Taming Cerberus: Becoming a Probation Officer Whisperer from the PSR interview through Sentencing

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1. Winning the Battle Before It is Fought

Manipulate Probation’s Impact on the Sentencing Process

I. The Plea:

Plea Agreements/Plea Colloquies:

• Charge Bargaining –
  • limit exposure by the nature of charge;
  • the Statutory Penalties; and the Time Period

• Do not Stipulate to Guideline Enhancements

• Craft Factual Basis that Limits Exposure
Practice Tips

• Use the Magic Phrase in Statement of Facts

the amount of drugs (or loss) that “is readily provable and reasonably attributable” to the Defendant is X.

• But Beware USSG Section 1B1.2

A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offenses shall be treated as if the defendant had been convicted of additional counts charging those offenses.
II. The PSR Interview
The Ten Commandments of the PSR Interview

I. Attend and Be a Buddhist

II. Know Your Probation Officer

III. Prepare Your Client

IV. Do Not Discuss Offense Conduct

V. Do Not Discuss Criminal History

VI. Watch Out for Special Skill
VIII – X: Planting Seeds

VIII. Control What you Can Control

-- Client’s History and Characteristics (Childhood)

-- Client’s Medical History

-- Client’s Substance Abuse History
    + Be Careful of the Type of Drug

-- Education and Employment
VIII – X: Planting Seeds

IX. Obtain Records

--- military

--- education

--- medical/psych

DO NOT RELY ON PROBATION
VIII – X: Planting Seeds

X. Provide Information
   -- Letters
   -- Certificates/Awards
   -- Petitions
   -- Psych Reports/Medical Records
3. The PSR Response

I. Draft objections as legal, not factual objections

II. Know Your Criminal History Principles

III. Know the Guideline Application Notes

IV. Address the PSR’s customary dismissal of variances/departures
I. Legal Objections:

• Be Mindful of Losing Acceptance of Responsibility

• If you agreed to a factual basis during the plea, you are stuck with it

• Legal Objections include arguments that specific facts do not support an enhancement

• Start your written response with the phrase “I have the following legal objections to the PSR”

• Don’t Show all Your Cards

• Rely on language of the Guidelines and Application Notes
II. Criminal History

• The date that the instant offense commences is the date that determines whether a prior conviction counts.

  -15 years for any sentence over 13-months.

  -10 years for any sentence under 13-months.

• Critical Distinction:

  • The 15-year period runs from the Defendant’s release from custody.

  • The 10-year period runs from date of the Imposition of Sentence.
Defendant A is convicted of possession with intent to distribute marijuana. The date of the offense is April 20, 2012.

Defendant A has a prior felony conviction for distribution of cocaine. A sentence of 1-year imprisonment was imposed on April 18, 2002. Does this conviction count toward Defendant A’s criminal history?

NO

Any sentence up to 13 months is not counted unless the sentence was imposed within 10-years from the date of the instant offense. See Application Note 2 to § 4A1.2.
Narrowing

• At times, you want to shorten the time period of the instant offense to potentially exclude priors.

• If you have a prior that is at or near expiration, then you want the instant offense to commence at the latest possible date.

• Beware of language that states from a date unknown as that allows the Government to argue for an earlier date for the offense conduct.

• In conspiracy cases, you want language in the charging document, plea agreement, and PSR that has your client’s criminal conduct begin on the date he joined the conspiracy -- supported by App. 3B to USSG § 1B1.3.
Practice Tip

Beware of Relevant Conduct (USSG § 1B1.3) in determining the date of the instant offense. Relevant Conduct committed prior to the charged date of the offense date can provide an earlier date for the commencement of the offense.

However, every problem is also an opportunity.

*It is under the greatest adversity that there exists the greatest potential for doing good*

*Dalai Lama*
Expanding

If you have recent convictions, you want to broaden the time period of the offense conduct for two reasons:

I. The career offender guideline has one significant difference on criminal history –
Defendant A is sentenced to 5 years of incarceration in Florida state court for felony trafficking of cocaine after his plea but prior to his sentencing in federal court. Does this Conviction count towards Defendant A’s criminal history?

