CLD-260 July 23, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1839**

CHRISTOPHER THIEME, Appellant

VS.

UNITED STATES OF AMERICA

(D.N.J. 2-19-cv-15507)

Present: JORDAN, KRAUSE and MATEY, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). For substantially the same reasons given by the District Court, jurists of reason would agree, Slack v. McDaniel, 529 U.S. 473, 484 (2000), that appellant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 was untimely filed. See 28 U.S.C. § 2255(f)(1). Appellant has not made a substantial showing that the District Court erred in declining to apply equitable tolling; among other problems, he has not sufficiently suggested that he diligently pursued his rights. See Holland v. Florida, 560 U.S. 631, 649 (2010). Thieme's actual innocence claim, which attacks his conviction for murder for hire on the ground that the statute is void for vagueness, goes to legal, not factual, innocence. See McQuiggin v. Perkins, 569 U.S. 383, 392, 399 (2013) (holding that actual innocence can be asserted as a gateway to hear time-barred claims if a petitioner persuades the "district court that, in light of the new evidence, no juror, acting reasonably, would have

voted to find him guilty beyond a reasonable doubt"); Bousley v. United States, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."). To the extent that Appellant appeals the District Court's denials of his other motions, a certificate of appealability is denied because reasonable jurists would not debate the correctness of the District Court's rulings. The motion for appointment of counsel is denied.

By the Court,

s/Paul B. Matey
Circuit Judge

Dated: July 29, 2020
SLC/cc: Christopher Thieme
Mark E. Coyne, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHRISTOPHER THIEME, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **Respondent.**	**Civil Action No. 19-15507 (SDW)** **MEMORANDUM OPINION**

IT APPEARING THAT:

1. On December 22, 2016, this Court entered an amended judgment of conviction sentencing Petitioner, Christopher Thieme to 210 months imprisonment. (Docket No. 16-294 at ECF No. 17). Petitioner did not appeal.

2. Two and a half years later, on or about June 14, 2019, Petitioner filed a motion purporting to seek relief either under § 2255 or the writ of audita querela. (Docket No. 16-294 at ECF No. 18).

3. On June 27, 2019, this Court entered an order finding that Petitioner's criminal motion could only proceed as a motion to vacate sentence under 28 U.S.C. § 2255, and providing Petitioner with the notice required by *Castro v. United States*, 540 U.S. 375 (2003). (Docket No. 16-294 at ECF No. 19). Petitioner thereafter filed a response to that order, electing to have his previous motion recharacterized as a § 2255 motion and to proceed on that motion. (Docket No. 16-294 at ECF No. 20).

4. The Clerk of the Court therefore refiled Petitioner's response and his prior motion as his motion to vacate sentence in this matter. (ECF No. 1). Because Petitioner did not use the form required for such motions filed by pro se petitioners, this Court thereafter administratively

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terminated this matter until such time as Petitioner refiled his motion using the required form. (ECF No. 2).

5. On August 21, 2019, Petitioner refiled his motion on the required form. (ECF No. 4).

6. On September 3, 2019, this Court entered an order screening Petitioner's motion to vacate sentence and entered an order directing Petitioner to show cause why his motion should not be dismissed as untimely filed. In that order, this Court found Petitioner's motion untimely absent some basis for tolling, explaining as follows:

