U.S.S.G.—A Bird's Eye View

A. General Tip:

If you are an online person like me, you may want to bookmark in your browser (and save to your Home Screen on your phone and your iPad) the Commission's U.S.S.G. "app." To open it on your computer, use this link: https://guidelines.ussc.gov/.

You may also want to bookmark an annotated version of U.S.S.G. that the Commission offers online. I have used this to get the history on certain guideline provisions and amendments in the past. You can access the annotated version here: https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated.

B. The sentencing table

You will find this table in Ch.5,Pt.A. If you practice federal criminal defense, you will become INTIMATELY familiar with this table. The whole point of calculating guidelines is to find out where your client will end up on on this table depending on the path he or she takes in the case.

C. For me, the starting point is always criminal history.

This is addressed in Ch.4, but it is always my starting point when calculating guidelines. This is because criminal history is important for: (1) analyzing whether statutory enhancements apply or could apply, (2) calculating offense levels for commonly used guideline provisions such as U.S.S.G. §2L1.2 (illegal reentry) or U.S.S.G. §2K2.1 (gun cases), and (3) alerting you to possible career offender enhancements.

The basic rules for calculating criminal history are found in U.S.S.G. §4A1.1 and U.S.S.G. §4A1.2. Here's what to watch out for:

- **Calculate your lookback periods**: §4A1.2(e); and in cases of offenses committed before age 18, §4A1.2(d)(2); address the lookback periods. If the relevant time period for the prior sentence falls outside of the lookback period, the conviction has "aged out." That's why it's important to get a firm understanding of your lookback period before you try to score criminal history. General rules are: 5 year lookback period for offenses committed before age 18, 10 year lookback period otherwise, and 15 year lookback period for sentences greater than 13 months. If the 10 year lookback period applies, the sentence needs to have been imposed within that timeframe. If the 15 year lookback period applies, if the client was incarcerated within that time period, it counts. For juvenile cases, the lookback period is always five unless the person was convicted as an adult; whether the sentence needs to be imposed within the lookback period or the client need only be incarcerated during the lookback period depends upon the length of the sentence.
    - Lookback periods are calculated from the earliest offense date. Make sure that you understand this date. For instance, in illegal reentry cases, if the client admits to ICE that he entered the U.S. years before ICE encountered him, then certain CH may count that otherwise would have aged out. This has severe consequences both w/r/t CH and the offense level in these cases.

- **If the conviction "counts"**: §4A1.1 addresses this. General rules are: >13 months are worth 3 points, 60D or more are worth 2 points, and any other sentence is worth 1 point. You cannot have more than 4 1-pointers. If your client was under a "criminal justice sentence," that's a + 2. Be on the lookout for §4A1.1(e) points – I've missed these before. Also, if a prior sentence is relevant conduct, it doesn't count. This is set out in the definition of "prior sentence" in §4A1.2, comment. (n.1).
    - Texas deferred adjudications will count if there's been an admission of guilt, even if successfully completed. §4A1.2(f).
- **Be on the lookout for the single sentence rule**: This is set forth in §4A1.2(a)(2). Best way to spot this issue: when you have the same arrest date, the same sentence dates, and similar case numbers.
- **Be on the lookout for minor offenses**: Refer to §4A1.2(c) for this set of rules. Some minor offenses never count, whereas others only count when there's a specific sentence imposed for the offense. A common one here is Failure to ID.
- **Revocations matter**: Refer to §4A1.2(k) for this set of rules. Revocations affect the length of a sentence and may affect whether the sentence falls within the lookback period. For instance, an initial probation sentence that counts (+1), which is revoked with a 180D revocation sentence (+2), will increase the points that sentence is worth. An initial probation sentence that has aged out with a 180D revocation sentence will remain aged out, however. An initial probation sentence that is revoked with a 2Y sentence will trigger the 15 year (vs. the 10 year) lookback period, and it may convert a 0 point offense into a 3 point offense. Also, review Application Note 11, the multiple revocation rule. This rule can save your client a lot of points if the client is revoked on multiple prior sentences all at once.

