ETHICS HYPOTHETICALS RELATED TO FEDERAL SENTENCING

Defendant Peter Meyers

Defense Counsel Paul Jones

AUSA Mary Brown

I.

Defendant **Peter Meyers** pleaded guilty to one count of possessing 15 kilograms of heroin with intent to distribute it and was admonished at the guilty plea hearing that he is facing a statutory mandatory prison sentence of 10 years. After a presentence investigation, the probation officer prepared a PSR, which erroneously stated that Meyers is in Criminal History Category (CHC) I because the probation officer mistakenly concluded that Meyers had no prior convictions. Defense counsel **Paul Jones** knows that Meyers's criminal history score should be 3 points and that his Criminal History Category should be II because he has a prior felony theft conviction (in another state) for which he received a sentence of 14 months in prison from which he was released 14 years ago. Scoring this prior sentence correctly under the Sentencing Guidelines would disqualify Meyers for the two-level "safety valve" reduction under USSG § 2D1.1(b)(16).

The PSR calculated Meyers's adjusted offense level to be 33 by starting with a base offense level of 36 and subtracting 3 levels for acceptance of responsibility. However, the PSR further stated that Meyers qualifies for the two-level "safety valve" reduction under USSG §2D1.1(b)(16) because he has no prior criminal history and also that the ten-year statutory mandatory minimum sentence no longer applies to him under 18 U.S.C. § 3553(f). With the application of the "safety valve" and placement of Meyers in CHC I, Meyers's total offense level would be 31 and the corresponding guidelines imprisonment range would be **108 to 135** months (and, without the 10-year mandatory minimum, the low-end of the guideline range would be 108 months, not 120 months). Although the PSR applied the safety valve and placed Meyers in CHC I, the PSR also erroneously referred to the wrong horizontal line on the guidelines' Sentencing Table (for level 32 rather than 31) and thereby mistakenly referred to Meyers's guidelines imprisonment range as **121 to 151** months. Had all of the guidelines calculations been correctly scored in the PSR – *i.e.*, no safety valve, a determination that Meyers is in CHC II, and a correct application of the Sentencing Table – Meyers's correct guidelines imprisonment range would have been **151 to 188** months.

Assume that there are no other errors in the PSR. Also assume that the AUSA in the case has filed a short "statement of non-objection to the PSR" (and is unaware of the errors in the PSR).

1. Does Jones have an ethical obligation to inform the probation officer and district court of Meyers's prior criminal history (which would disqualify him for the "safety valve")?

2. Should Jones file a written objection to the PSR stating – or phone the probation officer to inform him – that the PSR referred to the wrong sentencing range in the Sentencing Table (based on the calculations in the PSR) and that, based on the calculations in the PSR, the corresponding imprisonment range should be 108 to 135 months?

3. Assuming Jones did not call the Sentencing Table error to the attention of the probation officer and court, would Jones act ethically by simply filing a short "statement of non-objection to the PSR" (and its range of 121-151 months)?

4. At sentencing, may Jones ethically ask the court for a sentence at the bottom of the guidelines range in the PSR – either (A) 121 months (assuming Jones has not asked the probation officer or court to use the 108-135 month range) *or* (B) 108 months (assuming Jones succeeded in having the probation officer change the range to 108-135 months)?

5. Assuming that Jones has filed a short "statement of non-objection to the PSR" as it currently exists (i.e., with a 121-151 month range), if the court explicitly asks Jones at sentencing if the PSR and the sentencing calculations within it are correct, how should Jones respond?

6. If either the 108-135-month or the 121-151-month range is still in the PSR at sentencing, what should Jones say when he is given the opportunity to request a particular sentence for Meyers? (Assume the court has refused to downwardly vary or depart from the guideline range in the PSR, which the court has adopted.)

II.

Peter Meyers was charged in federal court in Baltimore with attempted possession of cocaine with intent to distribute it. Meyers pleaded not guilty and went to trial. At trial, the prosecutor, **AUSA**

Mary Brown, introduced evidence that Meyers had attempted to acquire seven kilograms of powder cocaine in December 2011 from a man named **Roger Clinton**. The jury convicted Meyers of the single charged count of attempted possession with the intent to distribute eight kilos of cocaine.

