; and
- the Independent Review Committee, which is established by the First Step Act.[6]

When developing the system, the Attorney General, with the assistance of the Independent Review Committee, is required to

[4] *Criminogenic needs* are risk factors for recidivism that can change and/or be addressed through an intervention.

[5] The act requires BOP to reassess prisoners not less than annually, and prisoners who are at high or medium risk for recidivism and within five years of being released are to receive more frequent reassessments.

[6] Under the act, the National Institute of Justice (NIJ) is required to select a nonpartisan and nonprofit organization with expertise in the study and development of risk and needs assessment tools to host the Independent Review Committee (committee). The organization selected by NIJ is required to select no fewer than six members for the committee who have expertise in risk and needs assessment systems. The committee is required to

- conduct a review of the existing prisoner risk and needs assessment systems;
- develop recommendations regarding rehabilitative programs and productive activities;
- conduct research and data analysis on rehabilitative programs related to the use of prisoner risk and needs assessment tools, the most effective and efficient uses of such programs, which rehabilitative programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism; and
- review and validate the system.

The committee is to terminate two years after DOJ releases the system.

- conduct a review of the existing risk and needs assessment systems;
- develop recommendations regarding recidivism reduction programs and productive activities;
- conduct ongoing research and data analysis on (1) evidence-based recidivism reduction programs related to the use of risk and needs assessment, (2) the most effective and efficient uses of such programs, (3) which programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism, and (4) products purchased by federal agencies that are manufactured overseas and could be manufactured by prisoners participating in a prison work program without reducing job opportunities for other workers in the United States;[7]
- annually review and validate the risk and needs assessment system, including an evaluation to ensure that assessments are based on *dynamic risk factors* (i.e., risk factors that can change); validate any tools that the system uses; and evaluate the recidivism rates among similarly classified prisoners to identify any unwarranted disparities, including disparities in such rates among similarly classified prisoners of different demographic groups, and make any changes to the system necessary to address any that are identified; and
- submit an annual report to Congress each year for five years starting in 2020 (see below).

Also, prior to releasing the system, DOJ is required to consult with the Independent Review Committee to

- review the effectiveness of recidivism reduction programs in prisons operated by BOP;
- review available information regarding the effectiveness of recidivism reduction programs and productive activities provided in state prisons;
- review the policies for entering into recidivism reduction partnerships authorized by the act; and
- direct BOP regarding (1) evidence-based recidivism reduction programs, (2) the ability for faith-based organizations to provide educational programs outside of religious courses, and (3) the addition of any new effective recidivism reduction programs that DOJ finds.

Under the act, the system is required to provide guidance on the type, amount, and intensity of recidivism reduction programming and productive activities to which each prisoner is assigned, including information on which programs prisoners should participate in based on their criminogenic needs and the ways that BOP can tailor programs to the specific criminogenic needs of each prisoner to reduce their risk of recidivism. The system is also required to provide guidance on how to group, to the extent practicable, prisoners with similar risk levels together in recidivism reduction programming and housing assignments.

The act requires BOP, when developing the system, to take steps to screen prisoners for dyslexia and to provide programs to treat prisoners who have it.

[7] In 2011, Congress gave the Federal Prison Industries (FPI) *repatriation authority*. As a part of the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2011 (P.L. 112-55), Congress authorized FPI to manufacture goods for the commercial market if they are currently or would have otherwise been manufactured outside the United States.

Implementation of the Risk and Needs Assessment System

Within 180 days of DOJ releasing the system, BOP is required to

- complete the initial risk and needs assessment for each prisoner (including for prisoners who were incarcerated before the enactment of the First Step Act);
- begin to assign prisoners to appropriate recidivism reduction programs based on the initial assessment;
- begin to expand the recidivism reduction programs and productive activities available at BOP facilities and add any new recidivism reduction programs and productive activities necessary to effectively implement the system; and
- begin to implement any other risk and needs assessment tools necessary to effectively implement the system over time.

BOP is required to expand recidivism reduction programming and productive activities capacity so that all prisoners have an opportunity to participate in risk reduction programs within two years of BOP completing initial risk and needs assessments for all prisoners. During the two-year period when BOP is expanding recidivism reduction programs and productive activities, prisoners who are nearing their release date are given priority for placement in such programs.

BOP is required to provide all prisoners with the opportunity to participate in recidivism reduction programs that address their criminogenic needs or productive activities throughout their term of incarceration. High- and medium-risk prisoners are to have priority for placement in recidivism reduction programs, while the program focus for low-risk prisoners is on participation in productive activities.

Prisoners who successfully participate in recidivism reduction programming or productive activities are required to be reassessed not less than annually, and high- and medium-risk prisoners who have less than five years remaining until their projected release date are required to have more frequent reassessments. If the reassessment shows that a prisoner's risk of recidivating or specific needs have changed, BOP is required to reassign the prisoner to recidivism reduction programs or productive activities consistent with those changes.

DOJ is required to develop and administer a training program for BOP employees on how to use the system. This training program must include

- initial training to educate employees on how to use the system in an appropriate and consistent manner,
- continuing education,
- periodic training updates, and
- a requirement that employees biannually demonstrate competence in administering the system.

To ensure that BOP is using the system in an appropriated and consistent manner, DOJ is required to monitor and assess how the system is used at BOP, including an annual audit of the system's use.

Incentives and Rewards for Program Participation

The First Step Act requires the use of incentives and rewards for prisoners to participate in recidivism reduction programs, including the following:

- additional phone privileges, and if available, video conferencing privileges, of up to 30 minutes a day, and up to 510 minutes a month;
- additional time for visitation at the prison, as determined by the warden of the prison;
- transfer to a facility closer to the prisoner's release residence, subject to the availability of bedspace, the prisoner's security designation, and the recommendation from the warden of the prison at which the prisoner is incarcerated at the time of making the request; and
- additional incentives and rewards as determined by BOP, to include not less than two of the following: (1) increased commissary spending limits and product offerings, (2) greater email access, (3) consideration for transfer to preferred housing units; and (4) other incentives solicited from prisoners and determined appropriate by BOP.

Rewards or incentives prisoners earn are in addition to any other rewards or incentives for which they may be eligible (e.g., good time credit under 18 U.S.C. Section 3624(b)).

Earned Time Credits for Program Participation

Under the act, prisoners who successfully complete recidivism reduction programming are eligible to earn up to 10 days of time credits for every 30 days of program participation. Minimum and low-risk prisoners who successfully completed recidivism reduction or productive activities and whose assessed risk of recidivism has not increased over two consecutive assessments are eligible to earn up to an additional five days of time credits for every 30 days of successful participation. However, prisoners serving a sentence for a conviction of any one of multiple enumerated offenses are ineligible to earn additional time credits regardless of risk level, though these prisoners are eligible to earn the other incentives and rewards for program participation outlined above. Offenses that make prisoners ineligible to earn additional time credits can generally be categorized as violent, terrorism, espionage, human trafficking, sex and sexual exploitation, repeat felon in possession of firearm, certain fraud, or high-level drug offenses. Prisoners who are subject to a final order of removal under immigration law are ineligible for additional earned time credits provided by the First Step Act.

Prisoners cannot retroactively earn time credits for programs they completed prior to the enactment of the First Step Act, and they cannot earn time credits for programs completed while detained pending adjudication of their cases.

The act requires BOP to develop guidelines for reducing time credits prisoners earned under the system for violating institutional rules or the rules of recidivism reduction programs and productive activities. The guidelines must also include a description of a process for prisoners to earn back any time credits they lost due to misconduct.

Prerelease Custody

A prisoner is not eligible to be placed in prerelease custody until

- the amount of time credits the prisoner has earned is equal to the remainder of his/her imposed term of imprisonment;
- the prisoner has shown a reduced risk of recidivism or has maintained a minimum or low recidivism risk during his/her term of imprisonment;

- the remainder of his/her imposed term of imprisonment has been computed under applicable law (e.g., any good time credits the prisoner has earned have been credited to his/her sentence); and
- the prisoner has been determined to be a minimum or low risk to recidivate based on his/her last two assessments, or has had a petition to be transferred to prerelease custody approved by the warden, after the warden's determination that the prisoner (1) would not be a danger to society if transferred to prerelease custody, (2) has made a good faith effort to lower his/her recidivism risk through participation in recidivism reduction programs or productive activities, and (3) is unlikely to recidivate.

