

CLE SEMINAR

District of Oregon Defense Practice Update

Hosted at:

Federal Public Defender's Office

Speakers:

Lisa C. Hay, Federal Public Defender

Stephen R. Sady, Chief Deputy Defender

Portland, Oregon

Live on February 13, 2019

12:00pm to 1:00pm

Eugene, Oregon

Live on February 14, 2019

12:00pm to 1:00pm

Medford, Oregon

Live on February 15, 2019

12:00pm to 1:00pm

LISA HAY
FEBRUARY 2019

DISTRICT OF OREGON DEFENSE PRACTICE UPDATE

*Restitution, plea language,
forfeiture, and discovery*



RESTITUTION UPDATE

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment¹ of the total criminal monetary penalties shall be as follows:

- A. Lump sum payment of \$ due immediately, balance due
 not later than , or
 in accordance with C, D, or E below; or
- B. Payment to begin immediately (may be combined with C, D, or E below); or
- C. If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than \$, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.
- D. Any balance at the imposition of this sentence shall be paid in monthly installments of not less than \$, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.
- E. Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) \$25 per quarter if the defendant is not working in a prison industries program. If the defendant received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, the defendant shall be required to apply the value of such resources to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

Nothing ordered herein shall affect the government's ability to collect up to the total amount of criminal monetary penalties imposed, pursuant to any existing collection authority.

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

PLEA AGREEMENT LANGUAGE

Restitution

15 **Restitution:** Defendant agrees to restitution for Adult Victim 1, now estimated to be less than \$100,000. Defendant agrees fully to disclose all assets in which defendant has any interest or over which defendant exercises control, directly or indirectly, including those held by a spouse, nominee, or third party. Defendant agrees to truthfully complete the Financial Disclosure Statement provided herein by the earlier of fourteen days from defendant's signature on this plea agreement or the date of defendant's entry of a guilty plea, sign it under penalty of perjury, and provide it to both the USAO and the United States Probation Office. Defendant agrees to provide updates with any material changes in circumstances, as described in 18 U.S.C. § 3664(k), within seven days of the event giving rise to the changed circumstances.

Defendant expressly authorizes the USAO to obtain a credit report on defendant. Defendant agrees to provide waivers, consents, or releases requested by the USAO to access records to verify the financial information. Defendant also authorizes the USAO to inspect and copy all financial documents and information held by the U.S. Probation Office.

The parties agree that defendant's failure to timely and accurately complete and sign the Financial Disclosure Statement, and any update thereto, may, in addition to any other penalty or remedy, constitute defendant's failure to accept responsibility under USSG § 3E1.1.

Transfer of Assets

Defendant agrees to notify the Financial Litigation Unit of the USAO before defendant transfers any interest in property with a value exceeding \$1000 owned directly or indirectly,

individually or jointly, by defendant, including any interest held or owned under any name, including trusts, partnerships, and corporations.

Restitution

The Court shall order restitution to each victim in the full amount of each victim's losses as determined by the Court.

Defendant understands and agrees that the total amount of any monetary judgment that the Court orders defendant to pay will be due and payable. Defendant further understands and agrees that pursuant to 18 U.S.C. § 3614, defendant may be resentenced to any sentence which might have originally been imposed if the court determines that defendant has knowingly and willfully refused to pay a fine or restitution as ordered or has failed to make sufficient bona fide efforts to pay a fine or restitution. Additionally, defendant understands and agrees that the government may enforce collection of any fine or restitution imposed in this case pursuant to 18 U.S.C. §§ 3572, 3613, and 3664(m), notwithstanding any initial or subsequently modified payment schedule set by the court. Defendant understands that any monetary debt defendant owes related to this matter may be included in the Treasury Offset Program to potentially offset defendant's federal retirement benefits, tax refunds, and other federal benefits.

Pursuant to 18 U.S.C. § 3612(b)(1)(F), defendant understands and agrees that until a fine or restitution order is paid in full, defendant must notify the USAO of any change in the mailing address or residence address within 30 days of the change. Further, pursuant to 18 U.S.C. § 3664(k), defendant shall notify the Court and the USAO immediately of any material change in defendant's economic circumstances that might affect defendant's ability to pay restitution, including, but not limited to, new or changed employment, increases in income, inheritances, monetary gifts, or any other acquisition of assets or money.

PLEA AGREEMENT LANGUAGE

Plea Language Matters For Restitution Liability

MVRA applies if plea agreement reflects charge bargaining:

“(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.”

18 U.S.C. § 3663A

RESTITUTION

A Quick Reminder: Defendant's Assets Do Matter

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

- (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
- (B) projected earnings and other income of the defendant; and
- (C) any financial obligations of the defendant; including obligations to dependents.

