

Full Service Federal Sentencing: Treating Sentencing as Trial

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2017 Minnesota Criminal Justice Institute CLE
August 22, 2017
1:15-2:15
Room 101, Radisson Blu Hotel
Minneapolis, MN

“Full Service” Sentencing
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This CLE will provide a brief overview of the basics of federal sentencing, but will focus primarily on how a criminal defense attorney can provide his or her client with advanced sentencing representation. The brief overview of the basics will cover general procedure, the Federal Sentencing Guidelines, motions for downward departure based on cooperation, § 3553(a) factors, working with prosecutors and probation officers, and the sentencing memo. The advanced portion of this CLE will consider how to develop and shape the record to give one's client the best possible chance to obtain a great sentence. Topics covered will include: addressing pending charges in state courts, enabling a client's exemplary cooperation, working with psychological and other experts, obtaining medical and psychological records, convincing prosecutors to decertify priors under § 851 and recommend favorable sentences, and requesting recommendations for incarceration at particular facilities. In short, “full service” sentencing means generating facts and shaping reality just as an attorney does in anticipation of trial.

- I. The basics
 - a. Federal sentencing procedure:
 - i. pre-indictment→
 1. Goal: keep client from being indicted
 2. Method: full cooperation
 3. Benefits: no federal indictment, may be state indicted
 4. Drawback: have to inform on everyone, risk of client making false statements, don't get discovery
 5. Pitfalls: client may lie, information may not be good enough, client may be more guilty than agents know
 6. Solution: close communication with client re proffer interview, careful analysis of client's culpability, usually don't have to worry about quality of information
 7. PRO TIPS:

- a. Tell a story to the AUSA, starting now. This story should be coherent throughout the process (part of the story is “my client is [sick, an addict, etc.], I am only now learning just how” sick.
 - b. Start now with your client to develop a genuine treatment/rehabilitation plan
 - c. Start now to avoid 851 certifications, prevent your client’s “f**k you” attitude
 - d. Get your client’s autobiography: they know relevant things, but not necessarily that they are relevant (clients may have difficulty opening up to people, may not have been rewarded in their lives for opening up)
- ii. counsel appointed/hired(?)→
- iii. indictment→
 - 1. Goal: avoid 851 certifications, cooperate or prepare for trial
 - 2. Method: speak with AUSA as soon as possible, keep client from adopting a “f**k you” stance
 - 3. Benefits: Can fully apply 3553(a), no mandatory minimums, can set client up for success
 - 4. Drawback: If cooperation, don’t necessarily get full discovery, don’t get a trial, client may plead guilty but be innocent
 - 5. Pitfalls: plead too early and client can’t demonstrate progress or view much discovery, plead too late and prosecutor may not accept the deal. If trial, client gets a trial penalty
 - 6. Solution: Stay friendly with the AUSA, stay in contact with AUSA, share with AUSA your client’s progress — change the AUSA’s mind about your client through concrete evidence. Use status reports and other motions to signal to court and AUSA what you want to signal.
(status report)
 - 7. PRO TIPS:
 - a. Tell AUSA about your client — blunt the prosecutor’s zeal
 - b. Cooperation above and beyond (client’s proactive cooperation with state, efforts to resolve child support arrears, etc.)
- iv. counsel appointed/hired→
- v. plea then cooperation(?)→
 - 1. Goal: set client up for the best sentence possible from the judge, the best recommendation possible from the AUSA, and create reasons to recommend the best sentence possible
 - 2. Method: Get experts (and funds from the court for experts), move to continue sentencing, stay in friendly contact with AUSA, show the AUSA how good your client is, show your client how good he can be. Convince your client to help himself for himself, not for a good sentence.
 - 3. Benefit: can set up client for a great sentencing outcome
 - 4. Drawbacks: AUSA and the court may want to hurry up the sentencing