YES

Under the guidelines, a prior sentence is any sentence that is imposed prior to the Defendant’s criminal sentencing. See Application Note 1 to § 4A1.2
Does this Conviction count as a prior predicate offense for career offender purposes?

NO

The career offender guideline specifically states that a “prior sentence” must occur before the commission of the instant offense. Thus, it does not count convictions that occur after the commencement of the instant offense. See USSG § 4B1.2
Expanding (Part II)

II. Relevant Conduct as a Shield

If Defendant A is sentenced in Florida court for felony trafficking of cocaine before the commission of his federal cocaine trafficking offense, this conviction counts as a prior predicate for career offender purposes?

It Depends
• By expanding time period, you can bring in priors as relevant conduct and thus they do not count in criminal history or career offender predicates.

• **USSG § 4A1.2:** a prior conviction is any sentence imposed upon adjudication of guilt that is not part of instant offense.

• **Application Note I:** Prior Sentence means a sentence imposed for a conviction that is not part of instant offense. That is, relevant conduct.
III. Know Your Application Notes!

USSG § 2B1.1: Amount of Loss/Set Off

A defendant fraudulently took out a $1,000,000 dollar mortgage on a home and only pays $100,000 on the mortgage before defaulting on the loan. The late fees and interest on the loan is $100,000. The bank sold the home in foreclosure for $400,000. The total amount of loss under USSG § 2B1.1 that is readily provable and reasonably attributable to the defendant is $1,100,000 (the loan (+) the late fees and interest).

FALSE

The total amount of loss is $500,000 (the loan (-) the price of the home (+) the mortgage payments).
Exclusions from Loss

Application Note 3(D) states that loss shall not include interest, finance charges, late fees, penalties, etc.
Credits Against Loss

Application Note 3(E) states that loss shall be reduced by funds or fair market value of property returned to victim before offense was detected.

However, where collateral is pledged, the amount the victim has recovered from its sale at the time of the sentencing.
Vulnerable Victim

If the Defendant knew or should have known the victims of the offense were vulnerable, then increase her offense level by 2-levels. See USSG § 3A1.1.
A defendant who has been convicted in a fraud scheme which involved some elderly and disabled victims is subject to a two-level enhancement for vulnerable victim under USSG § 3A1.1?

It Depends

Application Note 2 to § 3A1.1 defines a “vulnerable victim” as someone who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.
Membership in a particular class is not sufficient to support the enhancement. See United States v. Lee, 973 F.2d 832, 834 (10th Cir. 1992). United States v. Mejia–Orosco, 868 F.2d 807, 809 (5th Cir. 1989)

Application Note 2 further states:

The enhancement applies when the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure to cancer patients or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.
Thus, the enhancement requires

1) the victim to have been unusually vulnerable and

2) specifically targeted in the offense.

*United States v. Yount, 960 F.2d. 955 (11th Cir. 1992).*
Minimal/Minor Role

A defendant cannot receive a minor-role reduction if the PSR scores only the 1-kilogram amount of cocaine that is attributable to him in a 5-kilogram cocaine conspiracy?

FALSE

Application Note 3 to USSG § 3B1.2 specifically states that a Defendant who is only held accountable for the conduct that he personally was involved and who performs a limited function is not precluded from a role reduction.

Note: This analysis also applies to fraud cases.
SOPHISTICATED MEANS

- Especially complex or intricate offense conduct pertaining to execution or concealment of the offense
- There is always some complexity in all fraud cases.
- *Some* complexity is not sufficient. Rather the question is whether the offense was especially complex or intricate for frauds of its kind. “It is not enough for the means used in a scheme to be “complex” or “intricate”; rather, the means must be “especially” so.
- The definition of “especially” includes “exceptionally” and “particularly.” Webster's Third New International Dictionary (1986). That is, the level of complexity or intricacy must set that particular scheme apart from ordinary schemes, and even ordinarily complex or intricate schemes.” *Id.*

Why the Meth Guidelines Suck

- Culpability is associated with weight and purity
  - Irrational to conclude that large amounts of pure meth is only associated with drug kingpins
- Guidelines based on old crack guidelines and minimum mandatory penalties
- Great Cases:

  *United States v. Gonzalez*, 533 F.Supp. 3d 974 (D. Idaho 2021);
  *United States v. Johnson*, 379 F. Supp. 3d 1213 (N.D. Ala 2019);
  *United States v. Bean*, 371 F.Supp. 3d 46 (D.N.H. 2019);
  *United States v. Nawanna*, 321 F.Supp. 3d 943 (N.D. Iowa 2018);
DEA National Drug Reports identify Heroin and Fentanyl as greatest driver of overdose deaths. Yet, under USSG § 2d1.1 (drug equivalency table):

1 gram of heroin = 1 kg marijuana;
1 gram of fent. = 2.5 kg of marijuana; but
1 gram of meth. = 20 kg of marijuana
Abuse of Trust

USSG § 3B1.3:

A two-level enhancement applies if the Defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense.
The Defendant is a lawyer who solicited buyers over the internet and falsely promised them that she would apply their funds to the purchases of timeshares.

Will defendant will receive an enhancement for abuse of trust?

NO
There is a component of misplaced trust inherent in every fraud.

Enhancement applies where the defendant is in a fiduciary, or other personal trust relationship to the victim of the fraud, and the defendant takes advantage of the relationship to perpetrate or conceal the offense.

The abuse of trust enhancement applies only where the "defendant has abused discretionary authority entrusted to the defendant by the victim."
Safety Valve under
18 U.S.C. § 3553(f) and USSG § 5C1.2
Safety Valve

For the following questions, assume the defendant would otherwise qualify for safety valve under USSG § 5C1.2.
If a defendant testifies falsely during his trial and is convicted in a drug case, can she receive a safety-valve reduction?

**YES**

Not later than the time of the sentencing hearing, the defendant has truthfully provided all information to the Government concerning the offense or offenses.

*See USSG § 5C1.2(5).*

The plain language of § 3553(f) and § 5C1.2 provides only one deadline for compliance, not later than the time of the sentencing hearing.

*See United States v. Brownlee,* 204 F.3d 1302 (11th Cir. 2000).
If a defendant receives an obstruction of justice enhancement for testifying falsely at the trial, can he still receive a safety-valve reduction?

YES

“Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief.”

United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000).
If this same defendant receives a two-level enhancement under USSG § 2D1.1 for the use of a firearm, could he still receive safety-valve at sentencing?

YES

To qualify for safety-valve relief, the defendant must show that he “did not ... possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.” It does not include reasonably foreseeable possession.

United States v. Clavijo, 165 F.3d 1341, 1343 (11th Cir.1999) (per curiam).
If this same defendant is convicted of a § 924(c) (possession of firearm in relation to a drug offense), can he still receive safety-valve at sentencing?

**YES**

*See Clavijo, 165 F.3d at 1343.*

However, Application Note 4 to § 5C1.2 states that a defendant is accountable for “his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.” *See United States v. Solis, 2012 WL 8333371 (March 14, 2012).*
IV. Planting Seeds

A court is unencumbered in its ability “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”


But, surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, ‘the history and characteristics’ of the defendant.

• In its final paragraphs, the PSR lists two independent sections (E & F) listing factors warranting a departure and a variance respectively.

• This is where you earn your money by knowing potential grounds for a departure and for a variance. And by telling your client’s story.

• The best place to start on departures is USSG § 5H. Under this guideline, factors such as age, physical and mental condition, charitable works, good deeds, and military history are considered potentially relevant grounds for departure.

• In fraud cases, be mindful of App. Note 21(c) to § 2B1.1 (stating that a downward departure may be warranted in cases where the amount of loss substantially overstates the seriousness of the offense). See also United States v. Schneider, 930 F.2d 555, 558 (7th Cir. 1991); United States v. Sublett, 124 F. 3d 693, 694-95 (5th Cir. 1997).

• Other great resources are: Michael Levine, 171 Easy Mitigating Factors; the websites for FPD for the E.D. of Mo; and FD.Org; and the Sentencing Commission.
Questions?
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