> Motions to vacate sentence are subject to a one year statute of limitations which runs from the latest of several possible dates: the date on which the petitioner's conviction becomes final, the date on which an impediment to making his motion is removed, the date on which the Supreme Court first recognizes the claims raised where a claim is based on a newly recognized right made retroactive to cases on collateral review, or the date on which the facts supporting the claim first could have been discovered through due diligence. 28 U.S.C. § 2255(f)(1)-(4). "In most cases, the operative date from which the limitation period is measured will be . . . the date on which the judgment of conviction becomes final." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (internal quotations omitted). Where a petitioner fails to file a direct appeal, his conviction is considered final, when the time for the filing of an appeal has run. *See Kapral v. United States*, 166 F. 3d 565, 577 (3d Cir. 1999).
>
> In this matter, Petitioner's amended judgment of conviction was entered on December 22, 2016. Docket No. 16-294 at ECF No. 17). Petitioner did not file an appeal, and his conviction therefore became final fourteen days later on January 5, 2017. *Kapral*, 166 F.3d at 577, Fed. R. App. P. 4(b)(1)(A)(i). Thus, absent some basis for a start date other than the finality of his conviction or some basis for equitable tolling, Petitioner's one year limitations period had elapsed as of January 5, 2018, well over a year before he filed his initial audita querela petition which became the basis for his current motion to vacate sentence in June 2019. (Docket No. 16-294 at ECF No. 18).
>
> In his habeas petition, Petitioner only argues one basis for an alternative start date for the limitations period. Specifically, he argues that the Supreme Court's decision in *Rosales-Mireles v. United States*, --- U.S. ---, 138 S. Ct. 1897 (2018), announced a new

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rule of law on which his claims rely which should be made retroactive to collateral relief cases. Pursuant to 28 U.S.C. § 2255(f)(3), the one year limitations period will run from "the date on which the right asserted was initially recognized by the Supreme Court" in those cases where "that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." A petitioner seeking to take advantage of this later start date must show that his claim relies on a rule of law "newly recognized" by the Supreme Court, and that that newly recognized right has been made retroactive to cases on collateral review. *Dodd*, 545 U.S. at 358.

The underlying problem with Petitioner's assertion that his claim relies on *Rosales-Mireles* is that, even if this Court were to assume that the case announced a new rule of law recognizing a new right[,] his argument in no way relies on the issue discussed in *Rosales-Mireles*. In *Rosales-Mireles*, the Supreme Court resolved a circuit split over the interpretation of Federal Rule of Criminal Procedure 52(b). 138 S. Ct. at 1906. Specifically, the Court resolved a split over whether and when a court of appeals should grant relief on a claim of plain guidelines error on direct appeal under the rule. *Id.* at 1906-1911. Thus, that case dealt with the proper use of discretion by a direct appellate court in determining when a remand for a resentencing is warranted based on plain guidelines error. Petitioner does not claim that the Court of Appeals committed any error in applying Rule 52(b) – he cannot make such a claim as he never filed a direct appeal. *Rosales-Mirales* is thus not the basis for his claims, and cannot provide him a later start date of the limitations period. Thus, absent some basis for tolling, Petitioner's current motion to vacate sentence remains time barred by well over a year.

Although the § 2255 limitations period is subject to equitable tolling where the facts of the matter so warrant, such tolling "is a remedy which should be invoked 'only sparingly.'" *United States v. Bass*, 268 F. App'x 196, 199 (3d Cir. 2008) (quoting *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998)). Tolling therefore only applies where a petitioner shows "(1) that he faced 'extraordinary circumstances that stood in the way of timely filing,' and (2) that he exercised reasonable diligence." *Johnson*, 590 F. App'x at 179 (quoting *Pabon v. Mahanoy*, 654 F.3d 385, 399 (3d Cir. 2011)). Excusable neglect is insufficient to establish a basis for equitable tolling. *United States v. Thomas*, 713 F.3d 165, 174 (3d Cir. 2013).

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> Petitioner does not present any basis for equitable tolling in his motion, and this Court is aware of no such basis from the facts presented. Because Petitioner did not address the equitable tolling issue in his motion, however, this Court will permit Plaintiff one opportunity to show why his motion to vacate sentence should not be dismissed as time barred.

(ECF No. 5 at 2-4).

7. Following an extension, Petitioner thereafter filed a response to the Order (ECF No. 8), as well as a motion seeking a declaratory judgment (ECF No. 10), and several motions seeking to amend and supplement his motion to vacate sentence. (ECF Nos. 13-15). As this Court has considered Petitioner's amendments and supplements in deciding this matter, Petitioner's motions to amend and supplement his motion to vacate sentence (ECF Nos. 13-15) are granted only to the extent that Petitioner requests consideration of his arguments.[1] As this Court will dismiss Petitioner's motion to vacate sentence as time barred for the reasons set forth below, Petitioner's motion seeking a declaratory judgment (ECF No. 10), which essentially sought a declaration that he is entitled to relief, shall also be denied as moot in light of the dismissal of his motion to vacate sentence.

