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# How the Federal Sentencing Guidelines Work: An Overview

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## Summary

Sentencing for all serious federal noncapital crimes begins with the federal Sentencing Guidelines. Congress establishes the maximum penalty and sometimes the minimum penalty for every federal crime by statute. In between, the Guidelines establish a series of escalating sentencing ranges based on the circumstances of the offense and the criminal record of the offender. The Guidelines do so using a score-keeping procedure. The Guidelines process involves:

- I. Identification of the most appropriate Guidelines section for the crime(s) of conviction, based on the nature of the offense (the most commonly applicable are noted in the Guidelines Index)
- II. Identification of the applicable base offense level indicated by the section
- III. Addition/subtraction of offense levels per section instructions for the circumstances in the case at hand
- IV. Addition/subtraction of offense levels per instructions in those chapters of the Guidelines relating to
  - A. Victim related matters
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
  - E. Acceptance of responsibility
- V. Calculation of the criminal history score
- VI. Consideration of departures (more/less severe treatment) which the Guidelines permit
- VII. Application Guidelines instructions relating to
  - A. Imprisonment (Sentencing Table)
  - B. Probation
  - C. Supervised release
  - D. Special assessments
  - E. Fines
  - F. Restitution
  - G. Forfeiture

VIII. Sentencing of Organizations

IX. Deviation based on the sentencing principles in 18 U.S.C. 3553(a).

This report is available in an abridged version entitled CRS Report R41697, *How the Federal Sentencing Guidelines Work: An Abridged Overview*.

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## Introduction

The federal Sentencing Guidelines greatly influence the sentences imposed for federal crimes. Once binding on federal courts, the Guidelines are now the starting point for federal sentencing in most cases.<sup>1</sup> They provide the principal standard against which the reasonableness of any sentence imposed is judged.<sup>2</sup> In the last quarter of FY2014, over 75% of the sentences imposed by federal courts fell within the sentence ranges recommended by the Guidelines or within those ranges but reduced by prosecution endorsed departures recommended in the Guidelines.<sup>3</sup>

The goal of the Guidelines is nation-wide federal sentencing consistency; to ensure that defendants with similar criminal records, convicted of similar crimes, receive similar sentences and that the dissimilar do not.<sup>4</sup> Between the statutory maximum and any statutory minimum established for noncapital federal felonies, the Guidelines calibrate a series of sentencing ranges, according to the nature of the offense and the defendant's criminal record.

## Background

The Guidelines are the work of the United States Sentencing Commission. Congress created the Commission and authorized the Guidelines in the Sentencing Reform Act of 1984.<sup>5</sup> The first Guidelines were promulgated with an effective date of November 1, 1987. The Commission may promulgate amendments which become effective 180 days after they are presented to Congress,

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<sup>1</sup> *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range”).

<sup>2</sup> *Id.* at 51 (When reviewing a sentence, a federal appellate court “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §355(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentencing – including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed.... If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness”).

<sup>3</sup> 46.5% involved cases sentenced within the Guideline range; 30.4% involved government endorsed sentences below the Guideline range pursuant to U.S.S.G. §§5K1.1(substantial assistance) or 5K3.1 (early disposition), U.S. Sentencing Commission, *Preliminary Quarterly Data Report: 1st<sup>st</sup> Quarter Release*, 1, available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015\\_1st\\_Quarterly\\_Report.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015_1st_Quarterly_Report.pdf).

<sup>4</sup> “The [Sentencing Reform] Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court. Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity,” United States Sentencing Commission, *2014 Federal Sentencing Guidelines Manual*, 2-3 (2014), available at <http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual>. In addition to the *Manual*, the Guidelines are also available in 18 U.S.C.A. App. and 18 U.S.C.S. App.

<sup>5</sup> P.L. 98-473, 98 Stat. 1987 (1984), as amended, 28 U.S.C. 991-998; see also, H.Rept. 98-1017 (1984); S.Rept. 98-225. The Sentencing Reform Act appears as Chapter II of the Comprehensive Crime Control Act of 1984, which in turn appears as Title II of the Public Law.

absent congressional action.<sup>6</sup> The Supreme Court has upheld the constitutionality of the Guidelines as a valid delegation of Congressional authority,<sup>7</sup> but held unconstitutional the provision in the Sentencing Reform Act which made them binding on federal courts, rather than advisory.<sup>8</sup>

## Overview

Sentencing under the Guidelines is essentially a score-keeping exercise, not unlike the procedure for filling out a federal income tax return. The process involves assigning “offense levels” for a particular offense based on the nature of the offense and the circumstances under which it was committed. Under the Guidelines, most sentencing determinations follow from the final offense level identified at the end of the process. The sentencing ranges for any term of imprisonment depend both on the final offense level and upon the offender’s criminal history score calculated on the basis of his past criminal record and divided into categories. Each of the possible forty-three offense levels has six sentencing ranges corresponding to the six criminal history categories (See the Sentencing Guidelines’ Sentencing Table, *supra*).

The Guidelines process involves:

- I. Identification of the most appropriate Guidelines section for the crime(s) of conviction, based on the nature of the offense (the most commonly applicable are noted in the Guidelines Index)
- II. Identification of the applicable base offense level indicated by the section
- III. Addition/subtraction of offense levels per section instructions for the circumstances in the case at hand
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  - E. Acceptance of responsibility
- V. Calculation of the criminal history score
- VI. Application Guidelines instructions relating to

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<sup>6</sup> 28 U.S.C. 994(p).

<sup>7</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>8</sup> *United States v. Booker*, 543 U.S. 220 (2005).

A. Imprisonment (Sentencing Table)

B. Probation

C. Supervised release

D. Special assessments

E. Fines

F. Restitution

G. Forfeiture

VII. Consideration of departures (more/less severe treatment) which the Guidelines permit

VIII. Sentence under the Guidelines.

**Table I. Sentencing Table**

(In months of imprisonment)

		<b>Criminal History Category (Criminal History Points)</b>					
		<b>I (0 or 1)</b>	<b>II (2 or 3)</b>	<b>III (4, 5, 6)</b>	<b>IV (7, 8, 9)</b>	<b>V (10, 11, 12)</b>	<b>VI (13 or more)</b>
	<b>Offense Level</b>						
<b>Zone A</b>	<b>1</b>	0-6	0-6	0-6	0-6	0-6	0-6
	<b>2</b>	0-6	0-6	0-6	0-6	0-6	1-7
	<b>3</b>	0-6	0-6	0-6	0-6	2-8	3-9
	<b>4</b>	0-6	0-6	0-6	2-8	4-10	6-12
	<b>5</b>	0-6	0-6	1-7	4-10	6-12	9-15
	<b>6</b>	0-6	1-7	2-8	6-12	9-15	12-18
	<b>7</b>	0-6	2-8	4-10	8-14	12-18	15-21
	<b>8</b>	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b>	<b>9</b>	4-10	6-12	8-14	12-18	18-24	21-27
	<b>10</b>	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b>	<b>11</b>	8-14	10-16	12-18	18-24	24-30	27-33
	<b>12</b>	10-16	12-18	15-21	21-27	27-33	30-37
<b>Zone D</b>	<b>13</b>	12-18	15-21	18-24	24-30	30-37	33-41
	<b>14</b>	15-21	18-24	21-27	27-33	33-41	37-46
	<b>15</b>	18-24	21-27	24-30	30-37	37-46	41-51

16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Source: United States Sentencing Commission



## Preliminaries

In noncapital cases, federal sentencing begins after a conviction at trial or more often pursuant to a plea agreement.<sup>9</sup> Unless excused by the court, a probation officer will conduct a presentence investigation in anticipation of providing the court with a presentence report.<sup>10</sup> The investigation includes an interview with the defendant.<sup>11</sup> The report will include a detailed recitation of factual information and of the Guideline and statutory provisions which the officer believes relevant and applicable.<sup>12</sup> The parties are supplied with copies of the report, afforded an opportunity to comment, and may be allowed to present evidence to the court relating to objections to the report.<sup>13</sup> A party who objects to a recommendation in the report bears the burden of proof by a preponderance of the evidence.<sup>14</sup>

The court must begin its sentencing determinations with a calculation of the sentencing range called for under the Guidelines.<sup>15</sup> Before imposing sentence the court must give the parties and victims of the crime a chance to be heard.<sup>16</sup> Having identified the applicable Guideline range, the court, in the exercise of its sentencing discretion, considers it along with the other sentencing factors found in 18 U.S.C. 3553(a) and with any other applicable statutory demands, such as the requirement to impose a minimum sentence of imprisonment in some instances.<sup>17</sup>

## Sentencing Calculations

In imposing sentence, the court will include a detailed explanation of its determinations and may impose probation, a fine, a special assessment, a term of incarceration, a term of supervised release, an obligation to pay restitution, and/or order forfeiture. The court may adjust an earlier sentence to correct clear error or to reflect substantial assistance to the government.<sup>18</sup> The parties may challenge on appeal the sentence or determinations upon which it is based. The court's sentence will be upheld on appeal, if it is found procedurally and substantively reasonable.<sup>19</sup>

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<sup>9</sup> The Sentencing Commission reports that for each of the last five years ending in FY 2014, more than 96.7% of those convicted of federal crimes had pled guilty, U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Figure C (2014), available at <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>.