A prisoner who is required to serve a period of supervised release after his/her term of incarceration and has earned time credits equivalent to the time remaining on his/her prison sentence can be transferred directly to supervised release if the prisoner's latest reassessment shows that he/she is a minimum or low risk to recidivate.[8] However, BOP cannot allow a prisoner to start serving a period of supervised release more than 12 months before he/she would otherwise be eligible to do so. If a prisoner has earned more than 12 months of additional time credits, the amount in excess of 12 months would be served in prerelease custody.

Prisoners who are placed on prerelease custody on home confinement are subject to a series of conditions. Per the act, prisoners on home confinement are required to have 24-hour electronic monitoring that enables the identification of their location and the time, and must remain in their residences, except to

- go to work or participate in job-seeking activities,
- participate in recidivism reduction programs or similar activities,
- perform community service,
- participate in crime victim restoration activities,
- receive medical treatment,
- attend religious activities, or
- participate in family-related activities that facilitate a prisoner's successful reentry.

When monitoring adherence to the conditions of prerelease custody, BOP is required, to the extent practicable, to reduce the restrictiveness of those conditions for prisoners who demonstrate continued compliance with their conditions.

If a prisoner violates the conditions of prerelease custody, BOP is authorized to place more conditions on the prisoner, or revoke prerelease custody and require the prisoner to serve the remainder of the sentence in prison. If the violation is nontechnical[9] in nature (e.g., committing a new crime), BOP is required to revoke the prisoner's prerelease custody.

BOP is required to expand its capacity, if necessary, so that all eligible prisoners can be placed in prerelease custody.

[8] Supervised release is a period of supervision that a prisoner serves after completing a term of incarceration. Courts decide whether to impose a term of supervised release, if it is not required by statute, and the court sets the terms and conditions of the period of supervised release. For more information, see CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*.

[9] Technical violations of prerelease custody are behaviors that are violations of the conditions of prerelease custody but are not criminal offenses (e.g., leaving home confinement for unauthorized activities).

Reporting Requirements

The act requires the submission of several reports to help Congress oversee the implementation and assess the effects of the system.

Department of Justice Report to Congress

Two years after the enactment of the First Step Act, and each year thereafter for the next five years, DOJ is required to submit a report to the House and Senate Judiciary Committees and the House and Senate Subcommittees on Commerce, Justice, Science, and Related Agencies (CJS) Appropriations that includes information on

- the types and effectiveness of recidivism reduction programs and productive activities provided by BOP, including the capacity of each program and activity at each prison and any gaps or shortages in capacity of such programs and activities;
- the recidivism rates of prisoners released from federal prison, based on the following criteria: (1) the primary offense of conviction; (2) the length of the sentence imposed and served; (3) the facility or facilities in which the prisoner's sentence was served; (4) the type of recidivism reduction programming; (5) prisoners' assessed and reassessed risk of recidivism; and (6) the type of productive activities;
- the status of prison work programs offered by BOP, including a strategy to expanding prison work opportunities for prisoners without reducing job opportunities for nonincarcerated U.S. workers; and
- any budgetary savings that have resulted from the implementation of the act, and a strategy for investing those savings in other federal, state, and local law enforcement activities and expanding recidivism reduction programs and productive activities at BOP facilities.

Report from the Independent Review Committee

Within two years of the enactment of the First Step Act, the Independent Review Committee is required to submit a report to the House and Senate Judiciary Committees and the House and Senate CJS Appropriations Subcommittees that includes

- a list of all offenses that make prisoners ineligible for earned time credits under the system, and the number of prisoners excluded for each offense by age, race, and sex;
- the criminal history categories of prisoners ineligible to receive earned time credits under the system, and the number of prisoners excluded for each category by age, race, and sex;
- the number of prisoners ineligible for earned time credits under the system who did not participate in recidivism reduction programming or productive activities by age, race, and sex; and
- any recommendations for modifications to the list of offenses that make prisoners ineligible to earn time credits and any other recommendations regarding recidivism reduction.

Government Accountability Office Audit

Within two years of BOP implementing the system, and every two years thereafter, the Government Accountability Office is required to audit how the system is being used at BOP facilities. The audit must include an analysis of the following:

- whether prisoners are being assessed under the system with the required frequency;
- whether BOP is able to offer recidivism reduction programs and productive activities as defined in 18 U.S.C. Section 3632(f);
- whether BOP is offering the type, amount, and intensity of recidivism reduction programs and productive activities that allow prisoners to earn the maximum amount of additional time credits for which they are eligible;
- whether DOJ is carrying out the duties required by the First Step Act;
- whether employees of the BOP are receiving the training required by the act;
- whether BOP offers work assignments to all prisoners who might benefit from them;
- whether BOP transfers prisoners to prerelease custody or supervised release as soon as they are eligible; and
- the rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups.

Authorization of Appropriations

The First Step Act authorizes $75 million per fiscal year from FY2019 to FY2023 for DOJ to establish and implement the system; 80% of this funding is to be directed to BOP for implementation.

Sentencing Reforms[10]

The First Step Act makes several changes to federal sentencing law. The act reduced the mandatory minimum sentences for certain drug offenses, expanded the scope of the safety valve, eliminated the stacking provision, and made the provisions of the Fair Sentencing Act of 2010 (P.L. 111-220) retroactive.

Changes to Mandatory Minimums for Certain Drug Offenders

The act adjusts the mandatory minimum sentences for certain drug traffickers with prior drug convictions. The act reduces the 20-year mandatory minimum (applicable where the offender has one prior qualifying conviction) to a 15-year mandatory minimum and reduces the life sentence mandatory minimum (applicable where the offender has two or more prior qualifying convictions) to a 25-year mandatory minimum.[11] The act also changes the prior conviction criteria

[10] Portions of this section were excerpted from CRS In Focus IF10573, *Federal Correctional Reform and the First Step Act of 2018*.

[11] For more information on mandatory minimum sentences for drug offenses, see CRS Report R45074, *Mandatory Minimum Sentencing of Federal Drug Offenses*.

under which these mandatory minimum penalties apply. In order for these mandatory minimums to apply, the offender's prior convictions must meet the new criteria of a *serious drug felony*[12] or a *serious violent felony*[13] rather than any *felony drug offense*.

Expanding the Safety Valve

The act makes drug offenders with minor criminal records eligible for the safety valve provision, which previously applied only to offenders with virtually spotless criminal records.[14] The safety valve allows judges to sentence low-level, nonviolent drug offenders to a term of imprisonment that is less than the applicable mandatory minimum.

Eliminating the Stacking Provision

The act eliminates *stacking* by providing that the 25-year mandatory minimum for a "second or subsequent" conviction for use of a firearm in furtherance of a drug trafficking crime or a violent crime applies only where the offender has a prior conviction for use of a firearm that is already final.[15] Under prior law, two violations that were charged concurrently triggered the enhanced mandatory minimum.

Retroactivity of the Fair Sentencing Act

The First Step Act authorizes courts to apply retroactively the Fair Sentencing Act of 2010, which increased the threshold quantities of crack cocaine sufficient to trigger mandatory minimum sentences, by resentencing qualified prisoners as if the Fair Sentencing Act had been in effect at the time of their offenses.[16] The retroactive application of the Fair Sentencing Act is not automatic. A prisoner must petition the court in order to have his/her sentence reduced.

[12] A *serious drug felony* is defined as an offense described in 18 U.S.C. Section 924(e)(2)—which encompasses only drug felonies that carry a maximum prison term of 10 years or more—for which the offender served a term of imprisonment of more than 12 months and the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense. Before the First Step Act, any prior conviction for a *felony drug offense* (meaning a drug offense with a maximum term of imprisonment of more than one year) counted for purposes of the repeat offender mandatory minimums.

[13] A serious violent felony is defined as an offense described in 18 U.S.C. Section 3559(c)(2) for which the offender served a term of imprisonment of more than 12 months and any offense that would be a felony violation of 18 U.S.C. Section 113 if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months. Before the First Step Act, only drug felony convictions counted for purposes of the repeat offender mandatory minimums.

[14] For background and further information on the safety valve and how it is applied, see CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*.

[15] For more information on penalties for the use of a firearm in furtherance of a drug trafficking or violent crime see CRS Report R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*.

[16] Prior to the enactment of the Fair Sentencing Act, 5,000 grams of powder cocaine or 50 grams of crack cocaine triggered the Controlled Substances Act's 10-year mandatory minimum and 500 grams of powder or 5 grams of crack triggered its 5-year mandatory minimum. The Fair Sentencing Act established a 5,000 grams to 280 grams ratio for the 10-year mandatory minimum and a 500 grams to 28 grams ratio for the 5-year mandatory minimum.