8. In his post-Order to Show Cause briefing, Petitioner presents five claims – three in which he challenges various issues with his sentence and restitution order, a claim in which he argues his counsel was ineffective in failing to raise these arguments, and a new claim in which he asserts that one of the statutes out of which his conviction arises – 18 U.S.C. § 1958, which criminalizes the use of interstate commerce in the commission of murder for hire – is constitutionally void for vagueness. All of these claims were raised long after the one year statute

[1] To the extent that Petitioner seeks to file a preemptive Rule 60(b) motion challenging a decision this Court has not yet issued dismissing his petition as time barred (*see* ECF No. 12) that motion is denied. A Rule 60(b) motion may only be filed to challenge an order or judgment issued by the Court, it may not be used to attack a decision that has not yet been issued.

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of limitations had run in this matter, and Petitioner's claims would therefore be time barred unless he can show a basis for equitable tolling, or a statutory basis for a later start date for the one year statute of limitations.

9. Petitioner presents three arguments for why his claims should not be time barred – a repetition of his already rejected argument that *Rosales-Mireles* should provide a later start date; an argument in which he asserts that his new void for vagueness claim should have a later start date as he believes that claim arises out of the Supreme Court's decision in *United States v. Davis*, --- U.S. ---, 139 S. Ct. 2319 (2019), or should otherwise be permitted to proceed as he believes he's actual innocent because of his vagueness challenge; an argument in which he asserts that his ineffective assistance of counsel claim arises out of *Garza v. Idaho*, --- U.S. ---, 139 S. Ct. 738, 746 (2019), and should therefore be timely as such; and a general claim in which he asserts that he should receive equitable tolling because he believes his plea agreement is unconstitutional and otherwise led to a miscarriage of justice.

10. Initially, the Court notes that Petitioner's *Rosales-Mireles* argument remains meritless for the reasons expressed in the Court's Order to Show Cause. *Rosales-Mireles* did not recognize the right that Petitioner seeks to vindicate – it instead merely resolved a circuit split regarding appellate procedure – and thus provides no basis for a later start date for the statute of limitations for Petitioner's claims.

11. Petitioner's reliance on *Garza* is similarly misplaced. To the extent that Petitioner intended to raise a claim that counsel proved ineffective in not filing a direct appeal on his behalf,[2]

[2] Although Petitioner asserts in his response to the OTSC that he wished to raise such a claim under *Garza*, he never sought to raise such a claim in his various amendments, and mentions *Garza* only tangentially in his motion to vacate sentence. For the sake of this opinion, however, this Court assumes Petitioner desired to raise such a claim as part of his ineffective assistance of counsel ground for relief.

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Garza does not provide a later start date for the statute of limitations. In order to provide a later start date, *Garza* would have had to newly recognize the right at issue, and that right would have had to have been made retroactive to cases on collateral review. *Dodd*, 545 U.S. at 358. As to the first question, the Supreme Court in *Garza* did not recognize a new right – the Court by its own logic was merely applying the rule announced in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), to those circumstances where there was an applicable appellate waiver. *Garza*, 139 S. Ct. at 745-48 ("reaffirm[ing]" the applicability of *Flores-Ortega* notwithstanding an appellate waiver). Even assuming *arguendo* that *Garza* had announced a new rule of constitutional law, a finding this Court does not make, Petitioner would still not be entitled to a later start date because he cannot meet the final requirement – that *Garza* has been made retroactive to cases on collateral review. *Garza* did not on its face state or imply that it should be applied retroactively, nor has either the Supreme Court or Third Circuit rendered the case retroactive to collateral review cases. Indeed, the few district courts of which this Court is aware to have addressed the question have found to the contrary. *See, e.g., United States v. Price*, No. 08-312, 2020 WL 516357, at *3 n. 1 (W.D. Pa. Jan. 23, 2020) (noting *Garza* has not been made retroactive); *United States v. McGee*, No. 16-95, 2019 WL 4248887, at *2 (E.D. Ky. Sept. 6, 2019) (*Garza* did not announce new rule and has not been made retroactive and does not provide later date for § 2255(f) statute of limitations); *United States v. Gibson*, Nos. 16-746, 19-420, 2019 WL 5213838, at *3 (D. Haw. Oct. 16, 2019) (same); *Macklin v. Dowling*, No. 19-375, 2019 WL 4727070, at * (W.D. Ok. Aug. 30, 2019) (same). As *Garza* neither announced a new rule of law on which Petitioner relies, nor has been made retroactive to cases on collateral review, *Garza* does not provide Petitioner with a later start date for his statute of limitations. *Dodd*, 545 U.S. at 358.