<sup>10</sup> 18 U.S.C. 3552; Fed. R. Crim. P. 32 (c)(1)(A).

<sup>11</sup> Fed. R. Crim. P. 32(c)(2).

<sup>12</sup> Fed. R. Crim. P. 32(d).

<sup>13</sup> Fed. R. Crim. P. 32(f), (g), (i).

<sup>14</sup> *United States v. Richardson*, 781 F.3d 237, 249 (5<sup>th</sup> Cir. 2015); *United States v. Melendez*, 775 F.3d 50, 59 (1<sup>st</sup> Cir. 2014); *United States v. Shelabarger*, 770 F.3d 714, 717-18 (8<sup>th</sup> Cir. 2014).

<sup>15</sup> *Gall v. United States*, 552 U.S. 38, 49 (2007).

<sup>16</sup> Fed. R. Crim. P. 32(i)(4).

<sup>17</sup> *Gall v. United States*, 552 U.S. at 49-50.

<sup>18</sup> Fed. R. Crim. P. 35.

<sup>19</sup> *Gall v. United States*, 552 U.S. at 51.

## Base Offense Levels

A Guideline calculation is required for every serious offense for which the defendant is convicted.<sup>20</sup> In most instances, the Guideline Index notes the Guideline offense section that corresponds to the offense of conviction.<sup>21</sup> In other instances, the most closely analogous section applies.<sup>22</sup>

A few offense sections list a single offense level.<sup>23</sup> Most, however, list two or more alternative base offense levels; indicate circumstances under which offense levels are to be added or subtracted; cross reference to the application of another offense section under some circumstances; or do some combination of the three. The offense section for drug trafficking, for instance, lists 5 alternative base offense levels, grounded primarily on the type and amount of the controlled substance involved.<sup>24</sup> Four of those set minimum offense levels when the offense also involves a serious injury; the fifth refers to the Drug Quantity Table which contains an array of 17 escalating offense levels based on the amount and type of drug involved.<sup>25</sup> In order to account for the cases which involve more than one type of controlled substance, the Guideline contains a drug equivalence table under which marijuana is used as the standard and other drugs are assigned an equivalent weight.<sup>26</sup> For instance, 1 gram of heroin is treated as the equivalent of 1 kilogram of marijuana. It also lists 14 circumstances under which offense levels must be added to or subtracted from the base offense level (e.g., a two-level increase for possession of a firearm during the course of the offense).<sup>27</sup>

### Example

Seven individuals and a corporation were convicted of Medicare fraud and appealed in *Moran*.<sup>28</sup> The applicable fraud Guideline, U.S.S.G. §2B1.1, sets a base offense level and provides for additional offense levels based on the extent of the fraud, as well as additional offense levels when mass marketing played a role in the crime, when the offense involved a risk of physical injury, and when the scheme was particularly sophisticated. The Guidelines also require adding offense levels beyond those found in §2B1.1 in order to account for the number and vulnerability of the scheme's victims and the higher level of culpability of two of the defendants. Thus:

“Defendants Antonio Macli and Jorge Macli had identical advisory guidelines calculations. They each had a base offense level of six, pursuant to U.S.S.G. §2B1.1(a)(2).<sup>29</sup> They received these increases to that offense level:

<sup>20</sup> The Guidelines do not apply to Class B or C misdemeanors nor to infractions, U.S.S.G. §1B1.9. The most serious of these is punishable by imprisonment for not than 6 months, 18 U.S.C. 3581(b).

<sup>21</sup> U.S.S.G. §1B1.2.

<sup>22</sup> U.S.S.G. §2X5.1.

<sup>23</sup> The sabotage offense section, for example, simply provides for a base offense level of 32.

<sup>24</sup> U.S.S.G. §2D1.1(a).

<sup>25</sup> U.S.S.G. §2D1.1(c).

<sup>26</sup> U.S.S.G. §2D1.1 cmt. app. n. 10.

<sup>27</sup> U.S.S.G. §2D1.1(b).

<sup>28</sup> *United States v. Moran*, 778 F.3d 942, 950 (11<sup>th</sup> Cir. 2015).

<sup>29</sup> U.S.S.G. §2B1.1(a) (“Base Offense Level: (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or 6, (continued...)”).

- a 20-level increase under §2B1.1(b)(1)(K), because the loss amount was more than \$7 million but not more than \$20 million;<sup>30</sup>
- a two-level increase under §2B1.1(b)(2)(A)(ii), because their offenses were committed through mass-marketing;<sup>31</sup>
- a two-level increase under §2B1.1(b)(9)(C), because their offenses involved sophisticated means;<sup>32</sup>
- a two-level increase under §2B1.1(b)(13)(A), because their offenses involved the conscious reckless risk of death or bodily injury;<sup>33</sup>
- a two-level increase under §3A1.1(b)(1), because they knew or should have known that a victim of their offenses was a vulnerable victim;<sup>34</sup>
- a two-level increase under §3B1.1(b)(2), because the offense involved a large number of vulnerable victims;<sup>35</sup> and
- a four-level upward adjustment under §3B1.1(a), because they were organizers or leaders of criminal activity that involved five or more participants or was otherwise extensive.<sup>36</sup>

“As a result, defendants Antonio Macli and Jorge Macli each had a total offense level of 40. Antonio Macli and Jorge Macli each had no criminal-history points and a criminal history category of 1. Their total offense level of 40 and criminal history categories of 1 resulted in advisory guidelines range of 292 to 365 months’ imprisonment.”<sup>37</sup>

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(...continued)

otherwise”). The health care fraud offense of conviction is punishable by imprisonment for not more than 20 years, 18 U.S.C. 1347.

<sup>30</sup> U.S.S.G. §2B1.1(b)(1)(“If the loss exceeded \$5,000, increase the offense level as follows: . . . (B) More than \$5,000 [-] add 2 . . . (K) More than \$7,000,000 [-] add 20[;] (L) More than \$20,000,000 [-] add 22 . . . (P) More than \$400,000, 000 [-] add 30”).

<sup>31</sup> U.S.S.G. §2B1.1(b)(2)(“Apply the greatest) if the offense - (A)(i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels. . .”).

<sup>32</sup> U.S.S.G. §2B1.1(b)(9)(C) when the Maclis committed their crimes, but now U.S.S.G. §2B1.1(b)(10)(C)(“If . . . (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12”).

<sup>33</sup> U.S.S.G. §2B1.1(b)(13)(A) when the Maclis committed their crimes, but now U.S.S.G. §2B1.1(b)(15)(A)(“If the offense involved (A) the conscious or reckless risk of death or serious bodily injury . . . , increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14”).

<sup>34</sup> U.S.S.G. §3A1.1(b)(1)(“If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels”).

<sup>35</sup> U.S.S.G. §3A1.1(b)(2)(“If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase by 2 additional levels”).

<sup>36</sup> U.S.S.G. §3B1.1(“Based on the defendant’s role in the offense, increase the offense level as follows: (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels”).

<sup>37</sup> *United States v. Moran*, 778 F.3d 942, 970 (11<sup>th</sup> Cir. 2015)(enumeration of the court replaced with bullets).