Reauthorization of the Second Chance Act

The Second Chance Reauthorization Act of 2018 (Title V of the First Step Act) reauthorizes many of the grant programs that were initially authorized by the Second Chance Act of 2007 (P.L. 110-199). The Second Chance Reauthorization Act also reauthorized a BOP pilot program to provide early release to elderly prisoners.

Reauthorization of the Adult and Juvenile State and Local Offender Demonstration Program

The Second Chance Reauthorization Act amends the authorization for the Adult and Juvenile State and Local Offender Demonstration Program so grants can be awarded to states, local governments, territories, or Indian tribes, or any combination thereof, in partnership with interested persons (including federal correctional officials), service providers, and nonprofit organizations, for the strategic planning and implementation of reentry programs. The Second Chance Reauthorization Act amended the authorization for this program to allow grants to be used for reentry courts and promoting employment opportunities consistent with a transitional jobs strategy in addition to the purposes for which grants could already be awarded.[17]

The act also amended the Second Chance Act authorizing legislation for the program to allow DOJ to award both planning and implementation grants. DOJ is required to develop a procedure to allow applicants to submit a single grant application when applying for both planning and implementation grants.

Under the amended program, DOJ is authorized to award up to $75,000 for planning grants and is prohibited from awarding more than $1 million in planning and implementation grants to any single entity. The program period for planning grants is limited to one year and implementation grants are limited to two years. DOJ is also required to make every effort to ensure the equitable geographic distribution of grants, taking into account the needs of underserved populations, including tribal and rural communities.

Under the amended program, applicants for implementation grants are subject to several requirements, including

- demonstrating that the application has the explicit support of the chief executive, or the designee, of the state, unit of government, territory, or Indian tribe applying for the grant;

[17] The act defines *transitional jobs strategy* as an employment strategy for youth and adults who are chronically unemployed or those that have barriers to employment that (1) is conducted by state, tribal, and local governments, state, tribal, and local workforce boards, and nonprofit organizations; (2) provides time-limited employment using individual placements, team placements, and social enterprise placements, without displacing existing employees; (3) pays wages in accordance with applicable law, but in no event less than the higher of the rate specified in Section 6(a)(1) of the Fair Labor Standards Act of 1938 or the applicable state or local minimum wage law, which are subsidized, in whole or in part, by public funds; (4) combines time-limited employment with activities that promote skill development, remove barriers to employment, and lead to unsubsidized employment such as a thorough orientation and individual assessment, job readiness and life skills training, case management and supportive services, adult education and training, child support-related services, job retention support and incentives, and other similar activities; (5) places participants into unsubsidized employment; and (6) provides job retention, re-employment services, and continuing and vocational education to ensure continuing participation in unsubsidized employment and identification of opportunities for advancement.

- discussing the role of federal and state corrections, community corrections, juvenile justice systems, and tribal and local jail systems in ensuring the successful reentry of ex-offenders into the applicants' communities;
- providing evidence of collaboration with state, local, and tribal agencies overseeing health, housing, child welfare, education, substance abuse, victim services, employment agencies, and local law enforcement agencies;
- providing a plan for analyzing the barriers (e.g., statutory, regulatory, rules-based, or practice-based) to reentry for ex-offenders in the applicants' communities;
- demonstrating that a state, local, territorial, or tribal reentry task force will be used to carry out the activities funded under the grant;
- providing a plan for continued collaboration with a local evaluator; and
- demonstrating that the applicant participated in the planning grant process, or engaged in a comparable reentry planning process.

DOJ is also required to give priority consideration to applications for implementation grants that focus on areas with a disproportionate population of returning prisoners, received input from stakeholders and coordinated with prisoners families, demonstrate effective case assessment and management, review the process by which violation of community supervision are adjudicated, provide for an independent evaluation of reentry programs, target moderate and high-risk returning prisoners, and target returning prisoners with histories of homelessness, substance abuse, or mental illness.

Under the amended program, applicants for implementation grants would be required to develop a strategic reentry plan that contains measurable three-year performance outcomes. Applicants would be required to develop a feasible goal for reducing recidivism using baseline data collected through the partnership with the local evaluator. Applicants are required to use, to the extent practicable, random assignment and controlled studies, or rigorous quasi-experimental studies with matched comparison groups, to determine the effectiveness of the program.

As authorized by the Second Chance Act, grantees under the Adult and Juvenile State and Local Offender Demonstration program are required to submit annual reports to DOJ that identify the specific progress made toward achieving their strategic performance outcomes, which they are required to submit as a part of their reentry strategic plans. Data on performance measures only need to be submitted by grantees that receive an implementation grant. The act repeals some performance outcomes (i.e., increased housing opportunities, reduction in substance abuse, and increased participation in substance abuse and mental health services) and adds the following outcomes:

- increased number of staff trained to administer reentry services;
- increased proportion of eligible individuals served by the program;
- increased number of individuals receiving risk screening needs assessment and case planning services;
- increased enrollment in and completion of treatment services, including substance abuse and mental health services for offenders who need them;
- increased enrollment in and degrees earned from educational programs;
- increased number of individuals obtaining and maintaining employment;
- increased number of individuals obtaining and maintaining housing;

- increased self-reports of successful community living, including stability of living situation and positive family relationships;
- reduction in drug and alcohol use; and
- reduction in recidivism rates for individuals receiving reentry services after release, as compared to either baseline recidivism rates in the jurisdiction of the grantee or recidivism rates of the comparison or control group.

The act allows applicants for implementation grants to include a cost-benefit analysis as a performance measure under their required reentry strategic plan.

The act reauthorizes appropriations for the program at $35 million for each fiscal year from FY2019 to FY2023.

Reauthorization of Grants for Family-Based Substance Abuse Treatment

The Second Chance Act authorized DOJ to make grants to states, local governments, and Indian tribes to develop, implement, and expand the use of family-based substance abuse treatment programs as an alternative to incarceration for parents who were convicted of nonviolent drug offenses and to provide prison-based family treatment programs for incarcerated parents of minor children.

The Second Chance Reauthorization Act amends the authorization for the program to allow grants to be awarded to nonprofit organizations and requires DOJ to give priority consideration to nonprofit organizations that demonstrate a relationship with state and local criminal justice agencies, including the judiciary and prosecutorial agencies or local correctional agencies.

The act reauthorizes appropriations for the program at $10 million for each fiscal year from FY2019 to FY2023.

Reauthorization of the Grant Program to Evaluate and Improve Educational Methods at Prisons, Jails, and Juvenile Facilities

The Second Chance Act authorized a grant program to evaluate and improve academic and vocational education in prisons, jails, and juvenile facilities. This program authorizes DOJ to make grants to states, units of local government, territories, Indian tribes, and other public and private entities to identify and implement best practices related to the provision of academic and vocational education in prisons, jails, and juvenile facilities. Grantees are required to submit reports within 90 days of the end of the final fiscal year of a grant detailing the progress they have made, and to allow DOJ to evaluate improved academic and vocational education methods carried out with grants provided under this program.

The Second Chance Reauthorization Act amends the authorizing legislation for this program to require DOJ to identify and publish best practices relating to academic and vocational education for offenders in prisons, jails, and juvenile facilities. In identifying best practices, the evaluations conducted under this program must be considered.

The act reauthorizes appropriations for this program at $5 million for each fiscal year from FY2019 to FY2023.

Reauthorization of the Careers Training Demonstration Grants

The Second Chance Act authorized DOJ to make grants to states, units of local government, territories, and Indian tribes to provide technology career training for prisoners. Grants could be awarded for programs that establish technology careers training programs for inmates in a prison, jail, or juvenile detention facility.

The Second Chance Reauthorization Act expanded the scope of the program to allow grant funds to be used to provide *any* career training to those who are soon to be released and during transition and reentry into the community. The act makes nonprofit organizations an eligible applicant under the program. Under the legislation, grants funds could be used to provide subsidized employment if it is a part of a career training program. The act also requires DOJ to give priority consideration to any application for a grant that

- provides an assessment of local demand for employees in the geographic area to which offenders are likely to return,
- conducts individualized reentry career planning upon admission to a correctional facility or post-release employment planning for each offender served under the grant,
- demonstrates connections to local employers, and
- evaluates employment outcomes.

The act reauthorizes appropriations for this program at $10 million for each fiscal year from FY2019 to FY2023.