5. Solution: Give the AUSA and the court reasons to delay sentencing and work, if not in favor of your client, at least blunt their zeal against her.
6. PRO TIPS
 - a. Resolve pending state charges, seek to cooperate on state charges
 - b. Resolve civil matters, like child support
 - c. Get experts. Inmates have drug addiction, TBI, childhood abuse, low IQ, mental illness. **(statistics on inmates)**
 - d. Get experts on drug amounts, child porn amounts, and other quantifiable variables (these amounts don't reflect culpability, especially meth) **(Miller article)**
- vi. trial(?) →
- vii. sentencing →
 1. Goal: Draft a sentencing memorandum that is informed by the hard work you and your client have done to get to this point, present witnesses at the sentencing hearing to support your client, prepare for oral argument
 2. Method: Treat this as the trial, for which you have prepared extensively, generated discovery and other evidence, prepared witnesses and ensured they are in court.
 3. Benefit: The best sentence possible for your client.
 4. Drawbacks: Client's sentence depends upon many different people
 5. Solution: Be as prepared for the sentencing hearing as you would be for the trial of your life.
 6. PRO TIPS
 - a. Sneak 3553(a) factors into 5k1.1/3553(e)-limited sentencing
 - b. Client's health and prison placement **(Hofstad brief)** — when BOP cannot care for a D. Requesting incarceration at particular facilities (when the BOP *cannot* accommodate needs).
 - c. Using Sentencing Commission statistics and addressing sentencing disparities.
 - d. Sentencing as a trial, but everything is fair game and evidence rules do not apply, but you still have to support your argument with evidence.
 - e. Keep telling the story.
- viii. Appeal
 1. Goal: to avoid any appealable issues
 2. Method: in district court, fully brief issues and develop facts to limit the court's discretion in favor of your client
 3. Benefit: you've done everything you can, up front, for your client
 4. Drawbacks: none
 5. District court duty: Court must address all of the non-frivolous arguments. By fully briefing them, the court will be required to grapple with good arguments and developed facts.

6. Appellate standard: review for reasonableness under the abuse of discretion standard
7. PRO TIPS
 - a. Fully briefing an issue *requires* the court to consider it. The more convincing your argument, the narrower the discretion of the court.
- b. Federal Sentencing Guidelines: an overview
 - i. Four approaches:
 1. Guidelines analysis
 2. Statutory min/max
 3. 851 certifications/5K1.1 and 3553(e) cooperation
 4. 3553(a) factors (**18 U.S.C. § 3553(a)**)
 - ii. **Sentencing exercise**
 - iii. **Guidelines worksheet**
 - iv. **Sentencing table**
 - v. Relevant conduct is the “cornerstone” of the Guidelines, but the designated “relevant conduct” favors harsher sentences.
- c. Federal Sentencing Guidelines: when numbers are involved
 - i. **U.S.S.G. § 2G2.2**
 - ii. **U.S.S.G. § 2B1.1**
- d. Federal Sentencing Guidelines: drugs
 - i. **U.S.S.G. § 2D1.1**
- e. § 851 certifications
 - i. **§ 851 certification**
 - ii. Downward departure based on cooperation (5K1.1, 18 U.S.C. § 3553(e))
- f. Probation officer interview/PSIR
- g. Sentencing memo
 - i. **Sentencing memorandum**
 - ii. **Psych eval packet cover and TOC**
- II. Going beyond the basics
 - a. Addressing a defendant’s underlying issues
 - i. **Statistics on inmates**
 - b. Getting an expert evaluator/witness
 - i. **Motion for funds for expert psychologist**
 - c. Challenging the numbers in the Guidelines
 - i. **Miller article**
 - d. Using sentencing statistics
 - i. **8th Circuit statistical information packet**
 - ii. **Quick facts (meth)**
 - iii. Aging out of crime
 - e. Using pleadings to your strategic advantage
 - i. **Status report**
- III. Open questions with the Guidelines
 - a. What does “life” equate to?
 - i. Sentencing Commission says life = 470 months.
 - ii. Prosecutors (in ND) say life = 360 months.
 - iii. The time isn’t definite.
 - b. What provisions are [otherwise unconstitutionally] vague?