## Adjustments

The Guidelines make adjustments for victim-related factors, the extent of the offender's participation (role in the offense), obstruction, conviction for multiple offenses, and the offender's acceptance of responsibility.<sup>38</sup>

### Victim

The Guidelines make adjustments in five victim-related situations: (1) when the victim is vulnerable or the offense is hate crime motivated; (2) when the victim is or was a government official or member of the officer's immediate family; (3) when the victim is restrained; (4) when the offense is a federal crime of terrorism; and (5) when the offense is a serious human rights offense.

Unless the offense is a civil rights violation, the hate crime and vulnerable victim adjustment, §3A1.1(a), adds 3 offense levels upon proof to the trier of fact beyond a reasonable doubt that the offense is hate motivated.<sup>39</sup> Section 3A1.1(b) adds 2 offense levels if the offender is aware that the victim of the offense is vulnerable and 4 offense levels if there are a large number of such victims.<sup>40</sup> This vulnerable victim adjustment is designed for cases in which the victim is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to" to the offense.<sup>41</sup>

Except when the underlying offense is obstruction of an officer, §3A1.2 adds 3 offense levels for an offense committed against a current or former government officer or employee or member of their family on account of the performance of official duty.<sup>42</sup> The enhancement is increased to 6 offense levels if the underlying offense is an assault or other crime against the person and an additional 6 offense levels if the underlying offense is knowingly committed against a law enforcement officer in the course of or flight from the offense or if the underlying offense is knowingly committed by prisoner against a prison official.<sup>43</sup>

<sup>38</sup> U.S.S.G. ch. 3.

<sup>39</sup> U.S.S.G. §3A1.1(a). Crimes motivated by hate include those offenses where the victim was selected because of the victim's actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, or sexual orientation. The section does not apply "on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline [relating to sex offenses]." The section does not apply, where U.S.S.G. §2H1.1(b)(1) [6 level increase in the case of a civil rights offense committed by a public official or under color of law] governs, U.S.S.G. §3A1.1, cmt. app. n.1. E.g., *United States v. Armstrong*, 620 F.3d 1172, 1175-176 (9<sup>th</sup> Cir. 2010); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 152-54 (2d Cir. 2008); *United States v. Weems*, 517 F.3d 1027, 1030 (8<sup>th</sup> Cir. 2008).

<sup>40</sup> U.S.S.G. §3A1.1(b).

<sup>41</sup> U.S.S.G. §3A1.1, cmt. app. n. 2; e.g., *United States v. Kimber*, 777 F.3d 553, 564-65 (2d Cir. 2015); *United States v. Myers*, 771 F.3d 162, 220-21 (5<sup>th</sup> Cir. 2014); *United States v. Callaway*, 762 F.3d 754, 760 (8<sup>th</sup> Cir. 2014).

<sup>42</sup> U.S.S.G. §3A1.2(a). E.g., *United States v. Wright-Darrisaw*, 781 F.3d 35, 38 (2d Cir. 2015); *United States v. Hutterer*, 706 F.3d 921, 925(8<sup>th</sup> Cir. 2013); *United States v. Mann*, 701 F.3d 274, 309-10 (8<sup>th</sup> Cir. 2012).

<sup>43</sup> U.S.S.G. §3A1.2(b), (c). E.g., *United States v. Dougherty*, 754 F.3d 1353, 1359 (11<sup>th</sup> Cir. 2014); *United States v. Jones*, 740 F.3d 127, 138-41 (3d Cir. 2014); *United States v. Conaway*, 713 F.3d 897, 902-903 (7<sup>th</sup> Cir. 2013). Courts may find an enhancement particularly appropriate where a firearm is involved, *United States v. Ford*, 613 F.3d 1263, 1269 (10<sup>th</sup> Cir. 2010)("[t]he evidence in this case supports all the necessary requirements for operation of this provision [U.S.S.G. §3A1.2(c)], regardless of whether Defendant Ford fired his weapon directly at the Grants police officer or fired at close range [(100 feet)] to create a diversion, because either way it constitutes an act which is intended to, and reasonably does, cause the victim to fear immediate bodily harm.... At least four circuits have found a defendant (continued...)

The third victim-related adjustment is a 2 offense level enhancement required when the victim is restrained, if restraint is not an element of the underlying offense.<sup>44</sup>

## Terrorism

Although the terrorism adjustment would seem to merit separate treatment, the Sentencing Commission places it among the victim adjustments, U.S.S.G. §3A1.4.<sup>45</sup> When the offense of conviction is one of the forty-plus crimes defined as a federal crime of terrorism, 12 offense levels must be added and the offense level and the result must place the offense level at 32 at least.<sup>46</sup> Moreover, the criminal history category must be set at Category VI, regardless of the extent of the offender’s prior criminal record.<sup>47</sup> The terrorist enhancement requires a finding that the defendant’s crime of conviction or his relevant conduct either includes a federal crime of terrorism or is intended to promote (although it does not constitute) a federal criminal of terrorism.<sup>48</sup> Section 2332b, which outlaws certain multination crimes of violence, supplies the definition of the term “federal crime of terrorism” used in §3A1.4, but the application of §3A1.4’s terrorism enhancement does not require a violation of §2332b.<sup>49</sup>

(...continued)

reaching for a gun during a police encounter creates a substantial risk of serious bodily harm”).

<sup>44</sup> U.S.S.G. §3A1.3, and cmt. app. n.2. E.g., *United States v. Dautovic*, 763 F.3d 927, 935 (8<sup>th</sup> Cir. 2014); *United States v. Joe*, 696 F.3d 1066, 1070-72 (10<sup>th</sup> Cir. 2012); *United States v. Gray*, 692 F.3d 514, 521-22 (6<sup>th</sup> Cir. 2012).

<sup>45</sup> E.g., *United States v. Stafford*, 782 F.3d 786, 791-92 (6<sup>th</sup> Cir. 2015); *United States v. Fidse*, 778 F.3d 477, 481-83 (5<sup>th</sup> Cir. 2015); *United States v. Hassan*, 742 F.3d 104, 148-50 (4<sup>th</sup> Cir. 2014). The placement, however, does not preclude imposition of both victim and terrorism enhancements, e.g., *In re Terrorist Bombings*, 552 F.3d 93, 152-53(2d Cir. 2008)(upholding hate crime (national origin animus), government official, and terrorism enhancements).

<sup>46</sup> U.S.S.G. §3A1.4(a). A list of the federal crimes of terrorism can be found in 18 U.S.C. 2332b(g)(5).

<sup>47</sup> U.S.S.G. §3A1.4(b).

<sup>48</sup> U.S.S.G. §3A1.4(a); *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009)(“[W]e believe that in the context at hand, the word ‘involved’ signifies that a defendant’s offense included a federal crime of terrorism; in other words, that a defendant committed, attempted, or conspired to commit a federal crime of terrorism as defined in 18 U.S.C. §2332b(g)(5). And, as the Fourth Circuit has recognized, commission of a federal crime of terrorism, which would trigger the ‘involved’ prong of the enhancement, incorporates ‘a specific intent requirement, namely, that the underlying felony was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. 18 U.S.C. §2332b(g)(5).’ *United States v. Chandia*, 514 F.3d 365, 376 (4<sup>th</sup> Cir. 2008)”); *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010) (“The ordinary meaning of the ‘intended to promote’ prong gives that clause a separate meaning from the ‘involved’ prong of §3A1.4. The ‘intended to promote’ prong applies where the defendant’s offense is intended to encourage, further, or bring about a federal crime of terrorism, even though the defendant’s own crime of conviction or relevant conduct may not include a federal crime of terrorism. And this has an important implication: To qualify as a federal crime of terrorism that may serve as a predicate for a §3A.14 enhancement, an offense must be listed in 18 U.S.C. §2332b(g)(5)(B) and, in addition, it must be an ‘offense that ... is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,’ as provided by 18 U.S.C. §2332b(g)(5)(A). Under the ‘intended to promote’ prong, however, so long as the defendant’s offense was intended to encourage, further, or bring about a federal crime of terrorism as statutorily defined, the defendant himself does not have to commit an offense listed in §2332b(g)(5)(B), and the defendant’s offense need not itself be “calculated” as described in §2332b(g)(5)(A)”); *United States v. Fidse*, 778 F.3d at 481.

