
Point-Counterpoint

Sentencing Guideline Topics

Defendant X

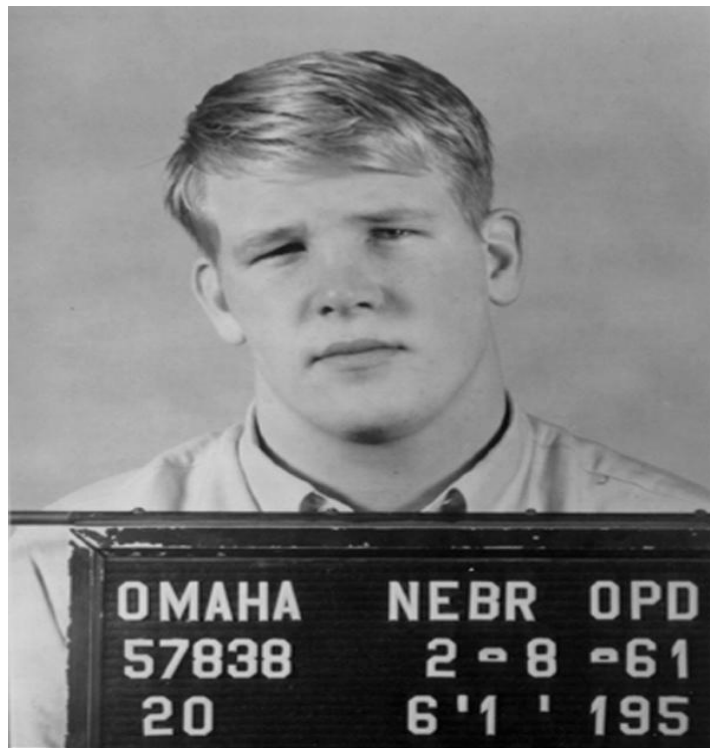


Defendant X has a Problem

Crashes his car after a high speed chase during which he

- Fired off a shot at pursuing officers
 - Threw two ounces of pure methamphetamine and a set of scales at the arresting officer
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Defendant X has not been terribly law-abiding



Defendant X has Priors

1) Burglary- has a conviction for aggravated burglary under a statute that prohibits

“without authority, entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being with intent to commit a felony, theft or sexually motivated crime therein.”

At the plea, he admitted entering a home and punching a small child

Defendant X has Priors

2) Fleeing and Eluding- Defendant X led officers on a ten mile high speed chase in rural Alabama. He was unhappy about the arrest.



Defendant X has Priors

3) Statutory Rape- Defendant X was convicted of having sex with a fourteen year old.

A picture would not be appropriate for this slide.

Defendant X has Priors

4) Involuntary Manslaughter- It was pled down.



Defendant X has Priors

Summary:

- 1) Burglary
 - 2) Fleeing And Eluding
 - 3) Statutory Rape
 - 4) Involuntary Manslaughter
-

The Charges

Drugs aren't back from the lab yet, so you are offered a plea to two counts:

924(c)

922(g)

Time to Run the Guidelines

What are we worried about?

- Career Offender on the 924(c)
 - ACCA on the 922(g)
-

Recidivist Enhancements

Career Offender on 924(c)- 4B1.1(c)(3)

360-Life at trial

262-327 with a plea

ACCA on 922(g)- 4B1.4

262-327 at trial

188-235 with a plea

Predicate Offenses

- 1) Burglary
- 2) Fleeing and Eluding
- 3) Statutory Rape
- 4) Involuntary Manslaughter

Take them in reverse order

Involuntary Manslaughter

- Crime must involve “purposeful, violent, and aggressive conduct.”
 - [United States v. McConnell](#)
 - Involuntary manslaughter has a mens rea requirement of recklessness
 - Doesn't count
-

Involuntary Manslaughter

Unless.....

Sykes v. United States

The phrase "purposeful, violent, and aggressive" has no precise textual link to the residual clause, which requires that an ACCA predicate "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). The *Begay* phrase is an addition to the statutory text. In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same. As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.

