

## § 2.20

## 28 CFR Ch. I (7-1-08 Edition)

or to remain on parole, unless the evidence is taken into account;

(2) The Commission is satisfied that the record before it is adequate notwithstanding the acquittal;

(3) The prisoner has been given the opportunity to respond to the evidence before the Commission; and

(4) The evidence before the Commission meets the preponderance standard.

In any other case, the Commission shall defer to the trial jury. Offense behavior in Category 5 or above shall presumptively support a finding under paragraph (c)(1) of this section.

(d) Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole, the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation should state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

[42 FR 39809, Aug. 5, 1977, as amended at 44 FR 26550, May 4, 1979; 44 FR 27658, May 11, 1979; 44 FR 31638, June 1, 1979; 49 FR 34207, Aug. 29, 1984; 49 FR 44098, Nov. 2, 1984; 50 FR 36423, Sept. 6, 1985; 51 FR 7064, Feb. 28, 1986; 56 FR 16270, Apr. 22, 1991; 56 FR 30868, July 8, 1991; 58 FR 16612, Mar. 30, 1993]

### § 2.20 Paroling policy guidelines: Statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the U.S. Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (pa-

role prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain instructions for the rating of certain offense behaviors. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

(h) If an offender was less than 18 years of age at the time of the current offense, such youthfulness shall, in itself, be considered as a mitigating factor.

(i) For criminal behavior committed while in confinement see § 2.36 (Rescission Guidelines).

(j)(1) In probation revocation cases, the original federal offense behavior and any new criminal conduct on probation (federal or otherwise) is considered in assessing offense severity. The original federal conviction is also counted in the salient factor score as a prior conviction. Credit is given toward the guidelines for any time spent in confinement on any offense considered in assessing offense severity.

(2) Exception: Where probation has been revoked on a complex sentence (i.e., a committed sentence of more than six months on one count or more of an indictment or information followed by a probation term on other count(s) of an indictment or information), the case shall be considered for

**Department of Justice**

**§ 2.20**

guideline purposes under § 2.21 as if parole rather than probation had been revoked.

**GUIDELINES FOR DECISIONMAKING**

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1998)			
	Very good (10 to 8)	Good (7 to 6)	Fair (5 to 4)	Poor (3 to 0)
	Guideline range (months)			
Category:				
1 .....	≤4	≤8	8-12	12-16
2 .....	≤6	≤10	12-16	16-22
3 .....	≤10	12-16	18-24	24-32
4 .....	12-18	20-26	26-34	34-44
5 .....	24-36	36-48	48-60	60-72
6 .....	40-52	52-64	64-78	78-100
7 .....	52-80	64-92	78-110	100-148
8 <sup>1</sup> .....	100+	120+	150+	180+

<sup>1</sup>Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the Commission will specify the pertinent case factors upon which it relied in reaching its decision, which may include the absence of any factors mitigating the offense. This procedure is intended to ensure that the prisoner understands that individualized consideration has been given to the facts of the case, and not to suggest that a grant of parole is to be presumed for any class of Category Eight offenders. However, a murder committed to silence a victim or witness, a contract murder, a murder by torture, the murder of a law enforcement officer to carry out an offense, or a murder committed to further the aims of an on-going criminal operation, shall not justify a grant of parole at any point in the prisoner's sentence unless there are compelling circumstances in mitigation (*e.g.*, a youthful offender who participated in a murder planned and executed by his parent). Such aggravated crimes are considered, by definition, at the extreme high end of Category Eight offenses. For these cases, the expiration of the sentence is deemed to be a decision at the maximum limit of the guideline range. (The fact that an offense does not fall under the definition contained herein does not mean that the Commission is obliged to grant a parole.)

**U.S. PAROLE COMMISSION OFFENSE BEHAVIOR SEVERITY INDEX**

- Chapter One Offenses of General Applicability
- Chapter Two Offenses Involving the Person
  - Subchapter A—Homicide Offenses
  - Subchapter B—Assault Offenses
  - Subchapter C—Kidnaping and Related Offenses
  - Subchapter D—Sexual Offenses
  - Subchapter E—Offenses Involving Aircraft
  - Subchapter F—Communication of Threats
- Chapter Three Offenses Involving Property
  - Subchapter A—Arson and Property Destruction Offenses
  - Subchapter B—Criminal Entry Offenses
  - Subchapter C—Robbery, Extortion, and Blackmail
  - Subchapter D—Theft and Related Offenses
  - Subchapter E—Counterfeiting and Related Offenses
  - Subchapter F—Bankruptcy Offenses

- Subchapter G—Violations of Securities or Investment Regulations and Antitrust Offenses
- Chapter Four Offenses Involving Immigration, Naturalization, and Passports
- Chapter Five Offenses Involving Revenue
  - Subchapter A—Internal Revenue Offenses
  - Subchapter B—Customs Offenses
  - Subchapter C—Contraband Cigarettes
- Chapter Six Offenses Involving Governmental Process
  - Subchapter A—Impersonation of Officials
  - Subchapter B—Obstructing Justice
  - Subchapter C—Official Corruption
- Chapter Seven Offenses Involving Individual Rights
  - Subchapter A—Offenses Involving Civil Rights
  - Subchapter B—Offenses Involving Privacy
- Chapter Eight Offenses Involving Explosives and Weapons
  - Subchapter A—Explosives and Other Dangerous Articles
  - Subchapter B—Firearms
- Chapter Nine Offenses Involving Illicit Drugs
  - Subchapter A—Heroin and Opiate Offenses
  - Subchapter B—Marihuana and Hashish Offenses
  - Subchapter C—Cocaine Offenses
  - Subchapter D—Other Illicit Drug Offenses
- Chapter Ten Offenses Involving National Defense
  - Subchapter A—Treason and Related Offenses
  - Subchapter B—Sabotage and Related Offenses
  - Subchapter C—Espionage and Related Offenses
  - Subchapter D—Selective Service Offenses
  - Subchapter E—Other National Defense Offenses
- Chapter Eleven Offenses Involving Organized Criminal Activity, Gambling, Obscenity, Sexual Exploitation of Children, Prostitution, and Non-Governmental Bribery
  - Subchapter A—Organized Crime Offenses
  - Subchapter B—Gambling Offenses
  - Subchapter C—Obscenity
  - Subchapter D—Sexual Exploitation of Children
  - Subchapter E—Prostitution and White Slave Traffic
  - Subchapter F—Non-Governmental Bribery
  - Subchapter G—Currency Offenses
- Chapter Twelve Miscellaneous Offenses
- Chapter Thirteen General Notes and Definitions
  - Subchapter A—General Notes
  - Subchapter B—Definitions

**CHAPTER ONE OFFENSES OF GENERAL APPLICABILITY**

101 *Conspiracy*  
Grade conspiracy in the same category as the underlying offense.

## § 2.20

### 102 *Attempt*

Grade attempt in the same category as the offense attempted.

### 103 *Aiding and Abetting*

Grade aiding and abetting in the same category as the underlying offense.

### 104 *Accessory After the Fact*

Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

### 105 *Solicitation to Commit a Crime of Violence*

Grade solicitation to commit a crime of violence in the same category as the underlying offense if the crime solicited would be graded as Category Eight. In all other cases grade solicitation to commit a crime of violence one category below the underlying offense, but not less than Category One.

NOTE TO CHAPTER ONE: The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense).

## CHAPTER TWO OFFENSES INVOLVING THE PERSON

### SUBCHAPTER A—HOMICIDE OFFENSES

#### 201 *Murder*

Murder, or a forcible felony\* resulting in the death of a person other than a participating offender, shall be graded as Category Eight.

#### 202 *Voluntary Manslaughter*

Category Seven.

#### 203 *Involuntary Manslaughter*

Category Four.

### SUBCHAPTER B—ASSAULT OFFENSES

#### 211 *Assault During Commission of Another Offense*

(a) If serious bodily injury\* results or if 'serious bodily injury is the result intended', grade as Category Seven;

(b) If bodily injury\* results, or a weapon is fired by any offender, grade as Category Six;

(c) Otherwise, grade as Category Five.

#### 212 *Assault*

(a) If serious bodily injury\* results or if 'serious bodily injury is the result intended', grade as Category Seven;

(b) If bodily injury\* results or a dangerous weapon is used by any offender, grade as Category Five;

(c) Otherwise, grade as Category Two;

(d) *Exception:* (1) If the victim was known to be a "protected person"\* or law enforcement, judicial, or correctional official, grade conduct under (a) as Category Seven, (b) as Category six, and (c) as Category Three.

(2) If an assault is committed while resisting an arrest or detention initiated by a law

\*Terms marked by an asterisk are defined in Chapter Thirteen.

## 28 CFR Ch. I (7-1-08 Edition)

enforcement officer or a civilian acting under color of law, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.

### 213 *Firing a Weapon at a Structure Where Occupants are Physically Present*

Grade according to the underlying offense if one can be established, but not less than Category Five.