<sup>49</sup> *United States v. Christianson*, 586 F.3d 532, 539-40 (7<sup>th</sup> Cir. 2009); *United States v. Salim*, 549 F.3d 67, 78 (2d Cir. 2008).

## Serious Human Rights Offense

The §3A1.5 adjustment applies to sentences imposed for violations of 18 U.S.C. 1091 (genocide), 2340A (torture), 2441(war crimes), or 2442 (recruiting or using child soldiers).<sup>50</sup> Genocide carries a 2 level increase.<sup>51</sup> The other offenses warrant a 4 level increase, unless death results in which case the minimum offense level is level 37.<sup>52</sup>

## Role in the Offense

The Guidelines devote five sections to matters related to the offender’s role in the crime of conviction: (1) aggravating roles, (2) mitigating roles, (3) abuse of a position of trust or use of special skill, (4) use of a minor, and (5) use of body armor in a drug trafficking offense or a crime of violence.

The Guidelines may adjust an offender’s offense level based on his level of participation in the offense of conviction. There is no adjustment for the one-man crime or the defendant of average culpability in a crime with more than one offender. On the other hand, leaders or organizers of a large criminal endeavor (involving 5 or more participants or “otherwise extensive”) warrant an increase of 4 levels;<sup>53</sup> their managerial subordinates (“managers or supervisors”), a 3 level increase; and the leader or organizers of a smaller criminal endeavor a 2 level increase.<sup>54</sup> Conversely, minimal participants in an offense merit a reduction of 4 levels; minor participants a 2 level reduction; and those whose participation falls somewhere in between, a 3 level reduction.<sup>55</sup>

“Participants” are those who are criminally liable for the endeavor regardless of whether they have been charged or convicted, but not undercover officers or those who are innocently employed.<sup>56</sup> “Otherwise extensive” endeavors may be marked by the involvement of a host of others who are victims or are not otherwise criminally liable.<sup>57</sup>

“A 4-level increase is warranted under §3B1.1(a) if the defendant participated in a criminal activity involving at least five participants (including himself) and organized or led at least one of the other participants.”<sup>58</sup> A criminal endeavor may involve more than one leader or organizer, and

<sup>50</sup> U.S.S.G. §3A1.5 cmt. app. n.1.

<sup>51</sup> U.S.S.G. §3A1.5(a).

<sup>52</sup> U.S.S.G. §3A1.5(b).

<sup>53</sup> E.g., *United States v. Razo*, 782 F.3d 31, 37 (1<sup>st</sup> Cir. 2015)

<sup>54</sup> U.S.S.G. §3B1.1.

<sup>55</sup> U.S.S.G. §3B1.2.

<sup>56</sup> U.S.S.G. §3B1.1, cmt. app. n. 1; *United States v. Moran*, 778 F.3d 942, 979 (11<sup>th</sup> Cir. 2015); *United States v. Haywood*, 777 F.3d 430, 433 (7<sup>th</sup> Cir. 2015); *United States v. Norman*, 776 F.3d 67, 82 (2d Cir. 2015).

<sup>57</sup> U.S.S.G. §3B1.1, cmt. app. n. 3 (“In assessing whether an organization is ‘otherwise extensive,’ all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive”); *United States v. Sosa*, 777 F.3d 1279, 1301 (11<sup>th</sup> Cir. 2015); *United States v. Sethi*, 702 F.3d 1076, 1080 (8<sup>th</sup> Cir. 2013)(“A scheme may be ‘otherwise extensive’ if it involves a large loss amount and covers a period of years”).

<sup>58</sup> *United States v. Haywood*, 777 F.3d at 433; see also, *United States v. Moran*, 778 F.3d at 979; *United States v. Shengyang Zhou*, 717 F.3d 1139, 1148-51 (10<sup>th</sup> Cir. 2013). “An upward departure may be warrant, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the proper, assets, or activities of a criminal organization.” U.S.S.G. §3B1.1, (continued...)

the distinction between leaders and managers, organizers and supervisors, is a matter of degree that involves consideration of “the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.”<sup>59</sup>

One step down, a 3-level increase awaits a defendant who acts as the manager or supervisor, rather than an organizer or leader, over a 5-member or otherwise extensive criminal enterprise.<sup>60</sup> As just noted, the difference between the 3-level increase for a manager/supervisor and the 4-level increase for a leader/organizer is a matter of degree.<sup>61</sup> Otherwise, the same general principles apply as govern the 4-level increase for leaders and organizers. The defendant must either have overseen the activities of at least one but not necessarily all of the participants,<sup>62</sup> or have exercised control over the enterprise’s “property, assets, or activities.”<sup>63</sup> Both culpable and innocent participants count for purposes of the 5 participant threshold.

In the case of the 2-level increase available for the organizers, leaders, managers, or supervisors of smaller criminal enterprises, the defendant likewise need not supervise to qualify but “may be deemed an organizer under §3B1.1 for devising a criminal scheme, providing the wherewithal to accomplish the criminal objective, and coordinating and overseeing the implementation of the conspiracy even though the defendant may not have any hierarchical control over other participants.”<sup>64</sup> In the alternative, a defendant may merit a 2-level increase if he supervised, led, or otherwise directed other participants in a criminal endeavor involving few than 5 participants.<sup>65</sup>

Like the leader-manager enhancement, the minimal-minor participant reduction is only available for crimes involving multiple participants.<sup>66</sup> The reductions may only be granted when the defendant is substantially less culpable than the average offender.<sup>67</sup> The Guidelines once describe

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cmt. app. n. 2.

<sup>59</sup> U.S.S.G. §3B1.1, cmt. app. n. 4; *United States v. Moran*, 778 F.3d 942, 979 (11<sup>th</sup> Cir. 2015); *United States v. Cooper*, 767 F.3d 721, 733 (7<sup>th</sup> Cir. 2014).

<sup>60</sup> U.S.S.G. §3B1.1(b).

<sup>61</sup> U.S.S.G. §3B1.1, cmt. app. n. 4 (“In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as ‘kingpin’ or ‘boss’ are not controlling. Factors the court should consider include the exercise of decision making authority; the nature of participation in the commission of the offense. . . and the degree of control and authority exercised over others”).

<sup>62</sup> U.S.S.G. §3B1.1, cmt. app. n. 2; *United States v. Baldwin*, 774 F.3d 711, 734-35 (11<sup>th</sup> Cir. 2014); *United States v. Olejiya*, 754 F.3d 986, 990-91 (D.C.Cir. 2014); *United States v. Gadson*, 763 F.3d 1189, 1222 (9<sup>th</sup> Cir. 2014).

<sup>63</sup> U.S.S.G. §3B1.1, cmt. app. n. 2; *United States v. Ochoa-Gomez*, 777 F.3d 278, 282-84 (5<sup>th</sup> Cir. 2015)(the defendant must have exercised control over one participant or exercised responsibility over the criminal enterprise’s property, assets, or activities).

<sup>64</sup> *United States v. Wardell*, 591 F.3d 1279, 1304 (10<sup>th</sup> Cir. 2009); see also, *United States v. Doe*, 778 F.3d 814, 824-26 (9<sup>th</sup> Cir. 2015); *United States v. Ochoa-Gomez*, 777 F.3d 278, 282-84 (5<sup>th</sup> Cir. 2015).

<sup>65</sup> *United States v. McCormick*, 773 F.3d 357, 359 (1<sup>st</sup> Cir. 2014)(“Such [a 2-level] increase is warranted only if the government proves that (1) the criminal enterprise involved at least two complicit participants (of whom the defendant may be counted as one), and (2) the defendant, in committing the offense, exercised control over, organized, or otherwise responsible for superintending the activities of, at least one of those other persons”); see also, *United States v. Hill*, 783 F.3d 842, 846-47 (11<sup>th</sup> Cir. 2015); *United States v. Brown*, 771 F.3d 1149, 1158-159 (9<sup>th</sup> Cir. 2014).

<sup>66</sup> U.S.S.G. §3B1.2, cmt. app. n. 2; *United States v. Salas*, 756 F.3d 1196, 1207 (10<sup>th</sup> Cir. 2014).