At trial, because she did not consider it necessary to do so, **AUSA Brown** did not introduce any evidence related to a **confidential source ("CS")** who had provided incriminating information about Meyers that had led to the DEA's wiretaps of Meyers's cell phone calls. During the wiretaps, the agents monitored Meyers's calls with Clinton, which led to Meyers's arrest and indictment. The CS had no involvement in Meyers's dealings with Clinton. The CS had told DEA agents that he and Meyers had engaged in "several" illegal drug deals during the prior three years, including two deals involving five kilograms of powder cocaine each. According to the CS, "Meyers specifically told me that he 'cooked' the powder cocaine he received during those two deals into 'crack' and subsequently distributed the drug in crack form 'throughout the Baltimore area.'" The DEA did not develop any additional information concerning those two alleged deals other than obtaining cell phone records showing many dozens of calls between the CS and Meyers during the prior three years.

During the presentence investigation in Meyers's case, the probation officer was given access to AUSA's file in the case, which contained a DEA-6 report about the CS. In the PSR, the probation officer included the information about the two alleged prior drug deals involving 5 kilos of powder cocaine each that, according to the CS, Meyers had turned into crack before selling. Based on 10 kilograms of crack and 8 kilograms of powder, the PSR calculated Meyers's base offense level at 38. If only the 8 kilograms of powder had been considered, Meyers's base offense level would have been calculated at 32. Because Meyers had no criminal history and also because no specific offense characteristics applied, his resulting guideline range in the PSR – with a base offense level of 38 and no credit for acceptance of responsibility – was 235-293 months. A base offense level of 32 would yield a guidelines range of 121-151 months.

After defense counsel **Paul Jones** received the PSR and saw the portion related to the CS's allegations, Jones objected that the evidence of the prior (unadjudicated) drug deals and "cooking" of the powder into crack cocaine should not be adopted by the district court because it did not have "sufficient indicia of reliability to support its probably accuracy." USSG §6A1.3, comment.

AUSA Brown file contains not only the DEA-6 about the CS's allegations concerning Meyers but also a rap sheet of the CS. That rap sheet shows three prior felony convictions (for burglary, impersonating a police officer, and grand theft – all within the past decade). It also shows that, at the time the CS provided the information about Meyers to the DEA, the CS had a pending felony drug-

trafficking charge in state court in Pennsylvania. The case agent wrote a short memo accompanying the rap sheet that said "the state prosecutor [in the pending case] has agreed to dismiss the charge based on [the CS's] cooperation with the DEA." In fact, the CS's pending state charge was dismissed after Meyers's arrest in the federal case.

1. Does AUSA Brown have an ethical and/or constitutional obligation to disclose the rap sheet and case agent's memo to the defense in Meyers's case? Why or why not?

2. Alternatively, assume that the information about the CS's prior convictions and pending charge (including the fact of the dismissal) was contained only in the case agent's file and was not known by AUSA Brown. What duty, if any, does AUSA Brown have regarding the disclosure of the information?

III.

Peter Meyers, an 18 year-old with no criminal record, was arrested by the DEA in Los Angeles as he was driving his car away from a suspected drug dealer's house. Meyers had 54 grams of crystal meth in a baggie in his jacket pocket. In the glove compartment of his car was a loaded 9-millimeter pistol. The agents seized both the drugs and gun, and Meyers was arrested. He was taken into federal custody and charged by a criminal complaint with possession of more than 50 grams of methamphetamine with intent to distribute it. The criminal complaint did not mention the pistol. At Meyers's initial appearance in federal court, **AFPD Paul Jones** was appointed to represent Meyers. The prosecutor, **AUSA Mary Brown**, approached Jones and said: "The agents seized a loaded 9 millimeter pistol in the glove compartment. If your client pleads guilty to the dope and cooperates (whether or not he can provide substantial assistance), I'll not charge him with a section 924 count." Jones conferred with Meyers, determined that no suppression issues existed, and responded to AUSA Jones as follows: "He'll take the deal, but I would like to avoid mentioning the fact that a loaded gun was in the car. Can your factual basis in the plea agreement omit that fact and also can you and your agent not provide the probation officer information about the gun being in the car? We want to avoid a gun bump under section 2D1.1(b)(1) and also qualify for the safety valve."

1. Assume that AUSA Brown is willing to consider Jones's proposal. Could Brown ethically enter into such an agreement to withhold evidence of the loaded pistol from the probation office and court?

2. Assume Brown and Jones ultimately entered into the agreement. At sentencing, the court specifically asks both attorneys: "The PSR doesn't say anything about it, but I just want to make sure that the defendant wasn't armed during the drug deal in this case. It's my understanding guns are tools of the trade for meth dealers." How should AFPD Jones respond? How should AUSA Brown respond?

IV.