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12. Petitioner's reliance on *Davis* is also misplaced. *Davis* did not invent the void for vagueness concept, nor did it apply it to the statute Petitioner wishes to challenge. *See Davis*, 139 S. Ct. at 2325, 2327-33 (collecting cases dating back to the late 19th century applying the void for vagueness doctrine to various statutes and applying that rule only to 18 U.S.C. § 924(c)). Petitioner's void for vagueness claim therefore does not arise out of any newly recognized right created by *Davis*, and *Davis* therefore cannot provide Petitioner with a later start date for the running of his limitations period.

13. Likewise, Petitioner's claim that he is actually innocent is without merit. Although actual innocence can serve as a gateway to pierce the § 2255(f) statute of limitations, *see McQuiggan v. Perkins*, 569 U.S. 383, 391-99 (2013), Petitioner is not actually innocent of using the means of interstate commerce to pursue a murder for hire in violation of 18 U.S.C. § 1958(a). Petitioner bases his claim of innocence on the idea that § 1958(a) is "void for vagueness" because certain prisoners have received multiple charges under the statute arising out of a single plot to commit murder for hire which was enacted through multiple uses of the means of interstate commerce, a practice the First Circuit disclaimed in *United States v. Gordon*, 875 F.3d 26, 31-37 (1st Cir. 2017). Contrary to Petitioner's assertion, however, *Gordon* did not argue that this practice rendered the statute void for vagueness, instead the First Circuit merely ruled that a defendant can receive only one conviction arising out of the statute for each plot to commit murder for hire in which he engaged, regardless of the number of phone calls, mailings, or use of interstate commerce that plot involved. *Id.* at 38. Petitioner's guilty plea suffers from no such issue. Nothing Petitioner has submitted nor which was discussed in *Gordon* in any way indicates that the elements of the crime contained in § 1958(a) are vague. As the statute is clear about what conduct is prohibited – the use of the means of interstate commerce to offer "anything of pecuniary value" to another with

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the intent that a murder be committed in violation of state and federal law – and as the statute is not otherwise subject to the arbitrariness concerns that otherwise animate the void for vagueness doctrine, Petitioner has not shown that the statute is unconstitutionally vague, and has thus not in any way shown his "actual innocence." He is therefore still fully subject to the one year limitations period in this matter.

14. Finally, this Court has considered all of the arguments presented by Petitioner and finds that he has failed to show any basis for equitable tolling as he has neither shown that he was diligent nor that he was prevented from earlier raising his claims due to an extraordinary circumstance. *Johnson*, 590 F. App'x at 179. Petitioner delayed two and a half years before seeking to raise his challenges, and has failed to present any persuasive argument as to why he could not have raised his claims sooner. That Petitioner agreed to a plea agreement that he now dislikes is no extraordinary circumstance, and Petitioner may not evade the § 2255 time bar based on his distaste for his earlier decisions. As this Court perceives no valid basis for equitable tolling and as Petitioner has failed to show any legal basis for a later start date for his statute of limitations in his various filings, Petitioner's motion to vacate sentence (ECF No. 4) is dismissed with prejudice as time barred.

15. Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he makes "a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "When the district court denies a habeas [matter] on procedural grounds without reaching the prisoner's underlying constitutional claim, a

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[Certificate of Appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [Petitioner's § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As jurists of reason would not debate that Petitioner's motion to vacate is clearly time barred, Petitioner has failed to make a substantial showing of the denial of a constitutional right, and he is therefore denied a certificate of appealability.