<sup>67</sup> U.S.S.G. §3B1.2, cmt. app. n. 3(A); *United States v. Mitchell*, 613 F.3d 862, 870 (8<sup>th</sup> Cir. 2010)(“Merely showing (continued...)”).

the 4-level reduction awarded minimal participants as one only “infrequently” appropriate.<sup>68</sup> The language may be gone; but the thought seems to persist.<sup>69</sup> It may be claimed only by those “least culpable” in the criminal enterprise, exemplified by those with a “lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others” in it.<sup>70</sup> The 2-level reduction is reserved for defendants who are less culpable than the average offender but more culpable than the minimal participant.<sup>71</sup> The 3-level reduction appears to have been found appropriate only rarely.

### *Abuse of Trust or Skill*

A 2-level enhancement awaits a defendant who “abuse[s] a position of public or private trust, or use[s] a special skill, in a manner than significantly facilitate[s] the commission or concealment of the offense.”<sup>72</sup> The abuse of trust enhancement requires the defendant hold a professional, managerial, or similar position, formal or informal, in which he is afforded considerable minimally supervised discretion, and that this level of discretion significantly contributes to the defendant’s ability to commit the offense or escape detection.<sup>73</sup> The enhancement applies with equal force when the defendant attains his position of trust through deception such as when he impersonates an attorney or doctor.<sup>74</sup>

The skills enhancement contemplates the use of a facility not ordinarily possessed by members of the general public that “usually require[s] substantial education, training, or licensing,” such as that possessed by doctors, lawyers, chemists, accountants, pilots, and explosives experts.<sup>75</sup> As in

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the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was ‘deeply involved’ in the offense”).

<sup>68</sup> U.S.S.G. §3B1.2, cmt. app. n. 4 (eff. Nov. 1, 2010).

<sup>69</sup> The Sentencing Commission explained that it felt the statement was unnecessary and might discourage appropriate recourse to a sentencing level reduction, 76 Fed. Reg. 24969 (May 3, 2011), 18 U.S.C.A. § 3B1.2, Historical Notes, 2011 Amendments.

<sup>70</sup> U.S.S.G. §3B1.2, cmt. app. n. 4; *United States v. Sweeney*, 611 F.3d 459, 476 (8<sup>th</sup> Cir. 2010).

<sup>71</sup> U.S.S.G. §3B1.2, cmt. app. n. 5; *United States v. Melendez-Rivera*, 782 F.3d 26, 28 (1<sup>st</sup> Cir. 2015) (“To qualify for this adjustment, a defendant must show that he is both less culpable than most of his cohorts in the particular criminal endeavor and less culpable than the mine-run of those who have committed similar crimes”); *United States v. Gadson*, 763 F.3d 1189, 1223 (9<sup>th</sup> Cir. 2014); *United States v. Salas*, 756 F.3d 1196, 1207 (10<sup>th</sup> Cir. 2014).

<sup>72</sup> U.S.S.G. §3B1.3.

<sup>73</sup> U.S.S.G. §3B1.3, cmt. app. n. 1; *United States v. DeMarco*, 784 F.3d 388, 397 (7<sup>th</sup> Cir. 2015) (internal citations omitted) (“We employ a two-part test to determine whether the abuse of trust enhancement is appropriate: (1) whether the defendant occupied a position of trust, and (2) whether the defendant’s abuse of that position of trust facilitated its commission or concealment of the crime. In determining whether the defendant occupied a position of trust, we analyze the situation from the perspective of the victim. A formal position of trust is not necessary under §3B1.3, rather, courts should look beyond labels and categories that characterize the relationship and focus on the nature of the defendant’s relationship to the victim and the level of responsibility he was given”); see also, *United States v. Babaria*, 775 F.3d 593, 596 (3d Cir. 2014); *United States v. Weiss*, 754 F.3d 207, 211-12 (4<sup>th</sup> Cir. 2014).

<sup>74</sup> U.S.S.G. §3B1.3, cmt. app. n. 3 (“This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact the defendant does not”); *United States v. Weiss*, 754 F.3d at 211; *United States v. Kieffer*, 621 F.3d 825, 835 (8<sup>th</sup> Cir. 2010).

<sup>75</sup> U.S.S.G. §3B1.3, cmt. app. n. 4; *United States v. Reichert*, 747 F.3d 445, 454 (6<sup>th</sup> Cir. 2014) (“[R]equisitely ‘special’ skills may be acquired through months (or years) of training, or the equivalent in self-tutelage. . . . [T]o qualify for the enhancement, a defendant’s self-taught skills must be particularly sophisticated. In this respect, emphasis is best placed on the difficulty with which a particular skill is acquired”); *United States v. Berry*, 717 F.3d 823, 834-35 (10<sup>th</sup> Cir. (continued...))



the case of an abuse of trust, the enhancement is only available where use of the special skill contributes to the defendant's ability to commit the offense or escape detection.<sup>76</sup> Enhancement is not available where the abuse of trust or the use of a special skill is specifically taken into account elsewhere in the Guidelines.<sup>77</sup> The abuse of trust enhancement may be used in addition to an enhancement based on the defendant's role in the crime; the use of special skill enhancement may not.<sup>78</sup>

### *Use of a Minor*

Section 3B1.4 assesses 2 offense levels for using, directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting a child under the age of 18 to commit a federal offense or to avoid apprehension; or attempting to do so.<sup>79</sup> Although the section covers recruitment, the enhancement may be assessed against a defendant who uses a minor recruited by another.<sup>80</sup> The defendant must be shown to have taken some affirmative action to involve the minor in the offense or related conduct.<sup>81</sup> The government, however, need not show that the defendant was aware of the minor's age,<sup>82</sup> nor show that the minor was aware of his involvement in a crime.<sup>83</sup> On the other hand, there is some support for the argument that the enhancement may be unavailable if the defendant was under the age of 21 at the time of the offense, but most courts do not agree.<sup>84</sup>

### *Body Armor*

A defendant convicted of a crime of violence or a drug trafficking crime faces a 2-level enhancement, if body armor was involved in the offense, and a 4-level enhancement if he used the armor himself in the preparation for, commission of, or flight from the offense.<sup>85</sup> The

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2013)(commercial driver's license and the ability to operate a "big rig" constitutes a special).

<sup>76</sup> U.S.S.G. §3B1.3; *United States v. Kimber*, 777 F.3d 553, 563-64 (2d Cir. 2015); *United States v. Tai*, 750 F.3d 309, 318 (3d Cir. 2014).

<sup>77</sup> *Id.*

<sup>78</sup> U.S.S.G. §3B1.3.

<sup>79</sup> U.S.S.G. §§3B1.4, 3B1.4, cmt. app. n. 1; e.g., *United States v. Powell*, 732 F.3d 361, 380-81 (5<sup>th</sup> Cir. 2013); *United States v. Yancy*, 725 F.3d 596, 598-99 (6<sup>th</sup> Cir. 2013).

<sup>80</sup> *United States v. Williams*, 590 F.3d 616, 618-19 (8<sup>th</sup> Cir. 2010).

<sup>81</sup> *United States v. Powell*, 732 F.3d at 380; *United States v. Yancy*, 725 F.3d at 598-99; *United States v. Jones*, 612 F.3d 1040, 1048 (8<sup>th</sup> Cir. 2010); but see, *United States v. Goodbear*, 676 F.3d 904, 911 (9<sup>th</sup> Cir. 2012)(upholding a 2 level use-of-a- minor enhancement of the defendant's sentence for misprision because the defendant "[Marcia] Goodbear knew, or it was reasonable to assume that she should have known, that Adrian Goodbear would use K.H. to lie to authorities, as he had instructed Goodbear to tell the same lie. There was no abuse of discretion in adding the two-level enhancement under §3B1.4, because it was reasonably foreseeable to Goodbear that Adrian would use K.H., a minor, to avoid being held responsible for Lyrik's murder").

<sup>82</sup> *United States v. Cox*, 577 F.3d 833, 837 (7<sup>th</sup> Cir. 2009); *United States v. Tipton*, 518 F.3d 591, 596 (8<sup>th</sup> Cir. 2008).