## SUBCHAPTER C—KIDNAPING AND RELATED OFFENSES

### 221 *Kidnaping*

(a) If the purpose of the kidnaping is for ransom or terrorism, grade as Category Eight;

(b) If a person is held hostage in a known place for purposes of extortion (e.g., forcing a bank manager to drive to a bank to retrieve money by holding a family member hostage at home), grade as Category Seven;

(c) If a victim is used as a shield or hostage in a confrontation with law enforcement authorities, grade as Category Seven;

(d) Otherwise, grade as Category Seven.

(e) *Exception:* If not for ransom or terrorism, and no bodily injury to victim, and limited duration (e.g., abducting the driver of a truck during a hijacking and releasing him unharmed within an hour), grade as Category Six.

### 222 *Demand for Ransom*

(a) If a kidnapping has, in fact, occurred, but it is established that the offender was not acting in concert with the kidnapper(s), grade as Category Seven;

(b) If no kidnapping has occurred, grade as "extortion".

## SUBCHAPTER D—SEXUAL OFFENSES

### 231 *Rape or Forcible Sodomy*

(a) Category Seven.

(b) *Exception:* If a prior consensual sexual relationship between victim and offender is present, grade as Category Six.

### 232 *Carnal Knowledge\* or Sodomy Involving Minors*

(a) Grade as Category Four, except as provided below.

(b) If the relationship is clearly consensual and the victim is at least fourteen years old, and the age difference between the victim and offender is less than four years, grade as Category One.

(c) If the victim is less than twelve years old, grade as Category Seven.

(d) If the offender is an adult who has abused a position of trust (e.g., teacher, counselor, or physician), or the offense involved predatory sexual behavior, grade as Category Seven. Sexual behavior is deemed predatory when the offender repeatedly uses any trick or other device to attract, lure, or bribe victims into the initial contact that results in the offense.

## Department of Justice

## § 2.20

### 233 *Other Unlawful Sexual Conduct With Minors*

- (a) Category Four
- (b) Exception: If the victim is less than twelve years old grade as Category Six.

#### SUBCHAPTER E—OFFENSES INVOLVING AIRCRAFT

### 241 *Aircraft Piracy* Category Eight.

### 242 *Interference with a Flight Crew*

- (a) If the conduct or attempted conduct has potential for creating a significant safety risk to an aircraft or passengers, grade as Category Seven.
- (b) Otherwise, grade as Category Two.

#### SUBCHAPTER F—COMMUNICATION OF THREATS

### 251 *Communicating a Threat [to kill, assault, or kidnap]*

- (a) Category Four;
- (b) *Notes:*
  - (1) Any overt act committed for the purposes of carrying out a threat in this subchapter may be considered as an aggravating factor.
  - (2) If for purposes of extortion or obstruction of justice, grade according to Chapter Three, subchapter C, or Chapter Six, subchapter B, as applicable.

#### CHAPTER THREE OFFENSES INVOLVING PROPERTY

##### SUBCHAPTER A—ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

### 301 *Property Destruction by Fire or Explosives*

- (a) If the conduct results in serious bodily injury\* or if 'serious bodily injury is the result intended\*', grade as Category Seven;
- (b) If the conduct (i) involves any place where persons are present or likely to be present; or (ii) involves a residence, building, or other structure; or (iii) results in bodily injury\*, grade as Category Six;
- (c) Otherwise, grade as "property destruction other than listed above" but not less than Category Five.

### 302 *Wrecking a Train* Category Seven.

### 303 *Property Destruction Other Than Listed Above*

- (a) If the conduct results in bodily injury\*, or serious bodily injury\*, or if serious bodily injury is the result intended\*, grade as if "assault during commission of another offense;"
- (b) If damage of more than \$5,000,000 is caused, grade as Category Seven;
- (c) If damage of more than \$1,000,000 but not more than \$5,000,000 is caused, grade as Category Six;

\*Terms marked by an asterisk are defined in Chapter Thirteen.

(d) If damage of more than \$200,000 but not more than \$1,000,000 is caused, grade as Category Five;

(e) If damage of at least \$40,000 but not more than \$200,000 is caused, grade as Category Four;

(f) If damage of at least \$2,000 but less than \$40,000 is caused, grade as Category Three;

(g) If damage of less than \$2,000 is caused, grade as Category One;

(h) *Exception:* If a significant interruption of a government or public utility function is caused, grade as not less than Category Three.

#### SUBCHAPTER B—CRIMINAL ENTRY OFFENSES

### 311 *Burglary or Unlawful Entry*

(a) If the conduct involves an armory or similar facility (e.g., a facility where automatic weapons or war materials are stored) for the purpose of theft or destruction of weapons or war materials, grade as Category Six;

(b) If the conduct involves an inhabited dwelling (whether or not a victim is present), or any premises with a hostile confrontation with a victim, grade as Category Five;

(c) If the conduct involves use of explosives or safecracking, grade as Category Five;

(d) Otherwise, grade as "theft" offense, but not less than Category Two.

(e) *Exception:* If the grade of the applicable "theft" offense exceeds the grade under this subchapter, grade as a "theft" offense.

#### SUBCHAPTER C—ROBBERY, EXTORTION, AND BLACKMAIL

### 321 *Robbery*

- (a) Category Five.
- (b) *Exceptions:*
  - (1) If the grade of the applicable "theft" offense exceeds the grade for robbery, grade as a "theft" offense.
  - (2) If any offender forces a victim to accompany any offender to a different location, or if a victim is forcibly detained by being tied, bound, or locked up, grade as Category Six.
  - (3) Pickpocketing (stealth—no force or fear), see subchapter D.
- (c) *Note:* Grade purse snatching (fear or force) as robbery.

### 322 *Extortion*

(a) If by threat of physical injury to person or property, or extortionate extension of credit (loansharking), grade as Category Five;

(b) If by use of official governmental position, grade according to Chapter Six, subchapter C.

(c) If neither (a) nor (b) is applicable, grade under Chapter Eleven, subchapter F;

### 323 *Blackmail [threat to injure reputation or accuse of crime]*

Grade as a "theft" offense according to the value of the property demanded, but not less

## § 2.20

than Category Three. Actual damage to reputation may be considered as an aggravating factor.

### SUBCHAPTER D—THEFT AND RELATED OFFENSES

#### 331 *Theft, Forgery, Fraud, Trafficking in Stolen Property\*, Interstate Transportation of Stolen Property, Receiving Stolen Property, Embezzlement, and Related Offenses*

(a) If the value of the property\* is more than \$5,000,000, grade as Category Seven;

(b) If the value of the property\* is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;

(c) If the value of the property\* is more than \$200,000 but not more than \$1,000,000, grade as Category Five;

(d) If the value of the property\* is at least \$40,000 but not more than \$200,000, grade as Category Four;

(e) If the value of the property\* is at least \$2,000 but less than \$40,000, grade as Category Three;

(f) If the value of the property\* is less than \$2,000, grade as Category One.

#### (g) *Exceptions:*

(1) Offenses involving stolen checks, credit cards, money orders or mail, forgery, fraud, interstate transportation of stolen or forged securities, trafficking in stolen property, or embezzlement shall be graded as not less than Category Two;

(2) Theft of an automobile shall be graded as no less than Category Three. Note: where the vehicle was recovered within 72 hours with no significant damage and the circumstances indicate that the only purpose of the theft was temporary use (e.g., joyriding), such circumstances may be considered as a mitigating factor.

(3) Grade obtaining drugs for own use by a fraudulent or fraudulently obtained prescription as Category Two.

(4) Grade manufacture, sale, and fraudulent use of credit cards as follows:

(i) Grade the manufacture, distribution or possession of counterfeit or altered credit cards as not less than Category Four.

(ii) Grade the distribution or possession of multiple stolen credit cards as not less than Category Three.

(iii) Grade the distribution or possession of a single stolen credit card as not less than Category Two.

(h) *Note:* In “theft” offenses, the total amount of the theft committed or attempted by the offender, or others acting in concert with the offender, is to be used.

(2) Grade fraudulent sale of drugs (e.g., sale of sugar as heroin) as ‘fraud’.

#### 332 *Pickpocketing [stealth-no force or fear]*

\*Terms marked by an asterisk are defined in Chapter Thirteen.

## 28 CFR Ch. I (7–1–08 Edition)

Grade as a “theft” offense, but not less than Category Three.

#### 333 *Fraudulent Loan Applications*

Grade as a “fraud” offense according to the amount of the loan.

#### 334 *Preparation or Possession of Fraudulent Documents*

(a) If for purposes of committing another offense, grade according to the offense intended;

(b) Otherwise, grade as Category Two.

#### 335 *Criminal Copyright Offenses*

(a) If very large scale (e.g., more than 100,000 sound recordings or more than 10,000 audio visual works), grade as Category Five;

(b) If large scale (e.g., 20,000–100,000 sound recordings or 2,000–10,000 audio visual works), grade as Category Four;

(c) If medium scale (e.g., 2,000–19,999 sound recordings or 200–1,999 audio visual works), grade as Category Three;

(d) If small scale (e.g., less than 2,000 sound recordings or less than 200 audio visual works), grade as Category Two.