16. In conclusion, Petitioner's motions to amend (ECF Nos. 12-15) are granted only to the extent that this Court has considered Petitioner's filings in this decision, Petitioner's first motion to amend (ECF No. 12) is DENIED to the extent Petitioner sought to file a pre-emptive motion pursuant to Rule 60(b), Petitioner's motion to vacate sentence (ECF No. 4) is DISMISSED WITH PREJUDICE as time barred, Petitioner is DENIED a certificate of appealability, and Petitioner's motion seeking a declaratory judgment (ECF No. 10) is DENIED as moot in light of the dismissal of his motion to vacate sentence. An appropriate order follows.

Dated: March 24, 2020

s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHRISTOPHER THIEME, **Petitioner,** **v.** **UNITED STATES OF AMERICA,** **Respondent.**	**Civil Action No. 19-15507 (SDW)** **ORDER**

This matter having come before the Court on *pro se* Petitioner Christopher Thieme's response (ECF No. 8) to this Court's order directing him to show cause why his motion to vacate sentence should not be dismissed as time barred (ECF No. 5), as well as Petitioner's motions seeking a declaratory judgment (ECF No. 10), and seeking to amend and/or supplement his motion to vacate sentence (ECF Nos. 12-15), the Court having considered the motion to vacate sentence (ECF No. 4), Petitioner's response, the record of proceedings in this matter, and Petitioner's motions, and for the reasons expressed in the accompanying memorandum opinion,

IT IS on this 24th day of March, 2020,

ORDERED that Petitioner's motions seeking to amend or supplement his motion to vacate sentence (ECF Nos. 12-15) are GRANTED solely to the extent that this Court has considered them in ruling upon Petitioner's motion to vacate; and it is further

ORDERED that Petitioner's first motion to amend (ECF No. 12) is DENIED to the extent Petitioner sought to file a pre-emptive Rule 60(b) motion before the entry of judgment in this matter; and it is further

ORDERED that Petitioner's motion to vacate sentence (ECF No. 4) is DISMISSED WITH PREJUDICE as time barred; and it is further

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ORDERED that Petitioner is DENIED a certificate of appealability; and it is further

ORDERED that Petitioner's motion seeking a declaratory judgment (ECF No. 10) is DENIED as moot in light of the dismissal of his motion to vacate sentence; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying memorandum opinion on Petitioner by regular mail and shall CLOSE the file.

s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

CASE NUMBER 2:16-CR-00294-SDW-1

CHRISTOPHER THIEME

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Date of Original Judgment: 12/19/2016
Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

The defendant, CHRISTOPHER THIEME, was represented by PATRICK N. MCMAHON, AFPD.

The defendant pleaded guilty to count(s) 1,2 of the INFORMATION on 6/21/2016. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:1958(A) AND 1201(D)	ATTEMPT TO KIDNAP/MURDER AND COMMIT THEFT OF PROPERTY	1/4/2016	1
18:1958(A) AND 1201(D)	RACKETEERING - MURDER	12/2015	2

As pronounced on December 19, 2016, the defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00 for count(s) 1,2, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this 22nd day of December, 2016.

Susan D. Wigenton
U.S. District Judge

07105

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Defendant: CHRISTOPHER THIEME
Case Number: 2:16-CR-00294-SDW-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months, consisting of 210 months on Count One and 120 months on Count Two to be served concurrently to each other.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

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Defendant: CHRISTOPHER THIEME
Case Number: 2:16-CR-00294-SDW-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of terms of 3 years on each of Counts One and Two, both terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth below.

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

COMPUTER MONITORING

You shall submit to an initial inspection by the U.S. Probation Office, and to any unannounced examinations during supervision, of your computer equipment. This includes, but is not limited to, personal computer, personal digital assistants, entertainment consoles, cellular telephones, and/or any electronic media device which is owned or accessed by you. You shall allow the installation on your computer of any hardware or software systems which monitor computer use. You shall pay the costs of the computer monitoring program. You shall abide by the standard conditions of computer monitoring. Any dispute as to the applicability of this condition shall be decided by the Court.