<sup>83</sup> *United States v. Calimlim*, 538 F.3d 706, 717 (7<sup>th</sup> Cir. 2008).

<sup>84</sup> *United States v. Jones*, 612 F.3d at 1048 (noting a conflict in the circuits); *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1115-116 (10<sup>th</sup> Cir. 2008).

<sup>85</sup> U.S.S.G. §3B1.5; *United States v. Haynes*, 582 F.3d 686, 711-12 (7<sup>th</sup> Cir. 2009). The 4-level enhancement is also appropriate where the defendant aided or abetted the use of body armor by a co-defendant, U.S.S.G. §3B1.5, cmt. app. n.2.

enhancement is appropriate even in cases in which the body armor served a purpose other than protection.<sup>86</sup> The section adopts the definition for “crime of violence” from 18 U.S.C. 16 and for “drug trafficking” from 18 U.S.C. 924(c)(2).<sup>87</sup>

## Obstruction

Obstruction may result in a sentencing enhancement under any of four sections: (1) obstruction or impeding the administration of justice, (2) reckless endangerment during flight, (3) commission of an offense while on release and (4) false registration of a domain name.

### *Obstructing or Impeding the Administration of Justice*

Section 3C1.1 declares:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

The Guidelines provide a list of eleven examples of when the enhancement may be appropriate,<sup>88</sup> and a list of five of when it may not.<sup>89</sup> Most of the examples deal with when false or perjurious statements may justify a 2-level increase. The Supreme Court declared some time ago that the Constitution poses no obstacle to enhancing the sentence of a defendant who commits perjury at his trial.<sup>90</sup> The examples of obstructions, for which a sentence may be enhanced, include “committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction.”<sup>91</sup> The section also covers providing a material false statement to a judge, magistrate, probation officer (relating to a presentence investigation), or a law enforcement officer (significantly obstructing an investigation of the offense of conviction).<sup>92</sup> Yet, the section does not cover giving

<sup>86</sup> *United States v. Shamah*, 624 F.3d 449, 459 (7<sup>th</sup> Cir. 2010), citing *United States v. Haynes*, 582 F.3d at 712 and *United States v. Barrett*, 552 F.3d 724, 728 (8<sup>th</sup> Cir. 2009)(noting with respect to defendant police officers convicted of “ripping off” drug dealers under the guise of a legitimate arrest, “[t]he [district] court drew the reasonable inference that the body armor was being used for its primary purpose – for protection. The fact that the body armor may also have been used to identify the defendant officers as legitimate Chicago cops engaged in lawful police activity doesn’t make the enhancement inappropriate”).

<sup>87</sup> U.S.S.G. §3B1.5, cmt. app. n.1.

<sup>88</sup> U.S.S.G. §3C1.1, cmt. app. nn. 4(A) - 4(K).

<sup>89</sup> U.S.S.G. §3C1.1, cmt. app. nn. 5(A) – 5(E).

<sup>90</sup> *United States v. Dunnigan*, 507 U.S. 87, 98 (1993).

<sup>91</sup> U.S.S.G. §3C1.1, cmt. app. n. 4(B); *United States v. Duperval*, 777 F.3d 1324, 1337 (11<sup>th</sup> Cir. 2015)(“This enhancement applies when a defendant commits perjury. Perjury is false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory”); see also, *United States v. Sierra-Villegas*, 774 F.3d 1093, 1102-103(6<sup>th</sup> Cir. 2014); *United States v. Castro-Ponce*, 770 F.3d 819, 822 (9<sup>th</sup> Cir. 2014).

<sup>92</sup> U.S.S.G. §3C1.1, cmt. app. n. 4(F), (G), (H); e.g., *United States v. Norman*, 776 F.3d 67, 84 (2d Cir. 2015)(providing false information to a judge); *United States v. Adejumo*, 772 F.3d 513, 528-29 (8<sup>th</sup> Cir. 2014) (obstructive false statements to a law enforcement officer); *United States v. Jordan*, 771 F.3d 17, 33-4 (1<sup>st</sup> Cir. 2014)(providing false documents during investigation or proceeding); *United States v. Mohmed*, 757 F.3d 757, 761 (8<sup>th</sup> Cir. 2014)(material false statements in the presentence investigation).

law enforcement officers an alias at the time of arrest (unless the misinformation significantly hinders investigation or prosecution of the crime of conviction), nor does it cover other false statements to law enforcement officers (unless it significantly obstructs the investigation of the offense of conviction).<sup>93</sup> Flight from arrest is not covered unless it involves reckless endangerment,<sup>94</sup> but failure to appear for judicial proceedings and escape from custody are.<sup>95</sup>

Obstruction under the section may also take the form of witness intimidation and destruction of evidence.<sup>96</sup> The destruction of evidence contemporaneous to arrest, such as attempting to swallow illicit drugs, is not covered unless it actually results in a material impediment to the investigation or prosecution.<sup>97</sup>

Most of the federal appellate courts agree that the section applies to the obstruction of a state investigation of the events surrounding the federal crime of conviction even when a federal investigation had yet to begin.<sup>98</sup> Moreover, some have found it to encompass steps taken to prevent detection prior to the initiation of any law enforcement investigation.<sup>99</sup>

### ***Reckless Endangerment During Flight***

A 2-level enhancement awaits a defendant who recklessly endangers another in course of, or in preparation for, flight from a law enforcement officer,<sup>100</sup> or who aids or abets another in such flight.<sup>101</sup> Mere flight, by definition, is not enough, even when engendering a dangerous, if reasonable, response.<sup>102</sup> In this context, “reckless” means “a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation of the standard of care that a reasonable person

<sup>93</sup> U.S.S.G. §3C1.1, cmt. app. n. 5(A), (C); *United States v. Sandoval*, 747 F.3d 464, 468 (7<sup>th</sup> Cir. 2014).

<sup>94</sup> U.S.S.G. §3C1.1, cmt. app. n. 5(D); but see, *United States v. Nduribe*, 703 F.3d 1049, 1051 (7<sup>th</sup> Cir. 2013).

<sup>95</sup> U.S.S.G. §3C1.1, cmt. app. n. 4(E); *United States v. Gonzalez*, 608 F.3d 1001, 1007 (7<sup>th</sup> Cir. 2010) (“Hernandez was released in exchange for promises to cooperate and to keep in touch, broke his promises, created delay and expense, and so merited the enhancement”); *United States v. Reeves*, 586 F.3d 20, 23-4 (D.C. Cir. 2009) (“Failing to appear at arraignment, and remaining at large for nearly a year is inherently obstructive”).

<sup>96</sup> U.S.S.G. §3C1.1, cmt. app. n. 4(A), (D), (K); *United States v. Collins*, 774 F.3d 256, 266 (5<sup>th</sup> Cir. 2014) (witness tampering); *United States v. Collins*, 754 F.3d 626, 629-30 (8<sup>th</sup> Cir. 2014) (destruction of evidence); *United States v. Almeida*, 748 F.3d 41, (1<sup>st</sup> Cir. 2014) (same).

<sup>97</sup> U.S.S.G. §3C1.1, cmt. app. n. 4(D); *United States v. Morales-Sanchez*, 609 F.3d 637, 640-41 (5<sup>th</sup> Cir. 2010).

<sup>98</sup> *United States v. Alexander*, 602 F.3d 639, 642-43 & n.4 (5<sup>th</sup> Cir. 2010) (citing opinions from the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits in accord and noting a contrary view in the Seventh Circuit).

<sup>99</sup> *United States v. Wayerski*, 624 F.3d 1342, 1351-352 (11<sup>th</sup> Cir. 2010).

<sup>100</sup> U.S.S.G. §3C1.2; U.S.S.G. §3C1.2, cmt. app. n. 3.

<sup>101</sup> U.S.S.G. §3C1.2, cmt. app. n. 5. A defendant must have aided and abetted the dangerous flight; it is not enough to have aided and abetted the crime from which flight was taken, *United States v. Johnson*, 694 F.3d 1192, 1196 (11<sup>th</sup> Cir. 2012) (“[B]efore the enhancement can be applied to Johnson, there must be a preponderance of evidence that he directly engaged in or actively aided or abetted, counseled, commanded, induced, procured, or willfully caused Pugh to carry out the dangerous getaway”); *United States v. Byrd*, 689 F.3d 636, 640 (6<sup>th</sup> Cir. 2012).