### Subchapter E—Counterfeiting and Related Offenses

#### 341 *Passing or Possession of Counterfeit Currency or Other Medium of Exchange\**

(a) If the face value of the currency or other medium of exchange is more than \$5,000,000, grade as Category Seven;

(b) If the face value of the currency or other medium of exchange is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;

(c) If the face value is more than \$200,000 but not more than \$1,000,000, grade as Category Five;

(d) If the face value is at least \$40,000 but not more than \$200,000, grade as Category Four;

(e) If the face value is at least \$2,000 but less than \$40,000, grade as Category Three;

(f) If the face value is less than \$2,000, grade as Category Two.

#### 342 *Manufacture of Counterfeit Currency or Other Medium of Exchange\* or Possession of Instruments for Manufacture*

Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession), but not less than Category Five. The term *manufacture* refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

### Subchapter F—Bankruptcy Offenses

#### 351 *Fraud in Bankruptcy or Concealing Property*

Grade as a “fraud” offense.

## Department of Justice

## § 2.20

Subchapter G—Violation of Securities or Investment Regulations and Antitrust Offenses

361 *Violation of Securities or Investment Regulations*

(a) If for purposes of fraud, grade according to the underlying offense;

(b) Otherwise, grade as Category Two.

362 *Antitrust Offenses*

(a) If estimated economic impact is more than one million dollars, grade as Category Four;

(b) If the estimated economic impact is more than \$100,000 but not more than one million dollars, grade as Category Three;

(c) Otherwise, grade as Category Two.

(d) *Note:* The term ‘economic impact’ refers to the estimated loss to any victims (e.g., loss to consumers from a price fixing offense).

363 *Insider Trading*

(a) If the estimated economic impact is more than \$5,000,000, grade as Category Seven;

(b) If the estimated economic impact is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;

(c) If the estimated economic impact is more than \$200,000 but not more than \$1,000,000, grade as Category Five;

(d) If the estimated economic impact is at least \$40,000 but not more than \$200,000, grade as Category Four;

(e) If the estimated economic impact is at least \$2,000 but less than \$40,000, grade as Category Three;

(f) If the estimated economic impact is less than \$2,000, grade as Category Two.

(g) *NOTE:* The term ‘economic impact’ includes the damage sustained by the victim whose information was unlawfully used, plus any other illicit profit resulting from the offense.

CHAPTER FOUR OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

401 *Unlawfully Entering the United States as an Alien*

Category One.

402 *Transportation of Unlawful Alien(s)*

(a) If the transportation of unlawful alien(s) involves detention and demand for payment, grade as Category Five;

(b) Otherwise, grade as Category Three.

403 *Offenses Involving Passports*

(a) If making an unlawful passport for distribution to another, possession with intent to distribute, or distribution of an unlawful passport, grade as Category Three;

(b) If fraudulently acquiring or improperly using a passport, grade as Category Two.

404 *Offenses Involving Naturalization or Citizenship Papers*

(a) If forging or falsifying naturalization or citizenship papers for distribution to an-

other, possession with intent to distribute, or distribution, grade as Category Three;

(b) If acquiring fraudulent naturalization or citizenship papers for own use or improper use of such papers, grade as Category Two;

(c) If failure to surrender canceled naturalization or citizenship certificate(s), grade as Category One.

CHAPTER FIVE OFFENSES INVOLVING REVENUE

Subchapter A—Internal Revenue Offenses

501 *Tax Evasion [income tax or other taxes]*

(a) If the amount of tax evaded or evasion attempted is more than \$5,000,000, grade as Category Seven;

(b) If the amount of tax evaded or evasion attempted is more than \$1,000,000 but not more than \$5,000,000, grade as Category Six;

(c) If the amount of tax evaded or evasion attempted is more than \$200,000 but not more than \$1,000,000, grade as Category Five;

(d) If the amount of tax evaded or evasion attempted is at least \$40,000 but not more than \$200,000, grade as Category Four;

(e) If the amount of tax evaded or evasion attempted is at least \$2,000 but less than \$40,000, grade as Category Three;

(f) If the amount of tax evaded or evasion attempted is less than \$2,000, grade as Category One.

(g) *Notes:*

(1) Grade according to the amount of tax evaded or evasion attempted, not the gross amount of income.

(2) Tax evasion refers to failure to pay applicable taxes. Grade a false claim for a tax refund (where tax has not been withheld) as a ‘‘fraud’’ offense.

502 *Operation of an Unregistered Still*

Grade as a ‘‘tax evasion’’ offense.

Subchapter B—Customs Offenses

511 *Smuggling Goods into the United States*

(a) If the conduct is for the purpose of tax evasion, grade as a ‘tax evasion’ offense.

(b) If the article is prohibited from entry to the country absolutely (e.g., illicit drugs or weapons), use the grading applicable to possession with intent to distribute of such articles, or the grading applicable to tax evasion, whichever is higher, but not less than Category Two;

(c) If the conduct involves breaking seals, or altering or defacing customs marks, or concealing invoices, grade according to (a) or (b), as applicable, but not less than Category Two.

512 *Smuggling Goods into Foreign Countries in Violation of Foreign Law* (re: 18 U.S.C. 546)

Category Two.

Subchapter C—Contraband Cigarettes

521 *Trafficking in Contraband Cigarettes* (re: 18 U.S.C. 2342)

## § 2.20

Grade as a tax evasion offense.

### CHAPTER SIX OFFENSES INVOLVING GOVERNMENTAL PROCESS

#### Subchapter A—Impersonation of Officials

##### 601 *Impersonation of Official*

- (a) If for purposes of commission of another offense, grade according to the offense attempted, but not less than Category Two;  
(b) Otherwise, grade as Category Two.

#### Subchapter B—Obstructing Justice

##### 611 *Perjury*

- (a) If the perjured testimony concerns a criminal offense, grade as accessory after the fact, but not less than Category Three;  
(b) *Otherwise*, grade as Category Three.  
(c) Suborning perjury, grade as perjury.

##### 612 *Unlawful False Statements Not Under Oath*

Category One.

##### 613 *Tampering With Evidence or Witness, Victim, Informant or Juror*

(a) If concerning a criminal offense, grade as accessory after the fact, but not less than Category Three.

(b) *Otherwise*, grade as Category Three.

(c) *Exception*: Intimidation by threat of physical harm, grade as not less than Category Five.

##### 614 *Misprision of a Felony\**

Grade as if “accessory after the fact” but not higher than Category Three.

##### 615 *Harboring a Fugitive*

Grade as if ‘accessory after the fact’ to the offense for which the fugitive is wanted, but not higher than Category Three.

##### 616 *Escape*

If in connection with another offense for which a severity rating can be assessed, grade the underlying offense and apply the rescission guidelines to determine an additional penalty. *Otherwise*, grade as Category Three.

##### 617 *Failure To Appear\**

(a) In Felony Proceedings. If in connection with an offense for which a severity rating can be assessed, add to the guidelines otherwise appropriate the following: (i) ≤ 6 months if voluntary return within 6 days, or (ii) 6–12 months in any other case. *Otherwise*, grade as Category Three.

(b) In Misdemeanor Proceedings. Grade as Category One.

(c) *Note*: For purposes of this subsection, a misdemeanor is defined as an offense for which the maximum penalty authorized by law (not necessarily the penalty actually imposed) does not exceed one year.

##### 618 *Contempt of Court*

(a) Criminal Contempt (re: 18 U.S.C. 402). Where imposed in connection with a prisoner serving a sentence for another offense, add ≤ 6 months to the guidelines otherwise appropriate.

## 28 CFR Ch. I (7–1–08 Edition)

(b) *Exception*: If a criminal sentence is imposed under 18 U.S.C. 401 for refusal to testify concerning a criminal offense, grade such conduct as if accessory after the fact.

(c) Civil Contempt. See 28 CFR 2.10.

#### Subchapter C—Official Corruption

##### 621 *Bribery or Extortion [use of official position—no physical threat]*

(a) Grade as a “theft offense” according to the value of the bribe demanded or received, or the favor received by the bribe-giver (whichever is greater), but not less than Category Three. The “favor received” is the gross value of the property, contract, obligation, interest, or payment intended to be awarded to the bribe-giver in return for the bribe. Grade the bribe-taker in the same manner.

(b) If the above conduct involves a pattern of corruption (e.g., multiple instances), grade as not less than Category Four.

(c) If the purpose of the conduct is the obstruction of justice, grade as if “perjury”.

(d) *Notes*:

(1) The grading in this subchapter applies to each party to a bribe.

(2) The extent to which the criminal conduct involves a breach of public trust, causing injury beyond that describable by monetary gain, may be considered as an aggravating factor.

##### 622 *Other Unlawful Use of Governmental Position*

Category Two.

#### Subchapter D—Voting Fraud

##### 631 *Voting Fraud*

Category Four.