Reauthorization of the Offender Reentry Substance Abuse and Criminal Justice Collaboration Program

The Second Chance Act authorized DOJ to make grants to states, units of local governments, territories, and Indian tribes in order to improve drug treatment programs in prisons and reduce the post-prison use of alcohol and other drugs by long-term users under correctional supervision. Grants may be used to continue or improve existing drug treatment programs, develop and implement programs for long-term users, provide addiction recovery support services, or establish medication assisted treatment (MAT) services as part of any drug treatment program offered to prisoners.

The Second Chance Reauthorization Act reauthorizes appropriations for this program at $15 million for each fiscal year from FY2019 to FY2023.

Reauthorization of the Community-Based Mentoring and Transitional Service Grants to Nonprofit Organizations Program

The Second Chance Act authorized DOJ to make grants to nonprofit organizations and Indian tribes to provide mentoring and other transitional services for offenders being released into the community. Funds could be used for mentoring programs in prisons or jails and during reentry, programs providing transition services during reentry, and programs providing training for mentors on the criminal justice system and victims issues.

The Second Chance Reauthorization Act amends the authorization for the program to pivot the focus toward providing community-based transitional services to former inmates returning to the community. Reflecting the change in focus, the reauthorization changed the name of the program

to "Community-based Mentoring and Transitional Services Grants to Nonprofit Organizations." The act specifies the transitional services that can be provided to returning inmates under the program, including educational, literacy, vocational, and the transitional jobs strategy; substance abuse treatment and services; coordinated supervision and services for offenders, including physical health care and comprehensive housing and mental health care; family services; and validated assessment tools to assess the risk factors of returning prisoners.

The act reauthorizes appropriations for this program at $15 million for each fiscal year from FY2019 to FY2023.

Reauthorization and Expansion of the BOP Early Release Pilot Program

The Second Chance Reauthorization Act reauthorized and expanded the scope of a pilot program initially authorized under the Second Chance Act that allowed BOP to place certain elderly nonviolent offenders on home confinement to serve the remainder of their sentences. BOP was authorized to conduct this pilot program at one facility for FY2009 and FY2010. An offender eligible to be released through the program had to meet the following requirements:

- at least 65 years old;
- never have been convicted of a violent, sex-related, espionage, or terrorism offense;
- sentenced to less than life;
- served the greater of 10 years or 75% of his/her sentence;
- not received a determination by BOP to have a history of violence, or of engaging in conduct constituting a sex, espionage, or terrorism offense;
- not escaped or attempted to escape;
- received a determination that release to home detention would result in a substantial reduction in cost to the federal government; and
- received a determination that he/she is not a substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

The Second Chance Reauthorization Act reestablishes the pilot program and allows BOP to operate it at multiple facilities from FY2019 to FY2023. The act also modifies the eligibility criteria for elderly offenders so that any offenders who are at least 60 year old and have served two-thirds of their sentences can be placed on home confinement.

The act also expands the program so that terminally ill offenders can be placed on home confinement. Eligibility criteria for home confinement for terminally ill offenders under the pilot program is the same as that for elderly offenders, except that terminally ill offenders of any age and who have served any portion of their sentences, even life sentences, are eligible for home confinement. Terminally ill prisoners are those who are deemed by a BOP medical doctor to need care at a nursing home, intermediate care facility, or assisted living facility, or those who have been diagnosed with a terminal illness.

Reauthorization of Reentry Research

The Second Chance Act authorized appropriations for a series of reentry-related research projects, including the following:

- a study by the National Institute of Justice (NIJ) identifying the number and characteristics of children with incarcerated parents and their likelihood of engaging in criminal activity;
- a study by NIJ identifying mechanisms to compare recidivism rates between states;
- a study by NIJ on the characteristics of individuals released from prison who do not recidivate;
- a study by the Bureau of Justice Statistics (BJS) analyzing the populations that present unique reentry challenges;
- studies by BJS to determine the characteristics of individuals who return to prison, jail, or a juvenile facility (including which individuals pose the highest risk to the community);
- annual reports by BJS on the profile of the population leaving prisons, jails, or juvenile facilities and entering the community;
- a national recidivism study by BJS every three years;
- a study by BJS of violations and revocation of community-based supervision (e.g., probation, parole, or other forms of post-incarceration supervision) violations;
- providing grants to states to fund studies aimed at improving data collection on former prisoners who have their post-incarceration supervision revoked in order to identify which such individuals pose the greatest risk to the community; and
- collecting data and developing best practices concerning the communication and coordination between state corrections and child welfare agencies, to ensure the safety and support of children of incarcerated parents.

The Second Chance Reauthorization Act reauthorizes appropriations for these research projects at $5 million for each fiscal year from FY2019 to FY2023.

Evaluation of the Second Chance Act

Within five years of the enactment of the Second Chance Reauthorization Act, NIJ is required to evaluate grants used by DOJ to support reentry and recidivism reduction programs at the state, local, tribal, and federal levels. Specifically, NIJ is required to evaluate the following:

- whether the programs are cost-effective, including the extent to which the programs improved reentry outcomes;
- whether the programs effectively delivered services;
- the effects programs had on the communities and participants involved;
- the effects programs had on related programs and activities;
- the extent to which programs met the needs of various demographic groups;
- the quality and effectiveness of technical assistance provided by DOJ to grantees for implementing such programs; and
- other factors as may be appropriate.

NIJ is required to identify outcome measures, including employment, housing, education, and public safety, that are the goals of programs authorized by the Second Chance Act and metrics for measuring whether those programs achieved the intended results. As a condition of receiving

funding under programs authorized by the Second Chance Act, grantees are required to collect and report data to DOJ related to those metrics.

NIJ is required to make data collected during evaluations of Second Chance Act programs publicly available in a manner that protects the confidentiality of program participants and is consistent with applicable law. NIJ is also required to make the final evaluation reports publicly available.

Recidivism Reduction Partnerships

The Second Chance Reauthorization Act requires BOP to develop policies for wardens of prisons and community-based facilities to enter into recidivism-reducing partnerships with nonprofit and other private organizations, including faith-based and community-based organizations to deliver recidivism reduction programming.

Repealed Programs

The Second Chance Reauthorization Act repealed the authorization for the State, Tribal, and Local Reentry Courts program (Section 111 of the Second Chance Act), the Responsible Reintegration of Offenders program (Section 212), and the Study on the Effectiveness of Depot Naltrexone for Heroin Addiction program (Section 244).

Other Provisions

In addition to correctional and sentencing reform and reauthorizing the Second Chance Act, the First Step Act contained a series of other criminal justice-related provisions.

Modification of Good Time Credits

The act amended 18 U.S.C. Section 3624(b) so that federal prisoners can earn up to 54 days of good time credit for every year of their *imposed* sentence rather than for every year of their sentenced *served*. Prior to the amendment, BOP interpreted the good time credit provision in Section 3624(b) to mean that prisoners are eligible to earn 54 days of good time credit for every year they serve. For example, this means that an offender who was sentenced to 10 years in prison and earned the maximum good time credits each year could be released after serving eight years and 260 days, having earned 54 days of good time credit for each year of the sentence served, but in effect, only 47 days of good time credit for every year of the imposed sentence.[18]

Bureau of Prisons Secure Firearm Storage

The act requires BOP to provide a secure storage area outside of the secure perimeter of a correctional institution for qualified law enforcement officers employed by BOP to store firearms or allow this class of employees to store firearms in their personal vehicles in lockboxes approved by BOP. The act also requires BOP, notwithstanding any other provision of law, to allow these same employees to carry concealed firearms on prison grounds but outside of the secure perimeter of the correctional institution.

[18] U.S. Government Accountability Office, *Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison*, GAO-12-320, February 2012, pp. 23-25.

Prohibition on the Use of Restraints on Pregnant Prisoners

The act prohibits BOP or the U.S. Marshals Service (USMS) from using restraints on pregnant inmates in their custody. The prohibition on the use of restraints begins on the date that pregnancy is confirmed by a healthcare professional. The restriction ends when the inmate completes postpartum recovery.

The prohibition on the use of restraints does not apply if the inmate is determined to be an immediate and credible flight risk or poses an immediate and serious threat of harm to herself or others that cannot be reasonably prevented by other means, or a healthcare professional determines that the use of restraints is appropriate for the medical safety of the inmate. Only the least restrictive restraints necessary to prevent escape or harm can be used. The exception to the use of restraints does not permit BOP or USMS to use them around the ankles, legs, or waist of an inmate; restrain an inmate's hands behind her back; use four-point restraints; or attach an inmate to another inmate. Upon the request of a healthcare professional, correctional officials or deputy marshals shall refrain from using restraints on an inmate or shall remove restraints used on an inmate.