<sup>102</sup> *United States v. Gould*, 529 F.3d 274, 277 (5<sup>th</sup> Cir. 2008) (“We have previously cited with approval *United States v. Reyes-Oseguera*, 106 F.3d 1481 (9<sup>th</sup> Cir. 1997), in which the Ninth Circuit held that mere flight—even if it results in armed pursuit—does not justify the enhancement”); *United States v. Small*, 599 F.3d 814, 816 (8<sup>th</sup> Cir. 2010); *United States v. Carter*, 601 F.3d 252, 255 (4<sup>th</sup> Cir. 2010).

would exercise in such a situation.”<sup>103</sup> Although captioned endangerment during “flight,” the enhancement applies to reckless endangerment created while resisting arrest as well.<sup>104</sup>

Some courts have said that the enhancement is available where the government shows that the defendant “(1) recklessly, (2) created a substantial risk of death or serious bodily injury, (3) to another person, (4) in course of fleeing from [or resisting] a law enforcement officer, (5) and that this conduct occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”<sup>105</sup>

### *Commission of Offense While on Release*

Section 3C1.3 adds 3 offense levels, if 18 U.S.C. 3147 applies. Section 3147 provides that an individual who commits a federal offense after have been released on bail for an earlier federal offense must be sentenced to a consecutive term of imprisonment of not more than 10 years (not more than one year if the subsequent offense is a misdemeanor). The section has been applied where the only subsequent offense was a failure to appear as required under the original bail, i.e., a violation of 18 U.S.C. 3146 (outlawing such failures).<sup>106</sup>

### *False Registration of Domain Name*

Section 3C1.4 calls for a 2-level enhancement if the defendant falsely registers a domain name in the course of a felony. The section is in response to 18 U.S.C. 3559(g)(1). Section 3559(g)(1) increases by 7 years the maximum penalty for a federal felony if the defendant falsely registers a domain name in its commission.

### **Multiple Counts**

Part 3D of the Guidelines addresses the situation where the defendant has been convicted of multiple counts of dissimilar crimes. In such cases, the crimes of conviction are divided in groups of related offenses (similar crimes/same harm/same victim/common scheme) and the offense level for each group is calculated using the most serious offense in the group as if it were the only offense of conviction.<sup>107</sup>

Crimes of conviction are related if they are related by the nature of offense and the circumstances under which they were committed. The Guidelines offer the following examples of instances where offenses are appropriately grouped:

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<sup>103</sup> U.S.S.G. §2A1.4, cmt. app. n. 1, adopted by cross reference in U.S.S.G. §3C1.2, cmt. app. n. 2; e.g., *United States v. McMahan*, 782 F.3d 1015, 1016 (8<sup>th</sup> Cir. 2015)(uninvited entry into a stranger’s home during the course of flight constituted a sufficiently substantial risk of serious bodily injury to justify a 2-level enhancement); *United States v. Narvaez-Soto*, 773 F.3d 282, 285 (1<sup>st</sup> Cir. 2014)(affirming enhancement where the defendant had almost hit an officer as he fled in his car); *United States v. Stafford*, 721 F.3d 380, 402-403 (6<sup>th</sup> Cir. 2013)(discarding a loaded gun while in flight through an area with pedestrian traffic constituted a substantial risk of serious bodily injury justify a 2-level enhancement).

<sup>104</sup> U.S.S.G. §3C1.2, cmt. app. n. 3.

<sup>105</sup> *United States v. Woods*, 604 F.3d 286, 292 (6<sup>th</sup> Cir. 2010); *United States v. Gould*, 529 F.3d at 276.

<sup>106</sup> *United States v. Duong*, 665 F.3d 364, 366 (1<sup>st</sup> Cir. 2012); *United States v. Rosas*, 615 F.3d 1058, 1063-64 (9<sup>th</sup> Cir. 2010); *United States v. Dison*, 573 F.3d 204, 210 (5<sup>th</sup> Cir. 2009).

<sup>107</sup> U.S.S.G. §3D1.1.

- The defendant is convicted of forging and uttering the same check
  
- The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping
  
- 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 defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode
  
- The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident
  
- The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit
  
- 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 defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole.<sup>108</sup>

The offense levels for each group are then assigned a number of units, the total converted into offense levels, and combined.<sup>109</sup> An initial group, the group with the highest offense level, is assigned 1 unit.<sup>110</sup> A single unit is also assigned to any other group with an offense level within 4 levels of the initial group, and a half unit is assigned to any other group with an offense level within 5 to 8 levels of the initial group.<sup>111</sup> The total number of units is converted into additional offenses (1 to 5 levels depending the number of units).<sup>112</sup> The combined offense level is the initial offense level plus the additional levels attributable to the number of units of related groups.<sup>113</sup>

To illustrate, again by way of the Guidelines' example:

Defendant A was convicted on four counts, each charging robbery of a different bank. Each would represent a distinct Group. § 3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§ 2B3.1(b)). In the fourth robbery \$12,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of § 3D1.4. Altogether there are 2 1/2 Units and the offense level for the most serious (28) is therefore increased by 3 levels under the table [which converts units to offense levels]. The combined offense level is 31.<sup>114</sup>

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<sup>108</sup> U.S.S.G. §3D1.2, cmt. app. nn.3, 4.

<sup>109</sup> U.S.S.G. §3D1.4.

<sup>110</sup> U.S.S.G. §3D1.4(a).

<sup>111</sup> U.S.S.G. §3D1.4(a), (b).

<sup>112</sup> U.S.S.G. §3D1.4.

<sup>113</sup> *Id.*

<sup>114</sup> U.S.S.G. §3D1.5, cmt. app. n. 1.

## Acceptance of Responsibility

Section 3E1.1 affords a defendant the prospect of reduced offense levels based on his acceptance of responsibility. As a general matter, a defendant who clearly demonstrates acceptance is entitled to a 2-level reduction.<sup>115</sup> On the motion of the government, a defendant with an offense level of 16 or more who qualifies for 2-level reduction may be awarded an additional 1-level reduction, if he provides timely notice of his intention to plead guilty.<sup>116</sup> The Guidelines provide examples of the type of conduct that may “clearly demonstrate” acceptance for purposes of a two level reduction.<sup>117</sup> A timely guilty plea is the most common mark of acceptance, but a defendant who pleads guilty in a timely manner is not entitled to a reduction as a matter of right.<sup>118</sup> On the other hand, the reduction is only rarely available to defendants convicted after trial.<sup>119</sup> Moreover, defendants who merit an obstruction enhancement will only qualify for an acceptance reduction under extraordinary circumstances.<sup>120</sup> Some authority exists for the proposition that the obstruction disqualification relates only to conduct occurring before the defendant pleads guilty.<sup>121</sup>

The court may grant an additional 1-level reduction upon the government’s motion, but the government may only refuse to move for the reduction on the basis of conduct identified in §3E1.1’s commentary.<sup>122</sup> The government may not refused to act, for instance, because the

<sup>115</sup> U.S.S.G. §3E1.1(a).

<sup>116</sup> U.S.S.G. §3E1.1(b).

<sup>117</sup> U.S.S.G. §3E1.1, cmt. app. n. 1 (truthful admissions; withdrawal from conspiracy; payment of restitution; prompt surrender; assistance in recovery of forfeitable assets; resignation from office; efforts at rehabilitation after the fact; timeliness of acceptance); *United States v. Burns*, 781 F.3d 688, 691 (4<sup>th</sup> Cir. 2015); *United States v. Doe*, 778 F.3d 814, 826 (9<sup>th</sup> Cir. 2015); *United States v. Schmitt*, 770 F.3d 524, 540 (7<sup>th</sup> Cir. 2014).

<sup>118</sup> U.S.S.G. §3E1.1, cmt. app. n. 1; *United States v. Miller*, 782 F.3d 793, 802 (7<sup>th</sup> Cir. 2015); *United States v. Gonzalez*, 781 F.3d 422, 431 (8<sup>th</sup> Cir. 2015).