D. Understand your statutory bounds

This is outside the purview of today's presentation, but it is important when calculating guidelines. No matter what your guideline range is, if it's not within the minimum and maximum allowed by law, the range will have to be adjusted. Refer to Ch.5,Pt.G for this set of rules. Remember that sentences on multiple of counts of conviction can be stacked (i.e. run consecutive), which will impact your "maximum" in the case. There are also certain statutes that require a mandatory stacked sentence, such as 18 U.S.C. § 924(c). You want to have these in mind so that you can cross check this information once you have calculated the guidelines. Be on the lookout for possible statutory enhancements, such as Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). I have had a client who I believed qualified for ACCA, but who neither the government nor the USPO recognized as such. It's important for you to know, however, as you advise your client.

E. Calculate your offense level

Ch.1's "Introduction" talks about the "theory" behind the U.S.S.G. I found it very helpful to review this when I first started, in terms of my comprehension of the Guidelines *and* my ability to explain to clients how the Guidelines are structured and the theories underlying the various rules. The biggest takeaway I had from Ch.1 is that the Guidelines have a mixed "real offense" and "charge offense" sentencing scheme. The "charge offense" portion is reflected by matching certain guidelines

provisions to certain charges. To know which guideline provisions apply, go to Appendix A and look up your statute. Then, you go from there to the specific guideline provision of Ch.2. Sometimes you will have multiple guideline provisions listed for a particular statute; I have come across this with robbery cases. In that case, I recommend crowdsourcing your questions, i.e. ask your colleagues what the U.S. Probation Department has done in prior cases, to best predict what will be done in your case. The "real offense" portion is reflected in the "Specific Offense Characteristics," i.e. the offense level enhancements set forth in a particular guideline. The most common guideline provisions that I work with are: §2B1.1 in fraud cases, §2D1.1 in drug cases, §2K2.1 in gun cases, and §2L1.2 in illegal reentry cases. We can't go into detail on these provisions in this presentation, but your biggest takeaway should be to **READ THE COMMENTARY**. You will either find landmines or gems there.

Arguably, however, the most important guideline provision for calculating offense level is not even in Ch.2. It is in §1B1.3 in Ch.1—the infamous **RELEVANT CONDUCT** provision. This is another example of the "real offense" sentencing theory. Best way to explain this is through the example of a drug case: if you're good for five deals but you're only convicted on one, you will be sentenced on the five. One of the key tools that I use for fighting relevant conduct (although it's rarely successful because the law is so bad for us) is to fight the sufficiency of the evidence to support an enhancement. This is separate from claiming that the facts are *incorrect*, which can jeopardize acceptance (see below); this is simply an argument that the facts are not *sufficient* for the court to find the facts necessary for the enhancement. For more information on fact-finding at sentencing, refer to §6A1.3.

Read, read, and reread the relevant conduct guideline and its commentary. I have read it numerous times; and just recently, I discovered a new part of the relevant conduct guideline that rendered obsolete objections that I had prepared in one of my cases.

F. Chapter 3—role adjustments, grouping, obstruction, and acceptance of responsibility.

You may be tempted to stop at Ch.2, get your offense level and CHC, and find your range in the sentencing table. **DO NOT DO THIS**. The portions of Ch.3 may apply in every case, so in every case, a complete calculation will require you to review the application of Ch.3. Here, I've highlighted the most important or common provisions that I have come across in my practice.

First, acceptance of responsibility, §3E1.1. This is where the main benefit is to pleading guilty. You get two levels off from the court, and an additional -1 if your offense level is 16 or greater and the prosecution moves for it. Common scenarios to watch it for are: First, clients may get acceptance taken away, even if they have pled guilty, if out on bond and there are positive drug tests. I have never specifically encountered this myself, but many lawyers in my office have. My understanding is that taking away acceptance for bond condition violations typically only occur when the client has violated *after* the plea of guilty, but know your judge! Second, if you are going to litigate a motion to suppress, you should advise your client about the risk of losing the additional acceptance point from the prosecution. If you push a case to trial and plead at the last minute, you may also lose the -1 from the prosecutor.