If restraints are used on a pregnant inmate, the correctional official or deputy marshal who used the restraints is required to submit a report within 30 days to BOP or USMS, and the healthcare provider responsible for the inmate's health and safety, that describes the facts and circumstances surrounding the use of the restraints, including the reason(s) for using them; the details of their use, including the type of restraint and length of time they were used; and any observable physical effects on the prisoner.

BOP and USMS are required to develop training guidelines regarding the use of restraints on inmates during pregnancy, labor, and postpartum recovery. The guidelines are required to include the following:

- how to identify certain symptoms of pregnancy that require immediate referral to a healthcare professional;
- circumstances under which exceptions to the prohibition on the use of restraints would apply;
- in cases where an exception applies, how to use restraints in a way that does not harm the inmate, the fetus, or the newborn;
- the information required to be reported when restraints are used; and
- the right of a healthcare professional to request that restraints not be used and the requirement to comply with such a request.

Placement of Prisoners Closer to Families

The act amends 18 U.S.C. Section 3621(b) to require BOP to house prisoners in facilities as close to their primary residence as possible, and to the extent practicable, within 500 driving miles, subject to a series of considerations. When making decisions about where to house a prisoner, BOP must consider bedspace availability, the prisoner's security designation, the prisoner's programmatic needs, the prisoner's mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns. BOP is also required, subject to these considerations and a prisoner's preference for staying at his/her current facility or being transferred, to transfer a prisoner to a facility closer to his/her primary residence even if the prisoner is currently housed at a facility within 500 driving miles.

Home Confinement for Low-Risk Prisoners

The act amends 18 U.S.C. Section 3624(c)(2) to require BOP, to the extent practicable, to place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph. Under Section 3624(c)(2), BOP is authorized to place prisoners in prerelease custody on home confinement for 10% of the term of imprisonment or six months, whichever is shorter.

Increasing the Use and Transparency of Compassionate Release

The act amends 18 U.S.C. Section 3582(c) regarding when a court can modify a term of imprisonment once it is imposed. Under Section 3582(c)(1)(A), a court, upon a petition from BOP, can reduce a prisoner's sentence and impose a term of probation or supervised release, with or without conditions, equal to the amount of time remaining on the prisoner's sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction," or the prisoner is at least 70 years of age, the prisoner has served at least 30 years of his/her sentence, and a determination has been made by BOP that the prisoner is not a danger to the safety of any other person or the community. This is sometimes referred to as *compassionate release*. The amendments made by the act allow the court to reduce a prisoner's sentence under Section 3582(c)(1)(A) upon a petition from BOP or the prisoner if the prisoner has fully exhausted all administrative rights to appeal a failure by BOP to bring a motion on the prisoner's behalf or upon a lapse of 30 days from the receipt of such a request by the warden of the prisoner's facility, whichever is earlier.

The act also requires BOP within 72 hours of a prisoner being diagnosed with a terminal illness to notify the prisoner's attorney, partner, and family about the diagnosis and inform them of their option to submit a petition for compassionate release on the prisoner's behalf. Within seven days, BOP is required to provide the prisoner's partner and family with an opportunity to visit. BOP is also required to provide assistance to the prisoner with drafting and submitting a petition for compassionate release if such assistance is requested by the prisoner or the prisoner's attorney, partner, or family. BOP is required to process requests for compassionate release within 14 days.

If a prisoner is mentally or physically unable to submit a petition for compassionate release, BOP is required to notify the prisoner's attorney, partner, or family that they can submit a petition on the prisoner's behalf. BOP is required to accept and process requests for compassionate release that are drafted by the prisoner's attorney, partner, or family. BOP is also required to assist prisoners who are mentally or physically unable to prepare their own request if such assistance is requested by the prisoner's attorney, partner, or family.

BOP is required to make available to prisoners information regarding their ability to request compassionate release, the timeline for submitting a request, and their right to appeal to a court the denial of a request after exhausting all administrative appeals BOP makes available to prisoners. This information is to appear in written materials for prisoners and staff, and be visibly posted

The act also requires BOP to submit annual reports to the House and Senate Judiciary Committees that provides data on how BOP is processing applications for compassionate release.

Identification for Returning Citizens

The act amends the authorization for the federal prisoner reentry initiative (34 U.S.C. Section 60541(b)) to require BOP to assist prisoners and offenders who were sentenced to a period of

community confinement[19] with obtaining a social security card, driver's license or other official photo identification, and birth certificate prior to being released from custody.

The act also amends 18 U.S.C. Section 4042(a) to require BOP to establish prerelease planning procedures to help prisoners apply for federal and state benefits and obtain identification, including a social security card, driver's license or other official photo identification, and birth certificate. BOP is required to help prisoners secure these benefits, subject to any limitations in law, prior to being released. The act also amends Section 4042(a) to require prerelease planning to include any individuals who only served a sentence of community confinement.

Expanding Prisoner Employment Through the Federal Prison Industries

The act authorizes the Federal Prison Industries (FPI, also known by its trade name, UNICOR) to sell products to public entities for use in correctional facilities, disaster relief, or emergency response; to the District of Columbia government; and to nonprofit organizations.[20] However, FPI is not allowed to sell office furniture to nonprofit organizations.

The act also requires BOP to set aside 15% of the wages paid to prisoners with FPI work assignments in a fund that will be payable to the prisoner upon release to aid with the cost of transitioning back into the community.

De-escalation Training

The act requires BOP to provide training to correctional officers and other BOP employees (including correctional officers and employees of facilities that contract with BOP to house prisoners) on how to de-escalate encounters between a law enforcement officer or an officer or employee of BOP and a civilian or a prisoner, and how to identify and appropriately respond to incidents that involve people with mental illness or other cognitive deficits.

Evidence-Based Treatment for Opioid and Heroin Abuse

Within 90 days of enactment of the act, BOP is required to submit a report to the House and Senate Judiciary and Appropriations Committees that assesses the availability of, and the capacity of BOP to provide, evidence-based treatment to prisoners with opioid and heroin abuse problems, including MAT, where appropriate. As a part of the report, BOP is required to provide a plan to expand access to evidence-based treatment for prisoners with heroin and opioid abuse problems, including MAT, where appropriate. After submitting the report, BOP is required to execute the plan it outlines in the report.

The act places a similar requirement on the Administrative Office of the United States Courts (AOUSC) regarding evidence-based treatment for opioid and heroin abuse for prisoners serving a term of supervised release. AOUSC has 120 days after enactment to submit its report to the House and Senate Judiciary and Appropriations Committees.

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[19] *Community confinement* is defined as "residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility."

[20] For background information on FPI, see CRS Report RL32380, *Federal Prison Industries: Background, Debate, Legislative History, and Policy Options*.

BOP Pilot Programs for Mentoring and Rescue Animals

The act requires BOP to establish two pilot programs that are to run for five years in at least 20 facilities. The first is a mentoring program that is to pair youth with volunteer mentors from faith-based or community organizations.[21] The other program is to use prisoners to provide training and therapy to animals seized by federal law enforcement officers and to abandoned or rescued animals in the care of organizations that provide shelter and similar services.

National Prisoner Statistics Program

The act requires BJS to expand data collected under its National Prisoner Statistics program to include 26 new data elements related to federal prisoners. Some of the data the act requires BJS to collect include the following:

- the number of prisoners who are veterans;
- the number of prisoners who have been placed in solitary confinement in the past year;
- the number of female prisoners who are known to be pregnant and the result of those pregnancies;
- the number of prisoners who received MAT to treat a substance abuse problem;
- the number of prisoners who are the parent or guardian of a minor child;
- the number of assaults on BOP staff by prisoners and the number of criminal prosecutions that resulted from those assaults;
- the capacity of recidivism reduction programs and productive activities to accommodate eligible prisoners at each BOP facility; and
- the number of prisoners enrolled in recidivism reduction programs and productive activities at each BOP facility, broken down by risk level and by program, and the number of those enrolled prisoners who successfully completed each program.

Starting one year after the enactment of the act, BJS is required to submit an annual report to the House and Senate Judiciary Committees for a period of seven years that contains the data specified in the act.

Healthcare Products

The act requires BOP to provide tampons and sanitary napkins that meet industry standards to prisoners for free and in a quantity that meets the healthcare needs of each prisoner.