### CHAPTER SEVEN OFFENSES INVOLVING INDIVIDUAL RIGHTS

#### Subchapter A—Offenses Involving Civil Rights

##### 701 *Conspiracy Against Rights of Citizens* (re: 18 U.S.C. 241)

(a) If death results, grade as Category Eight;

(b) *Otherwise*, grade as if “assault”.

##### 702 *Deprivation of Rights Under Color of Law* (re: 18 U.S.C. 242)

(a) If death results, grade as Category Eight;

(b) *Otherwise*, grade as if “assault”.

##### 703 *Federally Protected Activity* (re: 18 U.S.C. 245)

(a) If death results, grade as Category Eight;

(b) *Otherwise*, grade as if “assault”.

##### 704 *Intimidation of Persons in Real Estate Transactions Based on Racial Discrimination* (re: 42 U.S.C. 3631)

(a) If death results, grade as Category Eight;

(b) *Otherwise*, grade as if “assault”.

## Department of Justice

## § 2.20

705 *Transportation of Strikebreakers* (re: 18 U.S.C. 1231)  
Category Two.

### Subchapter B—Offenses Involving Privacy

711 *Interception and Disclosure of Wire or Oral Communications* (re: 18 U.S.C. 2511)  
Category Two.

712 *Manufacture, Distribution, Possession, and Advertising of Wire or Oral Communication Intercepting Devices* (re: 18 U.S.C. 2512)

(a) *Category Three.*

(b) *Exception:* If simple possession, grade as Category Two.

713 *Unauthorized Opening of Mail*  
Category Two.

## CHAPTER EIGHT OFFENSES INVOLVING EXPLOSIVES AND WEAPONS

### Subchapter A—Explosives Offenses and Other Dangerous Articles

801 *Unlawful Possession or Distribution of Explosives; or Use of Explosives During a Felony*

Grade according to offense intended, but not less than Category Five.

802 *Mailing Explosives or Other Injurious Articles With Intent To Commit a Crime*

Grade according to offense intended, but not less than Category Five.

### Subchapter B—Firearms

811 *Possession by Prohibited Person* (e.g., ex-felon)

(a) If single weapon (rifle, shotgun, or handgun) with ammunition of the same caliber, or ammunition of a single caliber (without weapon), grade as Category Three;

(b) If multiple weapons (rifles, shotguns, or handguns), or ammunition of different calibers, or single weapon and ammunition of a different caliber, grade as Category Four.

812 *Unlawful Possession or Manufacture of Sawed-off Shotgun, Machine Gun, Silencer, or "Assassination kit"*

(a) If silencer or "assassination kit", grade as Category Six;

(b) If sawed-off shotgun or machine gun, grade as Category Five.

813 *Unlawful Distribution of Weapons or Possession With Intent To Distribute*

(a) If silencer(s) or "assassination kit(s)", grade as Category Six;

(b) If sawed-off shotgun(s) or machine gun(s), grade as Category Five;

(c) If multiple weapons (rifles, shotguns, or handguns), or ammunition of different calibers, or single weapon and ammunition of a different caliber, grade as Category Four;

(d) If single weapon (rifle, shotgun, or handgun) with ammunition of the same caliber, or ammunition of a single caliber (without weapon), grade as Category Three.

## CHAPTER NINE OFFENSES INVOLVING ILLICIT DRUGS

### Subchapter A—Heroin and Opiate\* Offenses

901 *Distribution or Possession With Intent To Distribute*

(a) If extremely large scale (e.g., involving 3 kilograms or more of 100% pure heroin, or equivalent amount), grade as Category Eight [except as noted in (c) below];

(b) If very large scale (e.g., involving 1 kilogram but less than 3 kilograms of 100% pure heroin, or equivalent amount), grade as Category Seven [except as noted in (c) below];

(c) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) or (b) as Category Six;

(d) If large scale (e.g., involving 50-999 grams of 100% pure heroin, or equivalent amount), grade as Category Six [except as noted in (e) below];

(e) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (d) as Category Five.

(f) If medium scale (e.g., involving 5-49 grams of 100% pure heroin, or equivalent amount), grade as Category Five;

(g) If small scale (e.g., involving less than 5 grams of 100% pure heroin, or equivalent amount), grade as Category Four;

902 *Simple Possession*  
Category One.

### Subchapter B—Marihuana and Hashish Offenses

911 *Distribution or Possession With Intent To Distribute*

(a) If extremely large scale (e.g., involving 20,000 pounds or more of marihuana/6,000 pounds or more of hashish/600 pounds or more of hash oil), grade as Category Six [except as noted in (b) below];

(b) Where the Commission finds that the offender had only a peripheral role, grade\* conduct under (a) as Category Five;

(c) If very large scale (e.g., involving 2,000-19,999 pounds of marihuana/600-5,999 pounds of hashish/60-599 pounds of hash oil), grade as Category Five;

(d) If large scale (e.g., involving 200-1,999 pounds of marihuana/60-599 pounds of hashish/6-59.9 pounds of hash oil), grade as Category Four;

(e) If medium scale (e.g., involving 50-199 pounds of marihuana/15-59.9 pounds of hashish/1.5-5.9 pounds of hash oil), grade as Category Three;

(f) If small scale (e.g., involving 10-49 pounds of marihuana/3-14.9 pounds of hashish/.3-1.4 pounds of hash oil), grade as Category Two;

(g) If very small scale (e.g., involving less than 10 pounds of marihuana/less than 3 pounds of hashish/less than .3 pounds of hash oil), grade as Category One.



§ 2.20

28 CFR Ch. I (7-1-08 Edition)

912 *Simple Possession*  
Category One.

Subchapter C—Cocaine Offenses

921 *Distribution or Possession With Intent to Distribute*

(a) If extremely large scale (e.g., involving 15 kilograms or more of 100% purity, or equivalent amount; or 1.5 kilograms or more of freebased cocaine), grade as Category Eight [except as noted in (c) below];

(b) If very large scale (e.g., involving 5 kilograms, but less than 15 kilograms of 100% purity, or equivalent amount; or 500 grams but less than 1.5 kilograms of freebased cocaine), grade as Category Seven [except as noted in (c) below];

(c) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) or (b) as Category Six;

(d) If large scale (e.g., involving more than 1 kilogram, but less than 5 kilograms of 100% purity, or equivalent amount; or more than 100 grams, but less than 500 grams of freebased cocaine) grade as Category Six [except as noted in (e) below];

(e) Where the Commission finds that the offender had only a peripheral role, grade conduct under (d) as Category Five;

(f) If medium scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount; or 10 grams-100 grams of freebased cocaine), grade as Category Five;

(g) If small scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount; or 1 gram-9.9 grams of freebased cocaine), grade as Category Four;

(h) If very small scale (e.g., involving less than 1.0-4.9 grams of 100% purity, or equivalent amount; or less than 1 gram of freebased cocaine), grade as Category Three;

(i) If extremely small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.

922 *Simple Possession*  
Category One.

Subchapter D—Other Illicit Drug Offenses

931 *Distribution or Possession With Intent To Distribute*

(a) If very large scale (e.g., involving more than 200,000 doses), grade as Category Six [except as noted in (b) below];

(b) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) as Category Five;

(c) If large scale (e.g., involving 20,000-200,000 doses), grade as Category Five;

(d) If medium scale (e.g., involving 1,000-19,999 doses), grade as Category Four;

(e) If small scale (e.g., involving 200-999 doses), grade as Category Three;

(f) If very small scale (e.g., involving less than 200 doses), grade as Category Two.

932 *Simple Possession*  
Category One.

NOTES TO CHAPTER NINE:

(1) Grade manufacture of synthetic illicit drugs as listed above, but not less than Category Five.

(2) "Equivalent amounts" for the cocaine and opiate categories may be computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure, etc.

(3) Grade unlawful possession or distribution of precursors of illicit drugs as Category Five (i.e., aiding and abetting the manufacture of synthetic illicit drugs).

(4) If weight, but not purity is available, the following grading may be used:

*Heroin*

Extremely large scale—6 kilograms or more  
Very large scale—2-5.99 kilograms  
Large scale—200 gms.-1.99 kilograms  
Medium scale—28.35-199.99 gms.  
Small scale—Less than 28.35 gms.

*Cocaine*

Extremely large scale—18.75 kilograms or more  
Very large scale—6.25-18.74 kilograms  
Large scale—1.25-6.24 kilograms  
Medium scale—200 gms.-1.24 kilograms  
Small scale—20 gms.-199.99 gms.  
Very small scale—4 gms.-19.99 gms.  
Extremely small scale—Less than 4 gms.

CHAPTER TEN OFFENSES INVOLVING  
NATIONAL DEFENSE

Subchapter A—Treason and Related Offenses

1001 *Treason*

Category Eight.

1002 *Rebellion or Insurrection*

Category Seven.

Subchapter B—Sabotage and Related  
Offenses

1011 *Sabotage*

Category Eight.

1012 *Enticing Desertion*

(a) In time of war or during a national defense emergency, grade as Category Four;

(b) Otherwise, grade as Category Three.

1013 *Harboring or Aiding a Deserter*

Category One.