- i. Johnson→Beckles→Dimaya: --
 - 1. *Johnson* (2015): D pleads guilty to being a felon in possession, gets an enhancement under the ACCA's residual clause for three prior "violent felonies" (18 U.S.C. § 924(e)(1)), defined as "conduct that presents a serious potential risk of physical injury to another." D's prior crime was possession of a sawed-off shotgun. Held: residual clause was unconstitutionally vague because it requires courts to look to the "ordinary case" of, say, possession of a sawed-off shotgun. But there is no "ordinary case."
 - 2. In light of Johnson, the U.S. Sentencing Commission got rid of the identical residual clause in the career offender provision. In its place is a list of enumerated crimes that count as "crimes of violence" which can increase a D's offense level and/or criminal history category.
 - 3. *Beckles* (2017): D convicted of being a felon in possession, gets a sentencing enhancement under USSG § 4B1.1(a)'s residual clause, enhancing sentences for prior "crimes of violence", defined at § 4B1.2(a) as the use, attempted use, or threatened use of physical force against another. Held: Guidelines are not subject to vagueness challenges, because the Guidelines do not fix sentences; they merely guide judicial discretion.
 - 4. *Dimaya* (2017): Considers whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions re an alien's removal, is unconstitutionally vague. Sec. 16(b) defines "crime of violence" in virtually the same way that the ACCA did in Johnson (exchanging "serious potential risk" with "substantial risk" and "conduct" with "in the course of committing the offense"). This provision triggers deportation. SCOTUS is still considering *Dimaya*.
 - 5. *Dimaya* and sentencing: under § 2L1.2(b)(1)(C) (re unlawfully entering or remaining in the U.S.), a D can get additional offense level points for committing a prior "aggravated felony." This term is defined in 8 U.S.C. § 1101(a)(43), which in turn defines it as a crime of violence in 18 U.S.C. § 16.
 - 6. THE UPSHOT: can't challenge Guidelines as vague, but may be able to challenge statutes as vague if the Guidelines refer to them.
- c. Drugs minus 2
 - i. **Richter pet for cert**
- d. Self-representation on resentencing, and major Guidelines amendments
 - i. Some amendments are retroactive (30 of appx 800 have been deemed retroactive). If they are, the question of self-representation may arise
 - 1. **Tollefson pet for cert**
 - ii. Retroactive amendments may also give rise to whether 3553(a) factors can be applied. Commission says no, SCOTUS in *Dillon v. U.S.* strongly suggested no, but this conclusion isn't unassailable or universal.
- e. Defendant's extraordinary physical condition
 - i. **Hofstad brief**
- f. Effect of future amendments (these are proposed 2017 amendments)

- i. Acceptance of responsibility: would delete the sentence that states “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The proposed amendment would instead provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under §3E1.1(a).
- ii. Potential amendments on synthetic drugs (like bath salts, spice, or K2):
Current Commission thinking is that a court would first determine
 1. “Whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance referenced in this guideline,”
 2. “Whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline,” and
 3. “Whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.”
 4. Second, once the court determines the most closely related controlled substance, the court would then determine the equivalent quantity of drug and use this quantity for the base offense level.

IV. Shaping the case, creating the facts

- a. Create leads through communication with client, client’s family and associates
 - i. Get client’s autobiography
 - ii. Sit with client multiple times, explore his life with him
 - iii. Speak with family members, friends, etc.
- b. Create facts through investigation and experts
 - i. Get every expert possible, as indicated by the facts
 - ii. If the synthetic drug amendment passes, you’ll need a drug expert
- c. Manipulate prosecutor’s outlook through formal and informal conversations
 - i. Disclose key facts at appropriate times (client’s past coerced drug abuse, for example) — don’t try to change prosecutor’s mind, but inform the prosecutor and let him come to his own conclusion
 - ii. Enlist the court in putting pressure on the prosecutor (through status reports, motions, etc.)
- d. Form and manipulate court’s outlook through motions and hearings
 - i. The court knows little/nothing about the case. Assume that. Take every opportunity to help the court form its opinion, shape its assumptions and expectations.
- e. Cooperation: on the instant case, other cases, state cases, child support, etc.
 - i. Cooperate in state cases (get state PD for your client, or agree to attend the proffer interview yourself)
 - ii. Prepare client for excellent proffer interview
 - iii. Prepare agents for excellent proffer interview (for example, make agents aware of a client’s particular mannerisms, which could be misinterpreted)