Federal Interagency Reentry Coordination

The act requires the Attorney General to coordinate with the Secretary of Housing and Urban Development, the Secretaries of Labor, Education, Health and Human Services, Veterans Affairs, and Agriculture, and the heads of other relevant federal agencies, as well as interested persons, service providers, nonprofit organizations, and state, tribal, and local governments, on federal

[21] *Youth* is defined as a "prisoner who was 21 years of age or younger at the time of the commission or alleged commission of the criminal offense for which the individual is being prosecuted or serving a term of imprisonment, as the case may be."

reentry policies, programs, and activities, with an emphasis on evidence-based practices and the elimination of duplication of services.

The Attorney General, in consultation with the secretaries specified in the act, is required to submit a report to Congress within two years of the enactment of the act that summarizes the achievements of the coordination, and includes recommendations for Congress on how to further reduce barriers to successful reentry.

Juvenile Solitary Confinement

The act prohibits juvenile facilities from using room confinement for discipline, punishment, retaliation, or any reason other than as a temporary response to a covered juvenile's behavior that poses a serious and immediate risk of physical harm to any individual.[22] The provisions of the act only apply to juveniles who have been charged with an alleged act of juvenile delinquency; have been adjudicated as delinquent under Chapter 403, Title 18 of the U.S. Code; or are facing charges as an adult in a federal district court for an alleged criminal offense.

Juvenile facilities are required to try to use less restrictive techniques, such as talking with the juvenile in an attempt to de-escalate the situation or allowing a mental health professional to talk to the juvenile, before placing the juvenile in room confinement. If the less restrictive techniques do not work and the juvenile is placed in room confinement, the staff of the juvenile facility is required to tell the juvenile why he/she is being placed in room confinement. Staff are also required to inform the juvenile that he/she will be released from room confinement as soon as he/she regains self-control and no longer poses a threat of physical harm to himself/herself or others. If a juvenile who poses a threat of harm to others does not sufficiently regain self-control, staff must inform the juvenile that he/she will be released within three hours of being placed in room confinement, or in the case of a juvenile who poses a threat of harm to himself/herself, that he/she will be released within 30 minutes of being placed in room confinement. If after the maximum period of confinement allowed the juvenile continues to pose a threat of physical harm to himself/herself or others, the juvenile is to be transferred to another juvenile facility or another location in the current facility where services can be provided to him/her. If a qualified mental health professional believes that the level of crisis services available to the juvenile are not adequate, the staff at the juvenile facility is to transfer the juvenile to a facility that can provide adequate services. The act prohibits juvenile facilities from using consecutive periods of room confinement on juveniles.

Author Information

Nathan James
Analyst in Crime Policy

[22] *Room confinement* means the involuntary placement of a juvenile alone in a cell, room, or other area for any reason.

Disclaimer

PRACTICAL TEMPLATES AND MATERIALS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	**PRESENTENCE INVESTIGATION REPORT**
	)	
	)	**Docket No.:** Case Number with the presiding judge's initials
Defendant's name	)	
	)	

Prepared for: The Honorable (insert presiding judge information)

Prepared by:

Assistant U.S. Attorney

AUSA name and contact information to include address, phone number and email address

Defense Counsel (appointed or retained counsel)

Defense counsel name and contact information to include address, phone number, and email address

Sentence Date: Date and time of sentencing

Offense: Federal statute section for the offense of conviction and class of the conviction.

Penalty Statutory terms for custody; supervised release; fine; and special assessment.

Arrest Date: Date of arrest

Release Status: Information regarding release if released on bond and custody credits served as of the day of sentencing.

Detainers: Information regarding immigration detainers or pending charges.

Codefendants: Co-defendant information to include next court date and type of proceeding (i.e., sentencing, motion or status hearing)

Related Cases: Related case number and related defendant name to include next court date and type of proceeding (i.e., sentencing, motion or status hearing)

Identifying Data:

Date of Birth:	Date Of Birth
Age:	Age
Race:	Race Description
Hispanic Origin:	Hispanic Description
Sex:	Sex Description
Eye Color:	Eye Color Description
Hair Color:	Hair Description
Height: convert	Height inches
Weight:	Weight lbs.
SSN#:	SSN
FBI#:	FBI Number
USM#:	Register Marshal Number
CII#:	State ID Number
CA/DL#:	Driver License Number
ICE#:	INS Number
PACTS#:	Client ID
Education:	Education
Citizenship:	Citizen Description
Immigration Status	Immigration Status
Country of Birth:	Country Of Birth
Place of Birth:	Place Of Birth

Current Address: Name and address of facility if the defendant is in custody
Choose an item.

Legal Residence: Legal address prior to arrest or current address on bond

Alias(es): Other names used to identify the defendant

Alternate IDs: Other identifying information related to the defendant to include other state numbers or DMV information.

Restrictions on Use and Redisclosure of Presentence Investigation Report. Disclosure of this presentence investigation report to the Federal Bureau of Prisons and redisclosure by the Bureau of Prisons is authorized by the United States District Court solely to assist administering the offender's prison sentence (i.e., classification, designation, programming, sentence calculation, pre-release planning, escape apprehension, prison disturbance response, sentence commutation, or pardon) and other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities. If this presentence investigation report is redisclosed by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the federal judiciary and the Department of Justice that further redisclosure of the presentence investigation report is prohibited without the consent of the sentencing judge.

This presentence report has taken into consideration the statutory factors listed at 18 U.S.C. § 3553(a) and the advisory sentencing guidelines.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. This section will include the date a charge or charges were filed against the defendant and the federal statute of the offense. This section will also include the number of counts as charged.

2. The count of conviction and date of conviction.

The Offense Conduct

3. This section will include a summary of the offense and any post arrest statements made by the defendant.

4. This section also will include comments from the AUSA, case agent, and defense counsel.

Victim Impact

5. This section will include information from any victim impact statements.

Pretrial Supervision Adjustment

6. This section will include information regarding the defendant's adjustment on pretrial bond supervision.

Custody Adjustment

7. This section will include information on the defendant's adjustment in custody to include any positive adjustments or disciplinary actions taken.

Defendant's Statement of the Offense

8. This section will include the date and place the defendant was interviewed by the probation office. The defendant's input to include any statements of motive or remorse will be in this section of the report.

Offense Level Computation

9. The 2018 Guidelines Manual, incorporating all guideline amendments, was used to determine the defendant's offense level. USSG §1B1.11.

Count 1: Count of conviction

10. **Base Offense Level:** The base offense level for the count of conviction.

11. **Specific Offense Characteristics:** This section includes any guideline increases or decreases related to the count of conviction.

12. **Adjustment for Role in the Offense:** Role analysis and recommendation to include an increase for aggravating role, a decrease for mitigating role, or a zero for neither.

13. **Adjusted Offense Level (Subtotal):**

14. **Acceptance of Responsibility:** Determination of acceptance of responsibility to be made by the probation officer pursuant to USSG § 3E1.1(a). **-2**

15. **Acceptance of Responsibility:** Determination to be made by the Government pursuant to USSG § 3E1.1(b). **-1**

16. **Total Offense Level:**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

17. Unless otherwise indicated, the defendant was represented by defense counsel or waived attorney representation for the following case(s).

Sources of Information

18. Computer clearances were conducted through the FBI, CII, California Department of Motor Vehicles (DMV), courts and law enforcement agencies. Relevant documents were requested and are referenced for the following entries.

19. Per Welfare and Institutions Code § 827, juvenile case records are confidential. Any supporting documentation of the following juvenile history was obtained with the express agreement that it shall not be made part of any other court file that is open to the public.

Juvenile Adjudication(s)

20. Any juvenile adjudications to include the arrest date; arresting agency; charged offenses; court jurisdiction and case number; a summary of the arrest; and determining guideline for scoring. Adjustment to supervision is included if the information is available.

Adult Criminal Conviction(s)

21. Any adult convictions to include the arrest date; arresting agency; charged offenses; court jurisdiction and case number; a summary of the arrest; and determining guideline for scoring. Adjust to supervision is included if the information is available.

Criminal History Computation

22. This section will include the total number of criminal history points and criminal history category.

Other Criminal Conduct

23. This section will include any additional arrests where a conviction is not present or cases that have been dismissed.

Pending Charges

24. This section will include pending charge information.

PART C. OFFENDER CHARACTERISTICS

Immigration Information

25. This section includes immigration information relating to the defendant's immigration status; active immigration detainers; and past removals and deportations.