Subchapter C—Espionage and Related  
Offenses

1021 *Espionage*

Category Eight.

Subchapter D—Selective Service Offenses

1031 *Failure to Register, Report for Examination or Induction*

(a) If committed during time of war or during a national defense emergency, grade as Category Four;

## Department of Justice

## § 2.20

(b) If committed when draftees are being inducted into the armed services, grade as Category Three;

(c) Otherwise, grade as Category One.

### Subchapter E—Other National Defense Offenses

#### 1041 *Offenses Involving Nuclear Energy*

Unauthorized production, possession, or transfer of nuclear weapons or special nuclear material or receipt of or tampering with restricted data on nuclear weapons or special nuclear material, grade as Category Eight.

#### 1042 *Violations of Export Administration Act* (50 U.S.C. 2410)

Grade conduct involving “national security controls” or “nuclear nonproliferation controls” as Category Six.

#### 1043 *Violations of the Arms Control Act* (22 U.S.C. 2278)

(a) Grade conduct involving export of sophisticated weaponry (e.g., aircraft, helicopters, armored vehicles, or “high technology” items) as Category Six.

(b) Grade Conduct involving export of other weapons (e.g., rifles, handguns, machine guns, or hand grenades) as if a weapons/explosive distribution offense under Offenses Involving Explosives and Weapons (Chapter Eight).

### CHAPTER ELEVEN—OFFENSES INVOLVING ORGANIZED CRIME ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION, NON-GOVERNMENTAL CORRUPTION, AND THE ENVIRONMENT

#### Subchapter A—Organized Crime Offenses

#### 1101 *Racketeer Influence and Corrupt Organizations* (re: 18 U.S.C. 1961–63)

Grade according to the underlying offense attempted, but not less than Category Five.

#### 1102 *Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise* (re: 18 U.S.C. 1952)

Grade according to the underlying offense attempted, but not less than Category Three.

#### Subchapter B—Gambling Offenses

#### 1111 *Gambling Law Violations—Operating or Employment in an Unlawful Business* (re: 18 U.S.C. 1955)

(a) If large scale operation [e.g., Sports books (estimated daily gross more than \$15,000); Horse books (estimated daily gross more than \$4,000); Numbers bankers (estimated daily gross more than \$2,000); Dice or card games (estimated daily ‘house cut’ more than \$1,000); video gambling (eight or more machines)]; grade as Category Four;

(b) If medium scale operation [e.g., Sports books (estimated daily gross \$5,000–\$15,000); Horse books (estimated daily gross \$1,500–\$4,000); Numbers bankers (estimated daily gross \$750–\$2,000); Dice or card games (esti-

mated daily ‘house cut’ \$400–\$1,000); video gambling (four-seven machines)]; grade as Category Three;

(c) If small scale operation [e.g., Sports books (estimated daily gross less than \$5,000); Horse books (estimated daily gross less than \$1,500); Numbers bankers (estimated daily gross less than \$750); Dice or card games (estimated daily ‘house cut’ less than \$400); video gambling (three or fewer machines)]; grade as Category Two;

(d) *Exception:* Where it is established that the offender had no proprietary interest or managerial role, grade as Category One.

#### 1112 *Interstate Transportation of Wagering Paraphernalia* (re: 18 U.S.C. 1953)

Grade as if ‘operating a gambling business’.

#### 1113 *Wire Transmission of Wagering Information* (re: 18 U.S.C. 1084)

Grade as if “operating a gambling business”.

#### 1114 *Operating or Owning a Gambling Ship* (re: 18 U.S.C. 1082)

Category Three.

#### 1115 *Importing or Transporting Lottery Tickets; Mailing Lottery Tickets or Related Matter* (re: 18 U.S.C. 1301, 1302)

(a) Grade as if “operating a gambling business”;

(b) *Exception:* If non-commercial, grade as Category One.

#### Subchapter C—Obscenity

#### 1121 *Mailing, Importing, or Transporting Obscene Matter*

(a) If for commercial purposes, grade as Category Three;

(b) Otherwise, Category One.

#### 1122 *Broadcasting Obscene Language*

Category One.

#### Subchapter D—Sexual Exploitation of Children

#### 1131 *Sexual Exploitation of Children\** (re: 18 U.S.C. 2251, 2252)

(a) Category Six;

(b) *Exception:* Where the Commission finds the offender had only a peripheral role (e.g., a retailer receiving such material for resale but with no involvement in the production or wholesale distribution of such material), grade as Category Five.

#### Subchapter E—Prostitution and White Slave Traffic

#### 1141 *Interstate Transportation for Commercial Purposes*

(a) If physical coercion, or involving person(s) of age less than 18, grade as Category Six;

(b) Otherwise, grade as Category Four.

#### 1142 *Prostitution*

Category One.

Subchapter F—Non-Governmental  
Corruption

1151 *Demand or Acceptance of Unlawful Gratuity Not Involving Federal, State, or Local Government Officials*

Grade as if a fraud offense according to (1) the amount of the bribe offered or demanded, or (2) the financial loss to the victim, whichever is higher.

1152 *Sports Bribery*

If the conduct involves bribery in a sporting contest, grade as if a theft offense according to the amount of the bribe, but not less than Category Three.

Subchapter G—Currency Offenses

1161 *Reports on Monetary Instrument Transactions*

(a) If extremely large scale (e.g., the estimated gross amount of currency involved is more than \$5,000,000), grade as Category Seven;

(b) If very large scale (e.g., the estimated gross amount of currency involved is more than \$1,000,000 but not more than \$5,000,000), grade as Category Six;

(c) If large scale (e.g., the estimated gross amount of currency involved is more than \$200,000 but not more than \$1,000,000), grade as Category Five;

(d) If medium scale (e.g., the estimated gross amount of currency involved is at least \$40,000 but not more than \$200,000), grade as Category Four;

(e) If small scale (e.g., the estimated gross amount of currency involved is less than \$40,000), grade as Category Three.

Subchapter H—Environmental Offenses

1171 *Knowing Endangerment Resulting From Unlawful Treatment, Transportation, Storage, or Disposal of Hazardous Waste* [Re: 42 U.S.C. 6928(e)]

(a) If death results, grade as Category Seven;

(b) If serious bodily injury results, grade as Category Six;

(c) Otherwise, grade as Category Five.

(d) *Note:* Knowing Endangerment requires a finding that the offender knowingly transported, treated, stored, or disposed of any hazardous waste and knew that he thereby placed another person in imminent danger of death or serious bodily injury.

1172 *Knowing Disposal and/or Storage and Treatment of Hazardous Waste Without a Permit; Transportation of Hazardous Waste to an Unpermitted Facility* [Re: 42 U.S.C. 6928(d)(1-2)]

(a) If death results, grade as Category Six;

(b) If (1) serious bodily injury results; or (2) a substantial potential for death or serious bodily injury in the future results; or (3) a substantial disruption to the environment results (e.g., estimated cleanup cost exceeds

\$200,000, or a community is evacuated for more than 72 hours), grade as Category Five;

(c) If (1) bodily injury results, or (2) a significant disruption to the environment results (e.g., estimated cleanup costs of \$40,000–\$200,000, or a community is evacuated for 72 hours or less), grade as Category Four;

(d) Otherwise, grade as Category Three;

(e) *Exception:* Where the offender is a non-managerial employee (i.e., a truck driver or loading dock worker) acting under the orders of another person, grade as two categories below the underlying offense, but not less than Category One.

CHAPTER TWELVE MISCELLANEOUS OFFENSES

If an offense behavior is not listed, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed in Chapters One-Eleven. If, and only if, an offense behavior cannot be graded by reference to Chapters One-Eleven, the following formula may be used as a guide.

Maximum sentence authorized by statute (not necessarily the sentence imposed)	Grading (category)
<< 2 years .....	1
2 to 3 years .....	2
4 to 5 years .....	3
6 to 10 years .....	4
11 to 20 years .....	5
21 to 29 years .....	6
30 years to life .....	7

CHAPTER THIRTEEN GENERAL NOTES AND  
DEFINITIONS

Subchapter A—General Notes

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

2. If an offense behavior involved multiple separate offenses, the severity level may be increased. Exception: in cases graded as Category Seven, multiple separate offenses are to be taken into account by consideration of a decision above the guidelines rather than by increasing the severity level.

(a) In certain instances, the guidelines specify how multiple offenses are to be rated. In offenses rated by monetary loss (e.g., theft and related offenses, counterfeiting, tax evasion) or drug offenses, the total amount of the property or drugs involved is used as the basis for the offense severity rating. In instances not specifically covered in the guidelines, the decision-makers must exercise discretion as to whether or not the multiple offense behavior is sufficiently aggravating to justify increasing the severity rating. The following chart is intended to provide guidance in assessing whether the severity of multiple offenses is sufficient to raise the offense severity level; it is not intended as a mechanical rule.

MULTIPLE SEPARATE OFFENSES

Severity	Points	Severity	Points
Category One .....	= 1/9	Category Five .....	= 9
Category Two .....	= 1/3	Category Six .....	= 27
Category Three .....	= 1	Category Seven .....	= 45
Category Four .....	= 3	.....	.....