MENTAL HEALTH TREATMENT

You shall undergo treatment in a mental health program approved by the United States Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, as approved by the United States Probation Office, until discharged by the Court. The Probation Officer shall supervise your compliance with this condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You shall not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

Defendant: CHRISTOPHER THIEME
Case Number: 2:16-CR-00294-SDW-1

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

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STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

17) You shall cooperate in the collection of DNA as directed by the Probation Officer.

(This standard condition would apply when the current offense or a prior federal offense is either a felony, any offense under Chapter 109A of Title 18 (i.e., §§ 2241-2248, any crime of violence [as defined in 18 U.S.C. § 16], any attempt or conspiracy to commit the above, an offense under the Uniform Code of Military Justice for which a sentence of confinement of more than one year may be imposed, or any other offense under the Uniform Code that is comparable to a qualifying federal offense);

18) Upon request, you shall provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the

financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You shall cooperate with the Probation Officer in the investigation of your financial dealings and shall provide truthful monthly statements of your income. You shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to your financial information and records;

19) As directed by the U.S. Probation Office, you shall participate in and complete any educational, vocational, cognitive or any other enrichment program offered by the U.S. Probation Office or any outside agency or establishment while under supervision;

20) You shall not operate any motor vehicle without a valid driver's license issued by the State of New Jersey, or in the state in which you are supervised. You shall comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office;

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed)_____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

Defendant: CHRISTOPHER THIEME
Case Number: 2:16-CR-00294-SDW-1

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of $1,033.50. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for distribution to:

J.B.
(address to be submitted separately.)

The restitution is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the restitution shall be paid from those funds at a rate equivalent to $25 every 3 months. In the event the entire restitution is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $50.00, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Certiorari Petition - App D
DATE: 09/22/2020 11:08 PM

APPENDIX D

CONSTITUTIONAL PROVISIONS

Article I, Section 1 - the "Vesting Clause"

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, Section 1, Clause 2 - the "Vesting Clause"

"The executive Power shall be vested in a President of the United States of America...."

Article III, Section 1 - the "Vesting Clause"

"The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Article I, Section 9, Clause 2 - the "Suspension Clause"

"The Privilege of the Writ of Habeas Corpus shall not be suspended unless When in Cases of Rebellion or Invasion the public Safety may require it."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Amendment XIV, Section 1 - the "Equal Protection Clause"

"All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal equal protection of the laws."

§ 1958. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959 [18 USCS § 1959]—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate or foreign commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

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§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

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(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16 [18 USCS § 16];

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 [18 USCS § 1365] (relating to tampering with consumer products); or

(iv) an offense under section 670 [18 USCS § 670] (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

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(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.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664 [18 USCS § 3664].

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§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

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(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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§2E1.4

(a) Base Offense Level (Apply the greater):

(1) **32**; or

(2) the offense level applicable to the underlying unlawful conduct.

Commentary Statutory Provision: 18 U.S.C. § 1958 (formerly 18 U.S.C. § 1952A). **Application Note:**

1. If the underlying conduct violates state law, the offense level corresponding to the mostanalogous federal offense is to be used.

Background: This guideline and the statute to which it applies do not require that a murderactually have been committed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 144); November 1, 1990 (amendment 311); November 1, 1992 (amendment 449).

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§2A1.5. Conspiracy or Solicitation to Commit Murder

(a) Base Offense Level: **33**

(b) Specific Offense Characteristic

(1) If the offense involved the offer or the receipt of anything ofpecuniary value for undertaking the murder, increase by **4** lev-els.

(c) Cross References

(1) If the offense resulted in the death of a victim, apply §2A1.1(First Degree Murder).

(2) If the offense resulted in an attempted murder or assault withintent to commit murder, apply §2A2.1 (Assault with Intent toCommit Murder; Attempted Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 371, 373, 1117, 1751(d).

Historical Note	Effective November 1, 1990 (amendment 311). Amended effective November 1, 2004 (amendment 663).

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§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped to-gether into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transac-tion.