Personal and Family Data

26. This section will include the following background information for the defendant: date and place of birth; family information; childhood adjustment information; marital and relationship information; information on offspring; and residential history. This section will also note any sources of confirmation or corroboration of the defendant's background.

27. Release Plans: Release plans or future aspirations.

Physical Condition

28. This section will include medical information relating to any present or past medical chronic conditions or surgeries.

29. This section also includes information on identifying marks such as tattoos or scars.

Mental and Emotional Health

30. This section will include information regarding any past mental or emotional health diagnosis or conditions. Also, past suicidal ideations or attempts. Mental health counseling or treatment will be summarized in this section.

Substance Abuse

31. This section will summarize a defendant's drug and alcohol history to include types of drugs used and frequency of use. Drug counseling or treatment will also be highlighted in this section.

Educational, Vocational and Special Skills

32. This section will summarize schools or vocational programs attended including dates of attendance, programs of study and diplomas and degrees obtained. This information will be presented in chronological order.

Employment Record

33. This section will summarize present or past employment to include employer information; dates of employment; job title; and performance and pay information if available. This information will be presented in chronological order.

Financial Condition: Ability to Pay

34. This section will include a breakdown of the defendant's financial profile. Specifically, the defendant's income; expenses, assets; liabilities, and civil judgments. The probation officer will review this information to determine whether the defendant has the ability to pay a fine in the case.

PART D. SENTENCING OPTIONS

The guideline options are advisory pursuant to United States v. Booker.

Custody

35. Statutory Provisions: Minimum and maximum custody term determined by the statute of conviction.

36. Guideline Provisions: The total offense level and criminal history category are included in this section to arrive at the guideline imprisonment range.

Supervised Release

37. Statutory Provisions: The maximum term of supervised release is included in this section along with the guideline.

38. Guideline Provisions: The guideline range for supervised release is included in this section along with the guideline.

Probation

39. Statutory Provisions: This section will include information about the eligibility of probation for the defendant and recite the class of the offense. This section will also include information about whether the defendant is eligible for an alternative sentence under the guidelines.

40. Guideline Provisions: This section will include the zone of the Sentencing Table the defendant is placed in and eligibility for probation.

Fines

41. Statutory Provisions: The maximum fine is included in this section of the report.

42. Guideline Provisions: The fine range for the offense of conviction is included here.

Third Party Risk

43. Any relevant third-party information will be included in this section.

Impact of Plea Agreement

44. Based on the written plea agreement, the parties have agreed to the following advisory guideline calculations:

An outline of the guideline calculations as it is presented in the plea agreement is included in this section of the report.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

45. Any factors that may warrant an upward or downward guideline departure and the corresponding guideline is outlined in this section of the report.

PART F. FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE ADVISORY GUIDELINE SYSTEM

46. This section includes an analysis of any factors that may warrant an upward or downward variance in the case.

PROBATION OFFICER'S ANALYSIS/JUSTIFICATION

47. **In analyzing this case and formulating a recommendation, the probation officer has considered the advisory sentencing guidelines and pertinent policy statement(s) issued by the Sentencing Commission in effect on the date of sentencing, along with the factors listed at 18 U.S.C. § 3553(a).**

48. This section of the report is reserved for an independent case analysis from the probation officer to arrive at a case recommendation. This section of the report will include a summary of the preceding information and factors previously addressed in the report.

49. The final guideline range is included in this section and a custodial and supervised release recommendation is made. In cases where safety valve is pending, an alternative recommendation is included in this section in anticipation of the guideline range changing prior to sentencing.

50. Justification for supervised released conditions may be included in this section of the report.

51. This section may also include a recommendation for a fine or restitution.

SENTENCING RECOMMENDATION

Custody

52. Statutory Maximum: Statutory maximum custodial term

53. Guideline Range: Custodial guideline range

54. Recommendation: Probation officer's custodial recommendation

Supervised Release

55. Statutory Maximum: Statutory maximum supervised release term

56. Guideline Range: Supervised release guideline range

57. Recommendation: Probation officer's recommendation

Recommended Conditions of Supervision

58. That the defendant abide by the mandatory and standard conditions of supervision and the following condition(s):

The probation officer's recommended conditions of supervised release will be enumerated in this section.

Fine

59. Statutory Maximum: Statutory maximum fine

60. Guideline Range: Fine range

61. Recommendation: Probation officer's recommendation

62. Restitution: Restitution information

Special Assessment Special assessment information

Respectfully Submitted,

By:

Reviewed and Approved:

Supervisory U.S. Probation Officer

UNITED STATES DISTRICT COURT
Federal Probation System
WORKSHEET FOR PRESENTENCE REPORT
(See Publication 107 for instruction)

☐ CH ☐ Offense
☐ Sub. Abuse ☐ Motive
☐ MH ☐ Remorse
☐ Financial ☐ Scars/Tats

PACTS: _____ **FACESHEET DATA**			
Defendant's Last Name: Court Name:	First Name:	Middle Name:	Generation:
True/Birth Last Name: Name:	First Name:	Middle Name:	Generation:

DEFENDANT'S IDENTIFYING DATA				
Date of Birth:	Age:	Sex:	Race:	SSN:

Country and place of Birth (Citizenship)	Immigration Status:	Date Obtained:	Date Revoked:
Other aliases used by the defendant, if any.			

Defendant's **current** address:			Address where defendant will be residing **upon** release:		
Address:			Address:		
Address:			Address:		
City:	State:	Zip Code:	City:	State:	Zip Code:

Residence Phone No.:	Mobile Phone No.:	Collateral Phone Nos:

Residential History:

PSI Date:		Location:	
Interpreter?		Case Agent Interview Date:	

Criminal History

☐None.
☐Decline to comment on advice of counsel.

Date of Arrest	Conviction	Court	Disposition

General Description of Criminal History:

Gang Affiliation

Name of Gang/Location:	Affiliation/Documented:	Moniker:
Joined:	Status/Active?	

Additional comments including why they joined or affiliated.

ACCEPTANCE OF RESPONSIBILITY

☐Decline to comment on advice of counsel.
☐Per counsel, adopt statement from the "factual basis" section of the plea agreement.
☐Per counsel, decline to comment at this time.
☐Written statement.

Comments from defense counsel regarding the IO, departures and/or variances:

Description of Offense:

Motivation:

Commented on motive ☐ yes ☐ no

Remorse:

Provided remorseful statement: ☐ yes ☐ no

Goals/Plans after his/her release from incarceration?

DEFENDANT'S FAMILY

List the defendant's biological parents. If defendant was reared by persons other than his naturals, add the surrogate parent's names immediately below the space allocated for Father and Mother. After the parents, list all siblings, living or deceased.

Name	Relationship	Age	City, State	Occupation
	Father			
Current: Maiden:	Mother			

DEFENDANT'S CHARACTERISTICS

Describe your childhood/upbringing. Was the defendant raised in an intact family? Ever abused or neglected? Did the defendant witness domestic violence while growing up? Include history as to adolescence and early adulthood; any history or action taken by the Department of Social Services. How was the defendant disciplined? Socio-economic status-were basic needs fulfilled?

Domestic Violence Incidents in childhood home: ☐ yes ☐ no
Reports of Abuse during childhood: ☐ yes ☐ no

Do your parents or siblings have health/mental health/alcohol or drug issues/criminal history?

Is your family aware of your legal case? ☐ yes ☐ no

How did they react?

Do they remain supportive? ☐ yes ☐ no

MARITAL HISTORY

Current Marital Status: ☐Single ☐Married ☐Cohabiting ☐Separated ☐Divorced ☐Widowed

Name	Age	Married	Divorced	Citizenship	City, State	Contact

Employment status of current spouse; prior criminal record; substance/alcohol abuse; domestic violence.

Spouse healthy? ☐ yes ☐ no

Reasons for separation/divorce:

CHILDREN

The defendant has no children. ☐

Name of Child	Age	Name of other Parent	Custody	Support	City/State

Note health problems, criminal history, substance abuse, or any other significant information.
Child/Children healthy? ☐ yes ☐ no If no, identify below.

PHYSICAL CONDITION			
Height:	Weight:	Hair Color:	Eye Color:
Scars:	Tattoos:		

☐The defendant is healthy and has no history of serious health problems.

Identify all serious or chronic illnesses and/or medical conditions; hospitalizations or surgeries (shotgun/stabbing).

Medications:

On medication ☐ yes ☐ no

Name and address of defendant's physician:

MENTAL AND EMOTIONAL HEALTH

☐No evidence of a current or past mental health condition.
☐History of a mental health condition (see below).