Second, obstruction, §3C1.1. This is where a client going to trial and testifying may actually end up with a five level swing towards the bottom of the table rather than just the loss of acceptance. Also, I recently had a client whose PSR Addendum came back without the acceptance reduction and a 2-level enhancement for obstruction added, despite the fact that the client had pled guilty, because of an alleged escape attempt. I had to withdraw because the alleged coconspirator was also an FPD

client, but that case illustrates how important it is to be aware of this obstruction enhancement. An obstruction enhancement may also apply if the client evaded law enforcement in a very dangerous manner, such as by engaging in a high-speed chase. Refer to §3C1.2 if you're concerned about this.

Third, look out for minor role adjustments, *especially* in drug cases. Refer to §3B1.2 for these rules. This can have a HUGE impact on the client's sentencing guideline range. FPD's resident expert on this is Stephen Green. For now, you should consider minor role in every drug case. If applied, it can reduce your offense level through the adjustment, cap the base offense level tied to drug weight quantity, and take away the application of the importation enhancement, commonly applied in meth cases. Also, if you handle theft of mail cases, a U.S.P.S. employee automatically will trigger the abuse of position of trust enhancement. Refer to the commentary of §3B1.3.

Fourth, if you have multiple counts, refer to Ch.3,Pt.D for grouping rules. For instance, drug ad gun cases group, robbery cases do not group. Read through this section for the grouping rules' application to your case. **Be aware of plea offers that require you to stipulate to more criminal conduct than just to the offense of conviction.** This may trigger enhancements, even if those stipulated offenses are extraneous to the offense of conviction, if the convictions would otherwise not group. A common place where I see this is robbery cases. I've gotten plea paperwork before that offered to drop two counts in exchange for a plea to one count of robbery but required the client to stipulate in the factual resume to the other two. Apart from the overall maximum and possibility of stacked sentences for revocation of supervised release in the future if convicted on all counts, that plea offer offered very little, i.e. practically nothing, to my client in terms of his sentence for *that* specific case. Don't be fooled! For the rules on stipulated offenses, refer to §1B1.2.

G. Double check career offender and other enhancements in Ch.4,Pt.B.

If your client is charged with a "crime of violence" or a "controlled substance offense," and your client has at least two violent-sounding or drug-related offenses, be on the lookout for career offender enhancements. Whether a charge is actually a crime of violence or a controlled substance offense, and whether any priors count as a crime of violence or controlled substance offense, is beyond the purview of this presentation. Definitions are found in §4B1.2, BUT do not rely on these definitions. **Research the caselaw, crowd source your questions, and do not assume that a particular offense is a crime of violence or a controlled substance offense because it sounds like it.** You will be doing a disservice to your client if you do that. This is a particularly complicated part of the law that calls for the application of the categorical approach.

Also found here is the ACCA enhancement and the Repeat and Dangerous Sex Offender Against Minors enhancement. I've seen these apply in my practice.

H. Am I done yet?

Almost! You got your criminal history category, your offense level, and your sentencing table. Find the range that applies if your client goes to trial and loses, and the range that applies if your client pleads guilty. Running guidelines is issue spotting; you can't know for sure what you will actually have to litigate until the PSR comes out. But I always advise the client on worst case scenario, making notes for myself as I go so that I have a reminder when objections are due.

What if my client committed the offense when a different guideline applied? Bad news! You may have to do the whole exercise again but with a different version/year. Refer to §1B1.11 for guidance. I've encountered this in illegal reentry cases, where the USPO applied the 2018 guidelines

for an offense committed/completed when the 2016 guidelines were in effect. My office litigated this issue to the Fifth Circuit and won, with drastic implications. The 2018 guidelines were harsher, and the Fifth Circuit agreed with us that this was an Ex Post Facto violation.

Once you've decided the guideline that applies and you run your calculations, now its's time for your sentencing advocacy! For the guidelines, you want to refer to Ch.5. If you have a high CHC for someone "not that bad," consider §4A1.3. Please also note that some departures may be set forth in the commentary to the specific guideline that applies, such as Application Notes 7 & 8 in §2L1.2.

Also, if you've got pending state cases or an undischarged state sentence, it is worth reviewing §5G1.3. This addresses consecutive and concurrent sentencing w/r/t the federal and state sentences.

Finally, if you have a client who has no criminal history, there is a nugget in §5C1.1 for you. It is the "nonviolent first offender" definition in Application Note 4. Take a look at it and see if you can argue for an alternative sentence for your client based on this provision.

Hope you find this handout helpful!

-MGV