(b) When counts involve the same victim and two or more acts or trans-actions connected by a common criminal objective or constitutingpart of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a spe-cific offense characteristic in, or other adjustment to, the guidelineapplicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped un-der this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

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§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5); §§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3; §2C1.5;§§2D2.1, 2D2.2, 2D2.3; §§2E1.3, 2E1.4, 2E2.1;§§2G1.1, 2G2.1;§§2H1.1, 2H2.1, 2H4.1; §§2L2.2, 2L2.5;§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9; §§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

For multiple counts of offenses that are not listed, grouping underthis subsection may or may not be appropriate; a case-by-case de-termination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics andother adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection doesnot necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1 Subsections (a)–(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one ormore of the subsections provide for such grouping. Counts for which the statute (A) spec-ifies a term of imprisonment to be imposed; and (B) requires that such term of imprison-ment be imposed to run consecutively to any other term of imprisonment are exceptedfrom application of the multiple count rules. *See* §3D1.1(b)(1); *id.*, comment. (n.1).

2 The term "***victim***" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and istherefore identifiable as the victim. For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" forpurposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closelyrelated. Where one count, for example, involves unlawfully entering the United Statesand the other involves possession of fraudulent evidence of citizenship, the counts aregrouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the saleof controlled substances and the other involves an immigration

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law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the leadparagraph, *i.e.*, to identify and group "counts involving substantially the same harm."

3 Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the samevictim.

When one count charges an attempt to commit an offense and the other charges the com-mission of that offense, or when one count charges an offense based on a general prohi-bition and the other charges violation of a specific prohibition encompassed in the generalprohibition, the counts will be grouped together under subsection (a).

Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and as-saulting the victim during the course of the kidnapping. The counts are to be groupedtogether. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent appre-hension as part of a single criminal episode. The counts are to be grouped together.

(5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be

grouped together. *But*: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts *are not* to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with asingle criminal objective and represent essentially one composite harm to the same vic-tim are to be grouped together, even if they constitute legally distinct offenses occurringat different times. This provision does not authorize the grouping of offenses that cannotbe considered to represent essentially one composite harm (*e.g.*, robbery of the same vic-tim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be groupedtogether under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortionand one count of

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extortion for the offense he conspired to commit. The counts are to begrouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days.

(3) The defendant is convicted of one count of auto theft and one count of altering thevehicle identification number of the car he stole. The counts are to be grouped together.

(4) The defendant is convicted of two counts of distributing a controlled substance, eachcount involving a separate sale of 10 grams of cocaine that is part of a common schemeor plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each countunder §1B1.3(a)(2). The two counts will then be grouped together under either this sub-section or subsection (d) to avoid double counting. *But*: (5) The defendant is convicted oftwo counts of rape for raping the same person on different days. The counts *are not* to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjust-ment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joinedtogether) a bank robbery on one occasion and an assault resulting in bodily injury onanother occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a differ-ent harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsec-tion. Frequently, this provision will overlap subsection (a), at least with respect to specificoffense characteristics. However, a count such as obstruction of justice, which representsa Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsec-tion (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count pro-vides an adjustment for only one

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occurrence of that factor. In such cases, only the countrepresenting the most serious of those factors is to be grouped with the other count. For

example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault con-viction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense char-acteristic . . . or other adjustment" within the meaning of subsection (c). For example, theguideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the de-fendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a crim-inal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most prop-erty crimes (except robbery, burglary, extortion and the like), drug offenses, firearmsoffenses, and other crimes where the guidelines are based primarily on quantity or con-template continuing behavior are to be grouped together. The list of instances in whichthis subsection should be applied is not exhaustive. Note, however, that certain guide-lines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection

(d) if the offense that is the object of the conspiracy, attempt, or solicitation is coveredunder subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped to-gether under subsection (d) if the offenses are of the same general type and otherwisemeet the criteria for grouping under this subsection. In such cases, the offense guidelinethat results in the highest offense level is used; *see* §3D1.3(b). The "same general type" of offense is to be construed broadly.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each froma different victim. All five counts are to be grouped together. (3) The defendant is con-victed of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to begrouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted ofone count of selling heroin, one

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count of selling PCP, and one count of selling cocaine. Thecounts are to be grouped together. The Commentary to §2D1.1 provides rules for combin-ing (adding) quantities of different drugs to determine a single combined offense level.