Defendant **Peter Meyers**, who has a prior felony drug conviction, is facing a potential 10-year mandatory minimum sentence for possession with intent to distribute cocaine. He has been charged in a criminal complaint; no indictment has been returned yet. **AUSA Mary Brown** wants Meyers to cooperate and advises **AFPD Paul Jones** that, *if* Meyers cooperates and provides substantial assistance, Brown will not file a § 851 notice of enhancement (that, if filed, would raise the mandatory minimum to 20 years) and also will file a motion for a substantial assistance departure under both § 3553(e) and § 5K1.1. Thus, the potential swing in Meyers's sentence is 15 years – as a 5-year sentence is not unrealistic should the cooperation prove to be fruitful.

During subsequent debriefings, Meyers fails to provide substantial assistance. The proffer sessions lead to nothing because Meyers simply appears not to know what AUSA Brown thought he did about certain other drug dealers. Brown then states that, as a matter of "office policy," she must file the § 851 notice.

Sensing that Meyers might have been holding something back, Jones stresses to Meyers that he will get a minimum 20-year sentence unless he provides truthful incriminating information about other drug dealers. Meyers responds that, two years ago, when he was receiving drugs from his supplier, a rival dealer approached them, pulled out a firearm, and attempted to rob the supplier. Meyers claimed that the supplier responded by grabbing the rival's gun and then fatally shooting the rival. Meyers said that he (Meyers) took the gun from the supplier and threw it in a nearby river. Meyers swears there

were no eyewitnesses and wants to cooperate about the shooting – but only under the condition that he can withhold information about his role with respect to discarding the firearm (as that will make him appear to have aided and abetted the supplier).

Meyers tells Jones that he is prepared to proffer this information about the shooting of the rival drug dealer to the AUSA, the DEA case agent, and local homicide detectives.

1. Should Jones set up the proffer session?

2. What should Jones advise Meyers to say during the debriefing?

3. Assume that Meyers goes to the proffer session intending to tell the truth but, during the debriefing, changes his story and says that the supplier (rather than Meyers) threw the gun in the river after killing the rival drug dealer. Now what should Jones do?

4. Assume that, before the debriefing, Jones told Meyers that he may not lie to or mislead the authorities about his role with regard to the gun, and Meyers then changes his story (to Jones) before the debriefing and tells Jones that he never touched the firearm. How should Jones proceed?

5. Assume that, during the debriefing, Jones learns that the supplier turns out to be one of Jones's former clients? How should Jones proceed?

V.

Peter Meyers was charged with conspiracy to distribute 30 grams of crack cocaine in federal court in St. Louis, which is located in the Eighth Circuit. He pleaded guilty. Meyers had two unrelated prior felony convictions in New York for third-degree burglary (both burglaries of a commercial building). The PSR treated Meyers as a career offender under the guidelines because the two prior New York burglary convictions were deemed "crimes of violence." Under binding Eighth Circuit precedent, burglary of a building is categorically a "crime of violence" under the career offender provision in the guidelines. *See United States v. Synder*, 511 F.3d 813, 818 (8th Cir. 2008) (noting that the Eighth Circuit has repeatedly ruled in this manner for over a decade). Conversely, some other circuits have held, as a

categorical matter, that burglary of a building is *not* a "crime of violence." *See, e.g.*, *United States v. Hurrell*, 555 F.3d 122 (2d Cir. 2009).

After receiving the PSR, **AFPD Paul Jones** goes to the local detention center to review the PSR with his client Meyers. Meyers informs Jones that "another inmate went to the law library" at the detention center and researched the legal issue of whether burglary of a commercial building qualifies as a "crime of violence" under the career offender provision. According to Meyers, the other inmate told him that he should "demand that [his] attorney object to the PSR" on the ground that Meyers's two New York burglary convictions are not "crimes of violence" and, thus, that Meyers is not a career offender. Meyers makes such a "demand" of Jones.

1. What should (must) Jones do, if anything, in response to Meyers's "demand"?

2. Further assume that Meyers raised a *pro se* objection about his career offender status, which was overruled by the district court at sentencing, but that no other legal issues were raised concerning the validity of Meyers's conviction or sentence. After sentencing, what obligation, if any, does Jones have to consult with Meyers about a possible appeal?

3. Assume that Meyers chooses to appeal and that a new defense counsel, **CJA Attorney Maria Gonzalez**, is appointed on appeal. Assume the only legal issue in Meyers's case is the "career offender" issue discussed above. What should Gonzalez do? Can (should) she file an *Anders* brief?