Examples: 3 Category Five Offense [3x(9)=27]=Category Six, 5 Category Five Offenses [5x(9)=45]=Category Seven, 2 Category Six Offenses [2x(27)=54]=Category Seven

(b) The term ‘multiple separate offenses’ generally refers to offenses committed at different times. However, there are certain circumstances in which offenses committed at the same time are properly considered multiple separate offenses for the purpose of establishing the offense severity rating. These include (1) unrelated offenses, and (2) offenses involving the unlawful possession of weapons during commission of another offense.

(c) For offenses graded according to monetary value (e.g., theft) and drug offenses, the severity rating is based on the amount or quantity involved and not on the number of separate instances.

(d) Intervening Arrests. Where offenses ordinarily graded by aggregation of value/quantity (e.g., property or drug offenses) are separated by an intervening arrest, grade (1) by aggregation of value/quantity or (2) as multiple separate offenses, whichever results in a higher severity category.

(e) Income Tax Violations Related to Other Criminal Activity. Where the circumstances indicate that the offender’s income tax violations are related to failure to report income from other criminal activity (e.g., failure to report income from a fraud offense) grade as tax evasion or according to the underlying criminal activity established, whichever is higher. Do not grade as multiple separate offenses.

3. In cases where multiple sentences have been imposed (whether consecutive or concurrent, and whether aggregated or not) an offense severity rating shall be established to reflect the overall severity of the underlying criminal behavior. This rating shall apply whether or not any of the component sentences have expired.

4. The prisoner is to be held accountable for his own actions and actions done in concert with others; however, the prisoner is not to be held accountable for activities committed by associates over which the prisoner has no control and could not have been reasonably expected to foresee. However, if the prisoner has been convicted of a conspiracy, he must be held accountable for the criminal activities committed by his co-conspirators, provided such activities were committed in furtherance of the conspiracy and subse-

quent to the date the prisoner joined the conspiracy, except in the case of an independent, small-scale operator whose role in the conspiracy was neither established nor significant. An offender has an “established” role in a conspiracy if, for example, he takes orders to perform a function that assists others to further the objectives of the conspiracy, even if his activities did not significantly contribute to those objectives. For such offenders, however, a “peripheral role” reduction may be considered.

5. The following are examples of circumstances that may be considered as aggravating factors: extreme cruelty or brutality to a victim; the degree of permanence or likely permanence of serious bodily injury resulting from the offender’s conduct; an offender’s conduct while attempting to evade arrest that causes circumstances creating a significant risk of harm to other persons (e.g., causing a high speed chase or provoking the legitimate firing of a weapon by law enforcement officers).

6. The phrase “may be considered an aggravating/mitigating factor” is used in this index to provide guidance concerning certain circumstances which may warrant a decision above or below the guidelines. This does not restrict consideration of above or below guidelines decisions only to these circumstances, nor does it mean that a decision above or below the guidelines is mandated in every such case.

Subchapter B—Definitions

1. “Accessory after the fact” refers to the conduct of one who, knowing an offense has been committed, assists the offender to avoid apprehension, trial, or punishment (e.g., by assisting in disposal of the proceeds of an offense).

NOTE: Where the conduct consists of concealing an offense by making false statements not under oath, grade as “misprision of felony”. Where the conduct consists of harboring a fugitive, grade as “harboring a fugitive”.

2. “Assassination kit” refers to a disguised weapon designed to kill without attracting attention. Unlike other weapons such as sawed-off shotguns which can be used to intimidate, assassination kits are intended to be undetectable in order to make the victim and bystanders unaware of the threat. A typical assassination kit is usually, but not always, a firearm with a silencer concealed in a briefcase or similar disguise and fired without showing the weapon.

3. “Bodily injury” refers to injury of a type normally requiring medical attention [e.g., broken bone(s), laceration(s) requiring stitches, severe bruises].

4. “Carnal knowledge” refers to sexual intercourse with a female who is less than 16 years of age and is not the wife of the offender.

5. “Extortionate extension of credit” refers to any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

6. “Failure to appear” refers to the violation of court imposed conditions of release pending trial, appeal, or imposition or execution of sentence by failure to appear before the court or to surrender for service of sentence.

7. “Forcible felony” includes, but shall not be limited to, kidnapping, rape or sodomy, aircraft piracy or interference with a flight crew, arson or property destruction offenses, escape, robbery, extortion, or criminal entry offenses, and attempts to commit such offenses.

8. “Involuntary manslaughter” refers to the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

9. “Misprision of felony” refers to the conduct of one who, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority. The “concealment” described above requires an act of commission (e.g., making a false statement to a law enforcement officer).

10. “Murder” refers to the unlawful killing of a human being with malice aforethought. “With malice aforethought” generally refers to a finding that the offender formed an intent to kill or do serious bodily harm to the victim without just cause or provocation.

11. “Opiate” includes heroin, morphine, opiate derivatives, and synthetic opiate substitutes.

12. “Other illicit drug offenses” include, but are not limited to, offenses involving the following: amphetamines, hallucinogens, barbiturates, methamphetamines, and phencyclidine (PCP).

13. “Other medium of exchange” includes, but is not limited to, postage stamps, governmental money orders, or governmental coupons redeemable for cash or goods.

14. “Peripheral role” in drug offenses refers to conduct such as that of a person hired as a deckhand on a marijuana boat, a person hired to help offload marijuana, a person with no special skills hired as a simple courier of drugs on a commercial airline flight, or a person hired as a chauffeur in a drug transaction. This definition does not include persons with decision-making or supervisory authority, persons with relevant special skills (e.g., a boat captain, chemist, or air-

plane pilot), or persons who finance such operations. Individuals who transport unusually large amounts of drugs (e.g., 50 kilos of cocaine or more) or who otherwise appear to have a high degree of trust, professionalism, or control will be considered to be “transporters” and not “simple couriers.”

15. “Protected person” refers to a person listed in 18 U.S.C. 351 (relating to Members of Congress), 1116 (relating to foreign officials, official guests, and internationally protected persons), or 1751 (relating to presidential assassination and officials in line of succession).

16. “Serious bodily injury” refers to injury creating a substantial risk of death, major disability or loss of a bodily function, or disfigurement.

17. “Serious bodily injury is the result intended” refers to a limited category of offense behaviors where the circumstances indicate that the bodily injury intended was serious (e.g., throwing acid in a person’s face, or firing a weapon at a person) but where it is not established that murder was the intended object. Where the circumstances establish that murder was the intended object, grade as an ‘attempt to murder’.

18. “Sexual exploitation of children” refers to employing, using, inducing, enticing, or coercing a person less than 18 years of age to engage in any sexually explicit conduct for the purpose of producing a visual or print medium depicting such conduct with knowledge or reason to know that such visual or print medium will be distributed for sale, transported in interstate or foreign commerce, or mailed. It also includes knowingly transporting, shipping, or receiving such visual or print medium for the purposes of distributing for sale, or knowingly distribution for sale such visual or print medium.

19. “Trafficking in stolen property” refers to receiving stolen property with intent to sell.

20. The “value of the property” is determined by estimating the actual or potential replacement cost to the victim. The “actual replacement cost” is the value or money permanently lost to the victim through theft/forgery/fraud. The “potential replacement cost” refers to the total loss the offender specifically intended to cause by theft/forgery/fraud, or the total amount of the victim’s money or property unlawfully exposed to risk of loss through theft/forgery/fraud notwithstanding subsequent recovery by the victim. The highest of these three values is the value to be used in rating the offense on the guidelines.

21. “Voluntary manslaughter” refers to the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion.”

## Department of Justice

## § 2.20

### SALIENT FACTOR SCORING MANUAL

The following instructions serve as a guide in computing the salient factor score.

ITEM A. PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) [[None = 3; One = 2; Two or three = 1; Four or more. . . = 0]]

#### A.1 In General.

(a) Count all convictions/adjudications (adult or juvenile) for criminal offenses (other than the current offense) that were committed prior to the present period of confinement, except as specifically noted.

(b) Convictions for prior offenses that are not separated from each other by an intervening arrest (*e.g.*, two burglaries followed by an arrest for both offenses) are counted as a single prior conviction. Prior offenses that are separated by an intervening arrest are counted separately (*e.g.*, three convictions for larceny and a conviction for an additional larceny committed after the arrest for the first three larcenies would be counted as two prior convictions, even if all the four offenses were adjudicated together).

(c) Do not count the current federal offense or state/local convictions resulting from the current federal offense (*i.e.*, offenses that are considered in assessing the severity of the current offense). Exception: Where the first and last overt acts of the current offense behavior are separated by an intervening federal conviction (*e.g.*, after conviction for the current federal offense, the offender commits another federal offense while on appeal bond), both offenses are counted in assessing offense severity; the earlier offense is also counted as a prior conviction in the salient factor score.

