Mistakes and Oversights Not Caught at the Time and Never Corrected

In the course of analyzing whether the current sentence would be lower if imposed today, you should check for mistakes in the sentence that went unnoticed by the court, the probation officer, and the parties at the time of sentencing. Such mistakes are surprisingly common and can have a profound effect on the term of imprisonment imposed. We refer here to typographical errors, mathematical errors, incorrect application of the Guidelines, or incorrect application of statutory provisions --- that were mistakes or oversights at the time they occurred and were never caught or corrected, not arguments that were made and lost at sentencing or on appeal. We offer here some examples, but this is not an exhaustive list of the possibilities. Ideally, you should (1) determine what facts were relied on to calculate the guideline range by examining the PSR, any objections or addenda to it, sentencing memoranda (if any), and the sentencing transcript, (2) calculate your client's guideline range from scratch based on those facts and the Guidelines Manual that should have been used,[1] without reference to the calculations made in the PSR, (3) then check your calculations against the ones made by the probation officer. *See also* Calculating the Guideline Range Then and Now.

Note that there is a new Guidelines Manual every year, and that the provisions you will encounter may have changed from one year to another (both in label and in content). The PSR will usually state the year of the manual used to calculate the guideline range. Be sure to check the manuals in effect on the date of your client's offense and on the date of sentencing, available here. If the two are different in a relevant way, the more lenient of the two should have been used. *See* USSG § 1B1.11(b)(1). Unless otherwise noted, the provisions cited and described here are to the current manual, but each has been in effect for at least 10 years. Your client may have been sentenced under an earlier version that was different.

Be alert for:

- Typographical errors, as in Ceasar Cantu's case, where the PSR contained a typo making the offense level 36, when it was really 34. Other examples may include:
    - The PSR accidentally selected the wrong Guideline range for the offense level and criminal history category from the Sentencing Table.
    - The PSR made an error in adding or subtracting adjustments/enhancements to the offense level or criminal history category (e.g., 24+3 = 28, or 4+5 = 10).
    - The PSR neglected to subtract for an adjustment that was found to apply (such as acceptance of responsibility or a mitigating role adjustment).

[1] The client should have been originally sentenced under the version in effect on the date of sentencing unless the version in effect on the date the offense was committed resulted in a lower guideline range, in which case that version should have been used. *See* USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987).

- Mathematical errors in converting different drug types into marijuana for purposes of calculating a base offense level. *See* USSG § 2D1.1. cmt. (n.8).

- Incorrect application of the Guidelines at the time of the original sentencing. The following are common examples, but you should look closely at all guideline applications in your case.
  - The defendant was sentenced under a version of the Guidelines that was promulgated after the defendant committed the offense and was more severe than the Guidelines in effect when the offense was committed, in violation of the Ex Post Facto Clause. *See* USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987).
  - Application of Guidelines from different manuals (violation of the "one book rule," in USSG §1B1.11(b)(2)), applying the least favorable provisions from both the manual in effect on the date of sentencing and the manual in effect on the date of the offense.
  - Application of two-level enhancement under USSG § 2D1.1(b)(1) if firearm "was possessed" where consecutive 18 U.S.C. § 924(c) sentence was also imposed. *See* USSG § 2K2.4, cmt. (n.4).
  - The defendant was held accountable under USSG §1B1.3 (Relevant Conduct) for the conduct of co-conspirators that occurred before the defendant joined the conspiracy or after defendant left the conspiracy.
  - The Court used an offense guideline that applied to a more serious offense to which the defendant did not stipulate as part of the plea agreement, rather than the offense of conviction. *See* USSG §1B1.2. (*E.g.*, application of § 2D1.2 (protected area, +2), when the agreement specified use of § 2D1.1).
  - The defendant's guideline range was increased based on self-incriminating information that he provided pursuant to a cooperation agreement in which the government agreed that such information would not be used against the defendant. *See* USSG §1B1.8(a).
  - Defendant was denied acceptance of responsibility points where he went to trial to preserve issues unrelated to factual guilt, challenged the application of the statute to his conduct, or raised a constitutional challenge to the statute. *See* USSG § 3E1.1, cmt. (n.2)

- Drug Guideline Errors
  - The defendant pled guilty to an offense involving methamphetamine mixture but the PSR assumed the quantity was actual methamphetamine rather than methamphetamine mixture. (E.g., defendant admitted responsibility for 75 grams of methamphetamine *mixture*. The Drug Quantity Table places 75 grams of

methamphetamine mixture at Level 26. *See* § 2D1.1(c)(7) (" [a]t least 50 G but less than 200 G of Methamphetamine, or at least 5G but less than 20 G of Methamphetamine (actual)"). However, the PSR assumed the quantity was *actual* methamphetamine and set the base offense level at 32. *See* USSG § 2D1.1(c)(4) ("[[a]t least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual)").