Statutory Rape

- Strict liability offense
 - Does not require knowledge of the age of the victim
 - No element of force is required
 - Rule applies only to 13-15 year old victims
-

Statutory Rape

Unless.....

United States v. Daye, where the Second Circuit holds that statutory rape is a violent felony. All other circuits disagree. See United States v. McDonald.

Fleeing and Eluding

- Like [Begay v. United States](#)
 - That case held DUI is not a violent felony
 - Lots of risk involved, but no purposeful, violent, or aggressive behavior
-

Fleeing and Eluding

No, Kirk

Fleeing and Eluding

- Controlled by Sykes
 - Directly held that fleeing and eluding is a violent felony
 - Counts as a predicate violent felony against Defendant X
-

Burglary

Of course it qualifies- it's right there in the statute

924(e) defines a violent felony as “including burglary, arson, or extortion”

Defendant X entered a structure and punched a child in the face- that's a violent felony

Burglary

- Have to employ the categorical approach
 - Compare elements of the predicate crime with the elements of the generic crime, meaning how the crime is commonly understood
 - Predicate only counts if the statute's elements are the same as, or narrower than, the generic offense
-

Burglary

- What if you can't tell, because the statute contains both the generic elements and non-generic elements?
 - Like a burglary statute that covers both structures and cars
 - Structures are covered under the traditional definition of burglary, cars are not
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Burglary

- Employ modified categorical approach
 - Say burglary statute reaches both structures and cars
 - Court can look to limited set of documents identified in [Shepard v. United States](#)
 - Charging documents, jury instructions, defendant's admissions, agreed factual basis
-

Burglary

- What about indivisible statutes, which do not contain alternative elements?
 - Some burglary statutes permit prosecution on the theory that entering a public place with the intent to commit theft is a burglary
 - Much broader than generic burglary
 - [Descamps v. United States](#)
-

Burglary

- Indivisible statute does not permit resort to modified categorical approach
 - Cannot be a predicate if broader than generic burglary and there are no alternative elements
 - Doesn't matter what defendant admitted in court
-

Burglary

- Burglary statute under which Defendant X was convicted is arguably indivisible
 - Doesn't matter if he admitted to punching a child- can't employ the modified categorical approach
-

So where are we?

Fleeing and eluding is a predicate offense, nothing else is.

Defendant X is looking at the 10-year mandatory minimum on the 924(c)

What about the 922(g)?

BOL 20, because he has one prior crime of violence

Add 4 levels under (b)(6), because he possessed the weapon in connection with another felony offense

What about the 922(g)?

No, dummy.

USSC Official Position

2K2.1, Application Note 4 and Amendment 599

- Do not apply firearm SOC in guideline for underlying offense
 - 924(c) accounts for any weapon SOC for the underlying offense
 - 924(c) accounts for any weapon within the relevant conduct
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Impact of 924(c) on SOC's

- Do not apply (b)(6) SOC
 - 924(c) accounts for the conduct encompassed by the enhancement
 - but.....
-

Impact of 924(c) on Cross References

- Rule does not affect any other SOC, BOL, or cross-reference at 2K2.1
 - Cross reference is still available
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Cross Reference?

- Two ounces of pure meth = BOL 32
 - Higher than 20 for the 922(g)
 - BOL is 32
 - Probation wins again
-

Cross Reference

Not so fast....

- United States v. Riley, 2007 WL 4561146
 - violates Double Jeopardy
 - Ha!
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Final Guideline Calculation

120 on 924(c)

Four priors (assume all sentences > 13 months)

12 points, CHC V

With a plea, 46-57

You Forgot Something

Remember- Defendant X fired a shot at the pursuing officers

Six level enhancement available under 3A1.2 (c)

Range is actually 84-105. But you tried very hard

Smarter Sentencing Act

We will update this slide as the legislation progresses