A.2 *Convictions.* (a) Felony convictions are counted. Non-felony convictions are counted, except as listed under (b) and (c). Convictions for driving while intoxicated/while under the influence/while impaired, or leaving the scene of an accident involving injury or an attended vehicle are counted. For the purpose of scoring Item A of the salient factor score, use the offense of conviction.

(b) Convictions for the following offenses are counted only if the sentence resulting was a commitment of more than thirty days (as defined in item B) or probation of one year or more (as defined in Item E), or if the record indicates that the offense was classified by the jurisdiction as a felony (regardless of sentence):

1. Contempt of court;
2. Disorderly conduct/disorderly person/breach of the peace/disturbing the peace/uttering loud and abusive language;
3. Driving without a license/with a revoked or suspended license/with a false license;
4. False information to a police officer;
5. Fish and game violations;

6. Gambling (*e.g.*, betting on dice, sports, cards) [Note: Operation or promotion of or employment in an unlawful gambling business is not included herein];

7. Loitering;
8. Non-support;
9. Prostitution;
10. Resisting arrest/evade and elude;
11. Trespassing;
12. Reckless driving;
13. Hindering/failure to obey a police officer;
14. Leaving the scene of an accident (except as listed under (a)).

(c) Convictions for certain minor offenses are not counted, regardless of sentence. These include:

1. Hitchhiking;
2. Local regulatory violations;
3. Public intoxication/possession of alcohol by a minor/possession of alcohol in an open container;
4. Traffic violations (except as specifically listed);
5. Vagrancy/vagabond and rogue;
6. Civil contempt.

A.3 *Juvenile Conduct.* Count juvenile convictions/adjudications except as follows:

(a) Do not count any status offense (*e.g.*, runaway, truancy, habitual disobedience) unless the behavior included a criminal offense which would otherwise be counted;

(b) Do not count any criminal offense committed at age 15 or less, unless it resulted in a commitment of more than 30 days.

A.4 *Military Conduct.* Count military convictions by general or special court-martial (not summary court-martial or Article 15 disciplinary proceeding) for acts that are generally prohibited by civilian criminal law (*e.g.*, assault, theft). Do not count convictions for strictly military offenses. *Note:* This does not preclude consideration of serious or repeated military misconduct as a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score in relation to this item).

A.5 *Diversion.* Conduct resulting in diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution, probation without plea, or a District of Columbia juvenile consent decree) is not to be counted in scoring this item. However, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be counted as a conviction even if a conviction is not formally entered.

A.6 *Setting Aside of Convictions/Restoration of Civil Rights.* Setting aside or removal of juvenile convictions/adjudications is normally for civil purposes (to remove civil penalties and stigma). Such convictions/adjudications are to be counted for purposes of assessing parole prognosis. This also applies to adult convictions/adjudications which

may be set aside by various methods (including pardon). However, convictions/adjudications that were set aside or pardoned on grounds of innocence are not to be counted.

**A.7 *Convictions Reversed or Vacated on Grounds of Constitutional or Procedural Error.*** Exclude any conviction reversed or vacated for constitutional or procedural grounds, unless the prisoner has been retried and reconvicted. It is the Commission's presumption that a conviction/adjudication is valid, except under the limited circumstances described in the first note below. If a prisoner challenges such conviction he/she should be advised to petition for a reversal of such conviction in the court in which he/she was originally tried, and then to provide the Commission with evidence of such reversal. *Note:* Occasionally the presentence report documents facts clearly indicating that a conviction was unconstitutional for deprivation of counsel [this occurs only when the conviction was for a felony, or for a lesser offense for which imprisonment was actually imposed; and the record is clear that the defendant (1) was indigent, and (2) was not provided counsel, and (3) did not waive counsel]. In such case, do not count the conviction. Similarly, do not count a conviction if: (1) the offender has petitioned the appropriate court to overturn a felony conviction that occurred prior to 1964, or a misdemeanor/petty offense conviction that occurred prior to 1973 (and the offender claims he served a jail sentence for the non-felony conviction); (2) the offender asserts he was denied his right to counsel in the prior conviction; and (3) the offender provides evidence (*e.g.*, a letter from the court clerk) that the records of the prior conviction are unavailable. *Note:* If a conviction found to be invalid is nonetheless supported by persuasive information that the offender committed the criminal act, this information may be considered as a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score).

**A.8 *Ancient Prior Record.*** If both of the following conditions are met: (1) The offender's only countable convictions under Item A occurred at least ten years prior to the commencement of the current offense behavior (the date of the last countable conviction under Item A refers to the date of the conviction, itself, not the date of the offense leading to conviction), and (2) there is at least a ten year commitment free period in the community (including time on probation or parole) between the last release from a countable commitment (under Item B) and the commencement of the current offense behavior; then convictions/commitments prior to the above ten year period are not to be counted for purposes of Item A, B, or C. *Note:* This provision does not preclude consideration of earlier behavior (*e.g.*, repetition of particularly serious or assaultive conduct) as

a negative indicant of parole prognosis (*i.e.*, a possible reason for overriding the salient factor score). Similarly, a substantial crime free period in the community, not amounting to ten years, may, in light of other factors, indicate that the offender belongs in a better risk category than the salient factor score indicates.

**A.9 *Foreign Convictions.*** Foreign convictions (for behavior that would be criminal in the United States) are counted.

**A.10 *Tribal Court Convictions.*** Tribal court convictions are counted under the same terms and conditions as any other conviction.

**A.11 *Forfeiture of Collateral.*** If the only known disposition is forfeiture of collateral, count as a conviction (if a conviction for such offense would otherwise be counted).

**A.12 *Conditional/Unconditional Discharge (New York State).*** In N.Y. State, the term "conditional discharge" refers to a conviction with a suspended sentence and unsupervised probation; the term "unconditional discharge" refers to a conviction with a suspended sentence. Thus, such N.Y. State dispositions for countable offenses are counted as convictions.

**A.13 *Adjudication Withheld (Florida).*** In Florida, the term "adjudication withheld" refers to a disposition in which a formal conviction is not entered at the time of sentencing, the purpose of which is to allow the defendant to retain his civil rights and not to be classified as a convicted felon. Since the disposition of adjudication withheld is characterized by an admission of guilt and/or a finding of guilt before a judicial body, dispositions of "adjudication withheld" are to be counted as convictions for salient factor scoring purposes. However, it is not considered a conviction on which forfeiture of street time can be based.

**A.14 *Juvenile Consent Decree (District of Columbia).*** A juvenile consent decree in the District of Columbia is a diversionary disposition not requiring an admission or finding of guilt. Therefore, it is not to be used in scoring this item.

**ITEM B. PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)** [[None=-2; One or two=1; Three or more=0]]

**B.1** Count all prior commitments of more than thirty days (adult or juvenile) resulting from a conviction/adjudication listed under Item A, except as noted below. Also count commitments of more than thirty days imposed upon revocation of probation or parole where the original probation or parole resulted from a conviction/adjudication counted under Item A.

**B.2** Count only commitments that were imposed prior to the commission of the last overt act of the current offense behavior.

## Department of Justice

## § 2.20

Commitments imposed after the current offense are not counted for purposes of this item. Concurrent or consecutive sentences (whether imposed as the same time or at different times) that result in a continuous period of confinement count as a single commitment. However, a new court commitment of more than thirty days imposed for an escape/attempted escape or for criminal behavior committed while in confinement/escape status counts as a separate commitment.

**B.3 Definitions.** (a) This item only includes commitments that were actually imposed. Do not count a suspended sentence as a commitment. Do not count confinement pending trial or sentencing or for study and observation as a commitment unless the sentence is specifically to "time served". If a sentence imposed is subsequently reconsidered and reduced, do not count as a commitment if it is determined that the total time served, including jail time, was 30 days or less. Count a sentence to intermittent confinement (e.g., weekends) totaling more than 30 days.

(b) This item includes confinement in adult or juvenile institutions, community corrections centers, and other residential treatment centers (e.g., halfway houses and community treatment centers). It does not include foster home placement. Count confinement in a community corrections center (CCC) or other residential treatment center only when it is part of a committed sentence. Do not count confinement in a community corrections center or other residential treatment center when imposed as a condition of probation or parole. Do not count self-commitment for drug or alcohol treatment.

(c) If a committed sentence of more than 30 days is imposed prior to the current offense but the offender avoids or delays service of the sentence (e.g., by absconding, escaping, bail pending appeal), count as a prior commitment. NOTE: Where the subject unlawfully avoids service of a prior commitment by escaping or failing to appear for service of sentence, this commitment is also to be considered in Items D and E. Example: An offender is sentenced to a three-year prison term, released on appeal bond, and commits the current offense. Count as a previous commitment under Item B, but not under Items D and E. To be considered under Items D and E, the avoidance of sentence must have been unlawful (e.g., escape or failure to report for service of sentence). Example: An offender is sentenced to a three-year prison term, escapes, and commits the current offense. Count as a previous commitment under Items B, D, and E.

(d) District of Columbia Juvenile Commitment to Department of Human Services. In the District of Columbia, juvenile offenders may be committed to the Department of Human Services for placement ranging from a foster home to a secure juvenile facility.