- f. Encourage client to get into counseling, work program, etc. for herself, not for sentencing
- g. Probation interview
 - i. Make sure it is in person
 - ii. Prepare client for the interview
 - iii. Provide key documents to probation officer before interview
 - iv. Guide the interview where appropriate
- h. Use the collateral consequences
 - i. Is your client a hunter? Talk about the prohibition on owning a gun.
 - ii. Is your client politically active? Talk about the ban on felons voting.
- V. Problems that prevent justice
 - a. 851 certifications (prosecutors certify simply because the court regularly undercuts them)
 - i. Get to the prosecutor and client before prosecutor certifies
 - b. Judicial discretion combined with defense counsel's failure to fully brief issues
 - c. Proliferation of crimes and felonies (overcriminalization)
 - i. Address the legislature (ND law making personal use a misdemeanor)
 - d. Failure to address individuals' problems before they commit crime
 - e. Other mandatory minimums
 - i. Charge bargain, if you have leverage
 - f. Gamesmanship: prosecutors withdraw potential deal because defendant took too long to accept (prosecutors have deadlines)
 - i. Get to your client early
 - g. Failure to address the "addict's deathly triad" (federal charges, conspiracy, addiction)
 - i. Unavailability of vital services in rural areas
 - ii. Failure of defendant or family to recognize problems (a client's car accident with TBI, for example)
 - iii. Conspiracy charges levied for evidentiary purposes, to induce pleas, and jack up sentences
 - iv. Federal charges take defendants out of the community, result in much longer sentences, more severe incarcerative settings
- VI. Solutions
 - a. Eliminate 851 certifications, give courts a role in rejecting certifications, or at least prosecutors should limit them to their intended use: against large-scale and repeat drug traffickers, not people stuck in the addict's deathly triad.
 - b. Reform federal and state drug laws, legalize a lot, trade enforcement resources for treatment resources
 - c. Shift resources from prosecution and law enforcement to treatment for TBI, addiction, childhood abuse, etc.
 - d. Tighten up federal conspiracy law, eliminate *Pinkerton* liability
 - e. Create mechanisms to encourage state, not federal prosecution

SENTENCING EXERCISE

Conviction: Count 1

Offense: Armed Bank Robbery; violation of 18 U.S.C. § 2113(a) and (d)

Maximum Statutory Penalties: 25 years and/or \$250,000; Class B Felony: up to 5 years supervised release following imprisonment; up to 3 years imprisonment upon subsequent revocation.

Note: an additional count of conviction for 18 U.S.C. § 924 (c) (use, carry, possession of firearm in relation to a crime of violence) would have required a consecutive sentence of at least 5 years imprisonment.

- committed robbery
- a federally insured bank
- carried a .38 caliber revolver (operational and loaded)
- pushed a teller, resulting in bodily injury (cut on forehead, bruises, contusions)
- restrained a customer (used packaging tape to bind and put into storage area)
- \$18,000. in bank loot taken, \$8000 recovered upon arrest 6 weeks after robbery
- within few days of apprehension defendant provided full information to the government and announced intentions to plead guilty

- defendant is a 23 year old male
- raised in broken family
- was sickly during childhood and missed a lot of school
- dropped out of school in the 9th grade and is functionally illiterate
- no job skills
- work history is that of construction laborer
- spotty employment record; currently unemployed and seeking work
- drinks 2 to 6 beers daily; occasional marijuana use
- lives with older sister
- never married
- has one child for which he is under a support order
- at time of robbery the defendant was in arrears in child support, had outstanding bills and had not contributed for some time to sister for living arrangements
- financial records show that within two weeks following the robbery, the defendant became current in his child support with a payment of \$4000, paid off outstanding debts of \$2000, gave his sister \$1000 and made a \$1000 down payment on a used car
- defendant has no noteworthy assets
- the defendant reports he was feeling pressure due to financial and family obligations and robbed the bank to get "out of the hole." In addition to the \$8000 spent on financial obligations and the down payment for an automobile, the defendant states that he used the remaining \$2000 to buy clothes and "party."
- the defendant has prior criminal record resulting from conduct committed after the defendant was 18 years old and disposed of in state court, as follows:

5 years ago	auto theft	2 years probation
2 years ago	grand larceny	6 months jail

Worksheet A (Offense Level)

Defendant _____ District/Office _____

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

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

Guidelines Manual Edition Used: 20____ (NOTE: worksheets keyed to the Manual effective November 1, 2010)

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

1. Offense Level (See Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

<u>Guideline</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Sum		<input type="text"/>

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable enter "0."