Did the defendant suffer from a mental health condition? Specify the diagnosis, treatment, prescription and dosage of medication, and name and address of provider/Doctor.

Currently, how does the defendant describe his/her mental health?

Have you ever attempted to hurt yourself and/or anyone else (suicidal ideation)?

Describe any addictive behavior (ie: gambling, shopping, pornography, work, etc.)

SUBSTANCE ABUSE

☐Decline to comment on advice of counsel.
☐No substance abuse/dependence history.

Substance	First	Last	Quantity/Frequency	Method	Cost
Alcohol			*Socially Only ☐ yes ☐ no*		
Marijuana/Spice			*Sporadically / Monthly / Weekly / Daily*		
Cocaine			*Sporadically / Monthly / Weekly / Daily*		
Crack			*Sporadically / Monthly / Weekly / Daily*		
Methamphetamine			*Sporadically / Monthly / Weekly / Daily*		
Heroin			*Sporadically / Monthly / Weekly / Daily*		
Ecstasy/GHB			*Sporadically / Monthly / Weekly / Daily*		
PCP, LSD					
Prescription/ Opiates					

Reasons for use/Periods of sobriety?

How has your use/abuse of alcohol/drugs impacted your relationships with significant others? Is your use a problem? Addicted? Overdosed?

Were you under the influence during the instant offense? Did alcohol/drugs contribute to you committing the IO?

Inpatient/Outpatient Treatment-NA/AA Meetings: Treatment Court Ordered?

Future Treatment Plans: RDAP:

EDUCATION	
Highest grade Completed:	Reason for discontinuing:

SCHOLASTIC HISTORY

Name of School Attended (List most recent first)	City/State	Start Date	End Date	Degree, Diploma or Certificate Received

ACADEMIC HISTORY

Was the defendant placed in Special Education Classes? If yes, was the defendant registered with the Department of Education? (Specify diagnosis and treatment) Did the defendant fail or repeat any school grade? If yes, explain.

Was the defendant expelled or suspended from school? If yes, explain what caused the suspension or expulsion.

Does the defendant have any interest in furthering his/her education? If yes, explain.

LANGUAGE SKILLS

- ☐ Fluent in English
- ☐ Limited fluency in English
- ☐ No fluency in English
- ☐ Primary language:
- ☐ Mute- Fluent in international sign language
- ☐ Fluent in another language:

☐ Reads ☐ Writes ☐ Illiterate

VOCATIONAL TRAINING/SKILLS

Does the defendant have any specialized training or skill(s)? (ie: construction, computers, clerical, sales, cosmetology, farming, fisher, maintenance, healthcare, transportation, etc.)

Does the defendant have any professional license(s)? ☐Yes ☐No

If yes, what license(s)?_____

Has the regulatory agency/board been notified? ☐ Yes ☐ No

Does the defendant have formal computer or network training? If so, what kind? Is he/she self-taught?

MILITARY

☐None	Branch of Service:	Service Number:	Date Entered:	Date Discharged:

Type of Discharge:_____

If dishonorable discharged, explain why:

Highest Rank:	Rank at Separation:	Decorations and Awards:	VA Claim No.:

Describe the defendant's military service. Describe any court(s) martial or non-judicial punishments. Describe any foreign or combat service. Describe any special training or skills acquired in the service. Describe any previous VA claims.

LEISURE / RECREATION

How did the defendant spend his/her free time in the community? Recreational activity? Sports? Any volunteer work?

EMPLOYMENT / UNEMPLOYMENT HISTORY				
Start Date	End Date	Name of Employer	City, State	Nature of Work Salary, Reason for Leaving
				☐ *FT* ☐ *PT* Pay: Hourly / Weekly / Monthly
				☐ *FT* ☐ *PT* Pay: Hourly / Weekly / Monthly
				☐ *FT* ☐ *PT* Pay: Hourly / Weekly / Monthly
				☐ *FT* ☐ *PT* Pay: Hourly / Weekly / Monthly
Summarize employment history over 10 years old:				
Are you able to return to your last job? Future employment plans?				

ADDITIONAL NOTES

ADDITIONAL NOTES

SENTENCING SUMMARY CHART

USPO: _____
AUSA: _____
DEF: _____

Defendant's Name: _____ Docket No. _____
Attorney's Name: _____ Phone No.: _____
Guideline Manual Used: _____ Agree with USPO Calc.: _____
Base Offense Level: (U.S.S.G. §) (Drug Quantity, if Applicable) _____ _____
Specific Offense Characteristics:

_____ _____
_____ _____
_____ _____
Adjustments:
_____ _____
_____ _____
_____ _____
Adjusted Offense Level: _____
☐Combined (Mult. Counts) ☐Career Offender ☐Armed Career Criminal
Adjustment for Acceptance of Responsibility: _____
Total Offense Level: _____
Criminal History Score: _____
Criminal History Category:
☐Career Offender ☐Armed Career Criminal
Guideline Range:
(Range limited by: ☐Minimum Mandatory ☐Statutory Maximum) *from:* _____
Departures: *to:* _____

_____ _____
_____ _____
_____ _____
_____ _____
Adjusted Offense Level: _____
Resulting Guideline Range: *from:* _____
to: _____

Recommendation:

_____

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, ANSWER THE FOLLOWING QUESTIONS.

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

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

_____

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

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

_____

3. The defendant pleaded guilty to a two-count indictment. Count 1 charged distribution of fentanyl resulting in death of victim A. Count 2 charged distribution of fentanyl resulting in death of victim B. The guideline applicable to both counts is §2D1.1. Each offense of conviction establishes that death resulted from the use of the fentanyl.

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

_____

4. Defendant pleaded guilty to five counts of assault. The applicable guideline for all counts is §2A2.3. The defendant, a former prison guard, pepper sprayed five inmates without

cause or justification. The five inmates were all sprayed on the same occasion at the same time.

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

---

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

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

---

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2018. During the robbery, he possessed a Glock pistol and pointed it at the teller as he demanded the money from her drawer. The defendant was arrested months later after being identified by authorities. It was during the arrest at his home that agents discovered three handguns, two 9mm pistols, and a .44 Magnum revolver. The Glock pistol possessed during the robbery was never recovered. The conviction for felon in possession names only the guns found during the search of the defendant's residence.

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

---

7. The defendant pleaded guilty to one count of felon in possession (§2K2.1), one count of one count of distribution of heroin (§2D1.1), and one count of using a firearm in connection

with a drug trafficking offense, a violation of 18 U.S.C. § 924(c). The firearm that is the subject of the felon in possession count was carried by the defendant during various drug sales.

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

---

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

Is the prosecutor correct?

---

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

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

---

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

occurred from 2017 through 2018. The defendant fraudulently used stolen credit cards. The applicable guideline in this case is also §2B1.1.

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

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

---

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

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

---

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

Is the defense attorney correct?

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

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

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

_____

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

True or False

_____

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

_____

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, ANSWER THE FOLLOWING QUESTIONS.

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

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

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

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

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

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

3. The defendant pleaded guilty to a two-count indictment. Count 1 charged distribution of fentanyl resulting in death of victim A. Count 2 charged distribution of fentanyl resulting in death of victim B. The guideline applicable to both counts is §2D1.1. Each offense of conviction establishes that death resulted from the use of the fentanyl.

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

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

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

4. Defendant pleaded guilty to five counts of assault. The applicable guideline for all counts is §2A2.3. The defendant, a former prison guard, pepper sprayed five inmates without cause or justification. The five inmates were all sprayed on the same occasion at the same time.

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

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

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

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

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

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2018. During the robbery, he possessed a Glock pistol and pointed it at the teller as he demanded the money from her drawer. The defendant was arrested months later after being identified by authorities. It was during the arrest at his home

that agents discovered three handguns, two 9mm pistols, and a .44 Magnum revolver. The Glock pistol possessed during the robbery was never recovered. The conviction for felon in possession names only the guns found during the search of the defendant's residence.

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

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

7. The defendant pleaded guilty to one count of felon in possession (§2K2.1), one count of one count of distribution of heroin (§2D1.1), and one count of using a firearm in connection with a drug trafficking offense, a violation of 18 U.S.C. § 924(c). The firearm that is the subject of the felon in possession count was carried by the defendant during various drug sales.

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

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

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

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

Is the prosecutor correct?

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

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

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

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

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

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

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

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

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

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

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

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

Is the defense attorney correct?

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

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

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

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

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

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

True or False

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

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

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