Such a commitment is counted only if it can be established that the juvenile was actually committed for more than 30 days to a secure juvenile institution or residential treatment center rather than a foster home.

### ITEM C. AGE AT COMMENCEMENT OF THE CURRENT OFFENSE/PRIOR COMMITMENTS OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)

**C.1** Score 3 if the subject was 26 years of age or more at the commencement of the current offense and has three or fewer prior commitments.

**C.2** Score 2 if the subject was 26 years of age or more at the commencement of the current offense and has four prior commitments.

**C.3** Score 1 if the subject was 26 years of age or more at the commencement of the current offense and has five or more prior commitments.

**C.4** Score 2 if the subject was 22–25 years of age at the commencement of the current offense and has three or fewer prior commitments.

**C.5** Score 1 if the subject was 22–25 years of age at the commencement of the current offense and has four prior commitments.

**C.6** Score 0 if the subject was 22–25 years of age at the commencement of the current offense and has five or more prior commitments.

**C.7** Score 1 if the subject was 20–21 years of age at the commencement of the current offense and has three or fewer prior commitments.

**C.8** Score 0 if the subject was 20–21 years of age at the commencement of the current offense and has four prior commitments.

**C.9** Score 0 if the subject was 19 years of age or less at the commencement of the current offense with any number of prior commitments.

**C.10** Definitions (a) Use the age of the commencement of the subject's current offense behavior, except as noted under the special instructions for probation/parole/confinement/escape status violators.

(b) Prior commitment is defined under Item B.

### ITEM D. RECENT COMMITMENT FREE PERIOD (THREE YEARS)

**D.1** Score 1 if the subject has no prior commitments; or if the subject was released to the community from his/her last prior commitment at least three years prior to commencement of his/her current offense behavior.

**D.2** Score 0 if the subject's last release to the community from a prior commitment occurred less than three years prior to the current offense behavior; or if the subject was in confinement/escape status at the time of the current offense.

**D.3** Definitions. (a) Prior commitment is defined under Item B.



## § 2.20

## 28 CFR Ch. I (7-1-08 Edition)

(b) Confinement/escape status is defined under Item E.

(c) Release to the community means release from confinement status (e.g., a person paroled through a CTC is released to the community when released from the CTC, not when placed in the CTC).

### ITEM E. PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME

E.1 Score 1 if the subject was not on probation or parole, nor in confinement or escape status at the time of the current offense behavior; and was not committed as a probation, parole, confinement, or escape status violator this time.

E.2 Score 0 if the subject was on probation or parole or in confinement or escape status at the time of the current offense behavior; or if the subject was committed as a probation, parole, confinement, or escape status violator this time.

E.3 *Definitions.* (a) The term probation/parole refers to a period of federal, state, or local probation or parole supervision. Occasionally, a court disposition such as 'summary probation' or 'unsupervised probation' will be encountered. If it is clear that this disposition involved no attempt at supervision, it will not be counted for purposes of this item. *Note:* Unsupervised probation/parole due to deportation is counted in scoring this item.

(b) The term "parole" includes parole, mandatory parole, supervised release, conditional release, or mandatory release supervision (*i.e.*, any form of supervised release).

(c) The term "confinement/escape status" includes institutional custody, work or study release, pass or furlough, community corrections center or other residential treatment center confinement (when such confinement is counted as a commitment under Item B), or escape from any of the above.

#### *Item F. Older Offenders.*

F.1 Score 1 if the offender was 41 years of age or more at the commencement of the current offense and the total score from Items A-E is 9 or less.

F.2 Score 0 if the offender was less than 41 years of age at the commencement of the current offense or if the total score from Items A-E is 10.

### SPECIAL INSTRUCTIONS—PROBATION VIOLATOR THIS TIME

Item A Count the original conviction that led to the sentence of probation as a prior conviction. Do not count the probation revocation as a prior conviction.

Item B Count all prior commitments of more than thirty days which were imposed prior to the behavior resulting in the current probation revocation. If the subject is committed as a probation violator following a 'split sentence' for which more than thirty

days were served, count the confinement portion of the 'split sentence' as a prior commitment. *Note:* The prisoner is still credited with the time served toward the current commitment.

Item C Use the age at commencement of the probation violation, not the original offense.

Item D Count backwards three years from the commencement of the probation violation.

Item E By definition, no point is credited for this item. Exception: A person placed on unsupervised probation (other than for deportation) would not lose credit for this item.

Item F Use the age at commencement of the probation violation, not the original offense.

### SPECIAL INSTRUCTIONS—PAROLE OR SUPERVISED RELEASE VIOLATOR THIS TIME

Item A The conviction from which paroled or placed on supervised release counts as a prior conviction.

Item B The commitment from which paroled or released to supervised release (including a prison term ordered for a prior supervised release revocation), counts as a prior commitment.

Item C Use the age at commencement of the violation behavior (including new criminal behavior).

Item D Count backwards three years from the commencement of the violation behavior (including new criminal behavior).

Item E By definition, no point is credited for this item.

Item F Use the age at commencement of the violation behavior (including new criminal behavior).

### SPECIAL INSTRUCTIONS—CONFINEMENT/ESCAPE STATUS VIOLATOR WITH NEW CRIMINAL BEHAVIOR IN THE COMMUNITY THIS TIME

Item A The conviction being served at the time of the confinement/escape status violation counts as a prior conviction.

Item B The commitment being served at the time of the confinement/escape status violation counts as a prior commitment.

Item C Use the age at commencement of the confinement/escape status violation.

Item D By definition, no point is credited for this item.

Item E By definition, no point is credited for this item.

Item F Use the age at commencement of the confinement/escape status violation.

(18 U.S.C. 4203(a)(1); 18 U.S.C. 4204(a)(6))

[47 FR 56336, Dec. 16, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 2.20, see the List of CFR Sections Affected, which appears in the

## Department of Justice

## § 2.23

Finding Aids section of the printed volume and on GPO Access.

### § 2.21 Reparole consideration guidelines.

(a)(1) If revocation is based upon administrative violation(s) only, grade the behavior as if a Category One offense under § 2.20.

(2) If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct, the appropriate severity rating for the new criminal behavior shall be calculated. New criminal conduct may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at revocation hearing. As violations may be for state or local offenses, the appropriate severity level may be determined by analogy with listed federal offense behaviors.

(b) The guidelines for parole consideration specified at 28 CFR 2.20 shall then be applied with the salient factor score recalculated. The conviction and commitment from which the offender was released shall be counted as a prior conviction and commitment.

(c) Time served on a new state or federal sentence shall be counted as time in custody for reparole guideline purposes. This does not affect the computation of the expiration date of the violator term as provided by §§ 2.47(e) and 2.52 (c) and (d).

(d) The above are merely guidelines. A decision outside these guidelines (either above or below) may be made when circumstances warrant.

[50 FR 40368, Oct. 3, 1985, as amended at 68 FR 41529, July 14, 2003]

### § 2.22 Communication with the Commission.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Commission must submit a written request to the appropriate office setting forth the nature of the information to be discussed. Such interview may be conducted by a Commissioner or assigned staff, and a written summary of each such interview shall be prepared and placed in the prisoner's file.

[43 FR 22707, May 28, 1978]

### § 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hearing examiners the authority necessary to conduct hearings and to make recommendations relative to the grant or denial of parole or reparole, revocation or reinstatement of parole or mandatory release, and conditions of parole. Any hearing may be conducted by a single examiner or by a panel of examiners. A Executive Hearing Examiner shall function as a hearing examiner for the purpose of obtaining a panel recommendation whenever the Regional Commissioner has not ordered that a hearing be conducted by a panel of two examiners. Notwithstanding the provisions of §§ 2.48 through 2.51, §§ 2.101 through 2.104, and §§ 2.214 through 2.217, there is also delegated to hearing examiners the authority necessary to make a probable cause finding, to determine the location of a revocation hearing, and to determine the witnesses who will attend the hearing, including the authority to issue subpoenas for witnesses and evidence.

(b) The concurrence of two hearing examiners, or of a hearing examiner and the Executive Hearing Examiner, shall be required to obtain a panel recommendation to the Regional Commissioner. A panel recommendation is required in each case decided by a Regional Commissioner after the holding of a hearing.

(c) An examiner panel recommendation consists of two concurring examiner votes. In the event of divergent votes, the case shall be referred to another hearing examiner (or to the Executive Hearing Examiner in the case of a hearing conducted by a panel of examiners) for another vote. If concurring votes do not result from such a referral, the case shall be referred to any available hearing examiner until a panel recommendation is obtained.

(d) A recommendation of a hearing examiner panel shall become an effective Commission decision only upon the Regional Commissioner's approval, and docketing at the regional office.

[44 FR 3408, Jan. 16, 1979, as amended at 45 FR 84052, Dec. 12, 1980; 59 FR 45625, Sept. 2, 1994; 60 FR 51349, Oct. 2, 1995; 66 FR 51302, Oct. 9, 2001]