(6) The defendant is convicted of three counts of tax evasion. The counts are to be groupedtogether. (7) The defendant is convicted of three counts of discharging toxic substancesfrom a single facility. The counts are to be grouped together. (8) The defendant is con-victed on two counts of check forgery and one count of uttering the first of the forgedchecks. All three counts are to be grouped together. Note, however, that the utteringcount is first grouped with the first forgery count under subsection (a) of this guideline,so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. *But*: (9) The defendant is convicted of three counts of bank robbery. The counts *are not* to be grouped together, nor are the amounts of money involved to be added.

1 A single case may result in application of several of the rules in this section. Thus, forexample, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.

2 A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the con-spiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* §1B1.2(d) and accompanying commentary. Then apply the or-dinary grouping rules to determine the combined offense level based upon the substan-tive counts of which the defendant is convicted and the various acts cited by the conspir-acy count that would constitute behavior of a substantive nature. **Example:** The defend-ant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) con-spiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Groupthe remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placedin the same Group of Closely Related Counts ("Group"). This section specifies four situationsin which counts are to be grouped

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together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims.For example, a defendant may stab three prison guards in a single escape attempt. Some wouldargue that all counts arising out of a single transaction or occurrence should be grouped to-gether even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture ade-quately the criminal behavior. Cases involving injury to distinct victims are sufficiently com-parable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving differentvictims (or societal harms in the case of "victimless" crimes) are grouped together only as pro-vided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them togethermay not always be clear cut. For example, how contemporaneous must two assaults on thesame victim be in order to warrant grouping together as constituting a single transaction oroccurrence? Existing case law may provide some guidance as to what constitutes distinct of-fenses, but such decisions often turn on the technical language of the statute and cannot becontrolling. In interpreting this Part and resolving ambiguities, the court should look to theunderlying policy of this Part as stated in the Introductory Commentary.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 45); November 1, 1989 (amend-ments 121, 253–256, and 303); November 1, 1990 (amendments 309, 348, and 349); November 1, 1991(amendment 417); November 1, 1992 (amendment 458); November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 1998 (amendment 579); Novem-ber 1, 2001 (amendments 615, 617, and 634); November 1, 2002 (amendment 638); January 25, 2003 (amendment 648); November 1, 2003 (amendment 656); November 1, 2004 (amendment 664); November 1,2005 (amendments 679 and 680); November 1, 2007 (amendment 701).

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)–(c), the offense level applicable to a

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Group is the offense level, deter-mined in accordance with Chapter Two and Parts A, B, and C ofChapter Three, for the most serious of the counts comprising theGroup, *i.e.*, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level correspondingto the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts in-volve offenses of the same general type to which different guidelinesapply, apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1 The "***offense level***" for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.

2 When counts are grouped pursuant to §3D1.2(a)–(c), the highest offense level of thecounts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified.Sometimes, it will be clear that one count in the Group cannot have a higher offense levelthan another, as with a count for an attempt or conspiracy to commit the completed of-fense. The formal determination of the offense level for such a count may be unnecessary.

3 When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to theaggregate behavior is used. If the counts in the Group are covered by different guidelines,use the guideline that produces the highest offense level. Determine whether the specificoffense characteristics or adjustments from Chapter Three, Parts A, B, and C apply basedupon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved thediffering specific offense characteristics that require increasing the offense level to a cer-tain minimum may affect the outcome.

4 Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendantcommits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the

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counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The rob-bery, however, will not. This is because the offense guideline for rape (§2A3.1) includesthe most common aggravating factors, including injury, that data showed to be signifi-cant in actual practice. The additional factor of property loss ordinarily can be taken intoaccount adequately within the guideline range for rape, which is fairly wide. However,

an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).

Background: This section provides rules for determining the offense level associated witheach Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Part.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 257 and 303); November 1, 2001 (amendment 617); November 1, 2004 (amendment 674).

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