\$ _____

3. Role in the Offense Adjustments (See Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

\$ _____

4. Obstruction Adjustments (See Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

\$ _____

5. Adjusted Offense Level

Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

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

☐

If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions

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

Step 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various “A” Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: A “group” may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

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

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

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

Count number(s): _____

 _____ (unit)

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

Count number(s): _____

 _____ (unit)

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

Count number(s): _____

 _____ (unit)

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

Count number(s): _____

 _____ (unit)

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

Count number(s): _____

 _____ (unit)

6. **Total Units**

(total units)

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

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

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

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

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

Worksheet C (Criminal History)

Defendant _____ Docket Number _____

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)
2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and
2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)
3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and
1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only two instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
- b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and

4. Sum of Criminal History Points for prior sentences under §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3).

Worksheet C

Defendant	Docket Number
-----------	---------------

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

10

6. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was counted as a single sentence which also included another sentence resulting from a conviction for a crime of violence. (See §§4A1.1(e) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered a single sentence. Otherwise, enter 0 Points.

10

[illegible]

- 7. Total Criminal History Points** (Sum of Items 4-6)

10

8. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

<u>Total Points</u>	<u>Criminal History Category</u>
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

Worksheet D (Guideline Worksheet)

Defendant _____

District _____

Docket Number _____

1. **Adjusted Offense Level** (From Worksheet A or B)
If Worksheet B is required, enter the result from Worksheet B, Item 9.
Otherwise, enter the result from Worksheet A, Item 5.

2. **Acceptance of Responsibility** (See Chapter Three, Part E)
Enter the applicable reduction of 2 or 3 levels. If no adjustment is applicable, enter "0".

3. **Offense Level Total** (Item 1 less Item 2)

4. **Criminal History Category** (From Worksheet C)
Enter the result from Worksheet C, Item 8.

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal/Repeat and Dangerous Sex Offender**
(see Chapter Three, Part A, and Chapter Four, Part B)

- a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A."

- b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**
Enter the applicable guideline range from Chapter Five, Part A.

Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)
If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A."

Months

☐

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

☐

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

Worksheet D

Defendant _____

Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6 or Item 7, if applicable.)
(See Chapter Five, Sentencing Table)

☐

Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐

Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐

Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(d)(2))

☐

Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of Term of Probation** (See §5B1.2)

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

☐

At least one year, but not more than five years if the offense level total is 6 or more

☐

No more than three years if the offense level total is 5 or less

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(10)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

Defendant _____

Docket Number _____

12. Supervised Release (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

- ☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- ☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release): (Check applicable box)

- ☐ Class A or B Felony: Three to Five Year Term
- ☐ Class C or D Felony: Two to Three Year Term
- ☐ Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- ☐ If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. _____

13. Conditions of Supervised Release (See §5D1.3)

List any mandatory conditions ((a)(1)-(8)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable: _____

14. Restitution (See §5E1.1)

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

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

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

15. Fines (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

a. Special fine provisions

- ☐ Check box if any of the counts of conviction is for a statute with a special fine provision. (This does not include the general fine provisions of 18 USC § 3571(b)(2), (d))

Minimum

Maximum

Enter the sum of statutory maximum fines for all such counts \$ _____

b. Fine Table (§5E1.2(c)(3))

Enter the minimum and maximum fines \$ _____ \$ _____

c. Guideline Range of Fines

(determined by the minimum of the fine table (Item 15(b)) and the greater maximum above (Item 15(a) or 15(b)))

\$ _____ \$ _____

d. Ability to Pay

- ☐ Check this box if the defendant does not have an ability to pay.

Worksheet D

Defendant _____

Docket Number _____

16. Special Assessments (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction:

- \$25 for each misdemeanor count of conviction
- Not less than \$100 for each felony count of conviction

§ _____

17. Additional Factors

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

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Completed by _____ Date _____