- The defendant's sentence was based on the weight of the entire tablets of ephedrine, pseudoephedrine, or phenylpropanolamine instead of the weight of such chemicals contained in the tablets. *See* USSG § 2D1.11, Note (C).

- Criminal history errors:
  - An error as in Percy Dillon's case, where the PSR added points for criminal history that should not have been added under the Guidelines in effect at the time of sentencing (there, a misdemeanor for which the sentence was neither probation of more than one year nor a term of imprisonment of at least thirty days, *see* USSG § 4A1.2(c)(1)).
  - Criminal history points were applied to a prior conviction that was invalid because the defendant was denied the right to counsel (including in the case of a suspended sentence that may have resulted in the actual deprivation of liberty). *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).
  - Criminal history points were applied to a prior sentence that was relevant conduct to the instant offense. *See* USSG § 1B1.3, cmt (n.8) (providing example); *id.* § 4A1.2(a)(1).
  - Criminal history points were added for committing the instant offense while under a criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status), *see* USSG § 4A1.1(d), but the defendant was not under such a sentence, or the PSR mistakenly stated that a prior offense was committed while the defendant was on probation or parole in relation to another state offense comprising the criminal history.
  - The defendant received points for a prior sentence that should have been excluded because it was too old. *See* USSG §§ 4A1.1, cmt. (n.1-3); 4A1.2(e).
  - The prior offense was committed before age 18, and criminal history points were added for a sentence imposed more than five years before the defendant's commencement of the instant offense (for a juvenile disposition or adult sentence of less than 60 days), or the defendant was released from confinement for the offense more than five years before his commencement of the instant offense (for a juvenile disposition or adult sentence of more than 60 days but less than a year and a day). *See* USSG § 4A1.2(d).

- Career offender errors -- The defendant was sentenced as a career offender under USSG § 4B1.1-4B1.2, but
    - One of the predicates was not a "controlled substance offense" or a "crime of violence" even under the guidelines and case law in effect at the time of sentencing. (For how a sentence would be lower based on *subsequent* changes in law, *see* How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today.)
    - A role adjustment (or other enhancement) was added to the career offender offense level. *See* USSG § 1B1.1(a)(1)-(8).
    - The defendant was not imprisoned within last 10 or 15 years on a predicate offense, depending on the sentence. *See* USSG §§ 4B1.2(c); 4A1.1(a)-(c), cmt (n.1-3); 4A1.2(e)(1).
    - The defendant's prior crime of violence was miscounted under §4A1.1(a), (b), or (c), triggering career offender enhancement when it should have been counted under (e) or not at all, thus rendering the enhancement inapplicable. *See* USSG § 4B1.2(c). (For example, the PSR counted a prior conviction as a predicate that was sentenced along with another, non-qualifying offense that received a longer term of imprisonment. *See* 4A1.2(a)(2).)

- § 851 Errors -- The sentence was enhanced based on a "prior conviction for a felony drug offense," but
    - The prosecutor never filed, or did not file before trial or entry of guilty plea, the prior felony information under 21 U.S.C. §851(a)(1).
    - The judge failed "after conviction but before pronouncement of sentence [to] inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information," or to "inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." 21 U.S.C. § 851(b).
    - The defendant's prior conviction was not final when the defendant committed the instant offense. *See* 21 U.S.C. § 841(b)(1)(A).
    - The defendant's prior conviction was not for a "felony drug offense," because, for example, it was not punishable in the convicting jurisdiction by more than one year. *See* 21 U.S.C. § 802(44). (For when a prior conviction is no longer for a "felony drug offense" because of a *subsequent* change in law, *see* How a Person Whose Sentence Was Previously Enhanced Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today.)
    - The defendant was neither prosecuted by indictment nor waived indictment for the instant federal drug offense. *See* 21 U.S.C. § 851(a)(2).

- ACCA Errors – The sentence for possession of a firearm, 18 U.S.C. § 922(g)(1), was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), but
    - Two or more of the three predicates were committed on the same occasion, 18 U.S.C. §924(e)(1), USSG § 4B1.4 cmt (n.1).
    - "Previous conviction" occurred after conviction under 18 U.S.C. § 922(g)(1). *See, e.g., United States v. Richardson*, 166 F.3d 1360 (11th Cir. 1999).