18 U.S.C. § 3664

PLEA AGREEMENT LANGUAGE

“Use of Plea-Related Statements”

16. **Use of Plea-Related Statements:** Except under circumstances where the Court, acting on its own, fails to accept this agreement, defendant agrees that, upon defendant’s signing of this agreement, the facts that defendant has admitted under this plea agreement as set forth above, as well as any facts to which defendant admits in open court at defendant’s plea hearing, shall be admissible against defendant under Fed. R. Evid. 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and defendant expressly waives defendant’s rights under Fed. R. Crim.

P. 11(f) and Fed. R. Evid. 410 with regard to the facts defendant admits in conjunction with this plea agreement.

DISCOVERY UPDATE

- *Protective Orders*
- *Redactions*
- *Other Cost Shifting*
- *Technical Format*



FORFEITURE

Money Judgment Forfeiture Litigation Update

- *United States v. Soto*, 2019 WL 489056 (9th Cir. Feb. 8, 2019)
 - The Ninth Circuit affirmed the district court's forfeiture order for substitute assets (attempted ammunition smuggling)
 - Plain error review (failure to object to forfeiture order at sentencing, failure to appeal the Rule 35(a) motion)
 - Adequacy of forfeiture in the indictment was not reviewable (not raised to district court or in opening appellate brief)
- “Money Judgment” in Plea Agreement
- Indictment Notice Issues

OTHER PRACTICE ISSUES?





Investigating Predicate Convictions

Federal Public Defender

District of Oregon

February 2019

Predicate Offense	Enhancing Statutes Or Guidelines
offense “punishable by imprisonment for a term exceeding one year”	922(g), 8 U.S.C. § 1326(a),
“crime of violence”	924(c), 4B1.2, 2K2.1(a), 2L1.2, 16(a)
“controlled substance offense”	4B1.2 , 2K2.1(a), 1227(a)(2)(B)(i)
“serious violent felony”	3559(c)(1)(A)(i)
“serious drug offense”	924(e)
“violent felony”	924(e)
“aggravated felony”	8 U.S.C. § 1227(a)(2)(A)(iii), 8 U.S.C. § 1101(a)(43)
offenses “relating to” child pornography	18 U.S.C. § 2252(b)(2)

Johnson v. United States,
135 S. Ct. 2551, 2557 (2015).

- The Armed Career Criminal Act’s definition of a violent felony as one that “involves conduct that presents a serious potential risk of physical injury to another” is **unconstitutionally vague**.
- By tying the judicial assessment of risk to a judicially imagined “ordinary case” of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.

Taylor v. United States,
495 U.S. 575, 595 (1990).

- When the Government alleges that a state conviction qualifies as an enhancing predicate, we employ a “**categorical approach**” to determine whether the state offense is comparable to the generic federal offense.
- Under this approach we look “not to the facts of the particular prior case,” but instead to whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal definition of a corresponding federal crime.

Shepard v. United States,
544 U.S. 13, 16 (2005)

A court determining the character of the state offense is generally limited to examining *Shepard* documents:

- the statutory definition,
- charging document,
- written plea agreement,
- transcript of plea colloquy, and
- any explicit factual finding by the trial judge to which the defendant assented.

Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)
Carachuri-Rosendo v. Holder, 560 U.S. 563, (2010)

- Courts may not use a “**hypothetical approach**” to use facts that did not serve as a basis for the state punishment.
- The court must presume the state convictions rested upon nothing more than the least of the acts criminalized.
- A mitigating sentencing factor must be taken into account even it is not an element of the offense.
- An aggravating sentencing factors cannot be taken into account even if they did not serve as the basis for the state conviction and punishment.

Johnson v. United States,
559 U.S. 133, 134 (2010).

For a predicate to qualify a “violent felony,” the predicate offense must require an **element of violent force** -- force capable of causing physical pain or injury to another person.

United States v. Valencia-Mendoza,
912 F.3d 1215 (9th Cir. 2019)

- For a predicate to qualify a felony as defined in 2L1.2 as an offense “punishable by imprisonment for a term exceeding one year,” the court must consider the maximum term that Defendant actually could have received under state law, *not* maximum term that Defendant theoretically could have received if different factual circumstances were present.
- The actual maximum term that Defendant could have received was only six months, because Washington law imposed a **mandatory sentencing range** and the sentencing court could not deviate from the statutory sentencing range unless it found that one of four specific factual circumstances was present.

States With Mandatory Sentencing Guidelines

- Oregon
- Washington
- Kansas
- North Carolina
- Michigan convictions after January 1, 1999
- California convictions between 1977 and March 30, 2007
- Indiana convictions before 2005
- Tennessee convictions before 2005
- New Jersey convictions before August 2, 2005
- Ohio convictions from October 10, 2000 to February 27, 2006

Want more materials?

For more materials from the February 13, 2019, District of Oregon Defense Practice Update CLE, please go to the [Case Documents](#) section of our site and open the Goodtimeblog_2019-02-13_final.pdf. You can also get there by going to Attorney Resources, then Case Documents.