<sup>119</sup> U.S.S.G. §3E1.1, cmt. app. nn. 2, 3; *United States v. Melendez*, 775 F.3d 50, 59 (1<sup>st</sup> Cir. 2014) *United States v. Khan*, 771 F.3d 367, 380 (7<sup>th</sup> Cir. 2014).

<sup>120</sup> U.S.S.G. §3E1.1, cmt. app. n. 4; *United States v. Adejumo*, 772 F.3d 513, 536 (8<sup>th</sup> Cir. 2014)(internal citations and some quotation marks omitted)(“Ordinarily, a defendant who obstructs justice is not entitled to the reduction for acceptance of responsibility. It is only in ‘extraordinary cases’ that a defendant who has been found to have obstructed justice is eligible for the acceptance of responsibility reduction. This does not mean, however, that it is impossible to receive both adjustments. In determining whether a case is “extraordinary,” sentencing courts are to look at the totality of the circumstances, including the nature of the [defendant’s] obstructive conduct and the degree of [defendant’s] acceptance of responsibility. [T]he district court must inquire into the particular circumstances of the defendant’s case: was the defendant’s obstructive conduct a relatively brief or early aberration, or was it a methodical, continued effort to obstruct justice? Although it is rare that a defendant who has obstructed justice will nonetheless earn a reduction for acceptance of responsibility, . . . a defendant’s ‘other positive actions’ could make his case ‘extraordinary.’ The types of conduct qualifying as obstructive are numerous and diverse, and the degree to which the obstructive conduct affects the investigation, prosecution, or sentencing of a defendant can vary widely. Additionally, a defendant may accept responsibility for the offense of conviction but act in an obstructive way that is substantively unrelated to his offense conduct”).

<sup>121</sup> *United States v. Knight*, 606 F.3d 171, 176 (4<sup>th</sup> Cir. 2010)(“[T]o the extent that Knight is arguing for the application of a bright-line rule that an acceptance-of-responsibility reduction should be applied as long as the defendant does not obstruct justice after agreeing to plead guilty, as suggested in [6<sup>th</sup> and 9<sup>th</sup> Cir. cases], her position is inconsistent with our case law, which generally treats the question of whether a defendant who obstructed justice is entitled to an acceptance of responsibility reduction as a largely factual matter”).

<sup>122</sup> U.S.S.G. §3E1.1, cmt. app. n. 6; *United States v. Castillo*, 779 F.3d 318, 320 (5<sup>th</sup> Cir. 2015)(internal citations omitted)(“At the time of Castillo’s sentencing, this Court had held that the government’s decision to refuse to move for the additional reduction under § 3E1.1(b) was reviewable on appeal only to determine whether the refusal to so move was based on an unconstitutional motive or was not reasonably related to a legitimate government end. Additionally, this Court had concluded that the defendant’s refusal to waive his appellate rights was a proper basis for the government (continued...)”).

defendant refuses to waive his right to appeal.<sup>123</sup> The court, however, remains free to deny a reduction in the face of the government's motion.<sup>124</sup>

## Criminal History

A defendant's criminal record may be of consequence under the Guidelines for two reasons. First, each of the final offense levels is divided into six criminal history categories with its own sentencing range corresponding to the extent of the defendant's criminal record. Thus for example, a sentencing range of 18 to 24 months applies to a defendant with offense level of 15 who falls within the lowest criminal history category; while a sentencing range of 41 to 51 months applies to a defendant with the same offense level who falls within the highest criminal history category.<sup>125</sup> Second, a defendant's criminal history will trigger repeat offender enhancements in some instances.

### *Criminal History Score*

A defendant's criminal history category is determined by his criminal history score:

- each of the first four sentences of less than 60 days adds 1 criminal history point to the total;
- each sentence of 60 days or more, but less than a year and a month, adds 2 points;
- each sentence for a year and a month or more adds 3 points;
- commission of the crime of conviction while under sentence (imprisoned, on parole, etc.) adds 2 points; and
- each prior sentence for a crime of violence imposed at the same time as a sentence of another offense adds 1 point (up to a maximum of 3 additional points).<sup>126</sup>

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(...continued)

to refuse to move for an additional reduction in offense level because it was rationally related to the purpose of § 3E1.1 and is not an unconstitutional motive. After Castillo had filed a notice of appeal, Amendment 775 to the sentencing guidelines became effective on November 1, 2013. Amendment 775 resolved a circuit split regarding whether a defendant's refusal to waive his right to appeal was an interest identified in § 3E1.1 such that the government could rely on it to decline to move for the offense-level reduction under § 3E1.1(b). Amendment 775 provides that the "government should not withhold [a § 3E1.1(b)] motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." In a footnote in its brief, the government recognized the amendment, but asserted that it was inapplicable because it became effective months after Castillo's sentencing. The government further argued that, even if it was a clarifying (as opposed to substantive) amendment, it would not preclude the government's refusal to move for a reduction because the commentary expressly discusses efficient allocation of resources by the government and the court").

<sup>123</sup> *Id.*

<sup>124</sup> E.g., *United States v. Sandidge*, 784 F.3d 1055, 1063-64 (7<sup>th</sup> Cir. 2015); *United States v. Burns*, 781 F.3d 688, 693(4<sup>th</sup> Cir. 2015).

<sup>125</sup> U.S.S.G. Sentencing Table. E.g., *United States v. Butler*, 777 F.3d 382, 389 (7<sup>th</sup> Cir. 2015)("[H]ad Butler been placed in Category III instead of IV, his corresponding Guidelines range would have decreased from 24-30 to 18-24 months").

<sup>126</sup> U.S.S.G. §4A1.1.

A defendant's criminal history category depends on the total number of his criminal history points:

Category I – 0 points or 1 point;

Category II – 2 or 3 points;

Category III – 4, 5, or 6 points;

Category IV – 7, 8, or 9 points;

Category V – 10, 11, or 12 points; and

Category VI – 13 or more points.<sup>127</sup>

For score keeping purposes, suspended sentences add a point as do other sentences yet to be imposed.<sup>128</sup> Felony sentences are always counted, but misdemeanor sentences for certain minor offenses are not always counted.<sup>129</sup>

In the case of prior offenses committed while a juvenile, three points are added for each sentence of imprisonment for a year and a month or more imposed upon a defendant convicted as an adult for an offense committed before the age of 18.<sup>130</sup> Two points are added for each sentence of confinement of 60 days or more (1 point for less severe sentences), imposed on a defendant for offenses committed when the defendant was under 18 years of age, if the defendant was released within five years of the commission of the present offense of conviction.<sup>131</sup> One point is added for a diversion involving a finding or admission of guilt; otherwise diversion or other deferred prosecution is not counted.<sup>132</sup>

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<sup>127</sup> U.S.S.G. Sentencing Table.

<sup>128</sup> U.S.S.G. §4A1.2(a)(3), (a)(4); *United States v. Mendez-Sosa*, 782 F.3d 1061, 1064 (9<sup>th</sup> Cir. 2015).

<sup>129</sup> U.S.S.G. §4A1.2(c). The sentences for the following misdemeanor offenses, their equivalents or similar offenses are not counted: "Fish and game violations, Hitchhiking, Juvenile status offenses and truancy, Local ordinance violations (except those violations that are also violations under state criminal law), Loitering, Minor traffic infractions (e.g., speeding [but not driving under the influence]), Public intoxication, [and] Vagrancy," *id.*; U.S.S.G. §4A1.2, cmt. app. n. 5.

The sentences for the following misdemeanor offenses, their equivalents, or similar offenses are only counted, if the sentence was probation for more than a year or imprisonment of 30 days or more, or if it is a sentence for a misdemeanor similar to the offense of conviction: "Careless or reckless driving, Contempt of court, Disorderly conduct or disturbing the peace, Driving without a license or with a revoked or suspended license, False information to a police officer, Gambling, Hindering or failure to obey a police officer, Insufficient funds check, Leaving the scene of an accident, Non-support, Prostitution, Resisting arrest, Trespassing," U.S.S.G. §4A1.2(c); *United States v. Grob*, 625 F.3d 1209, 1213-215 (9<sup>th</sup> Cir. 2010).

<sup>130</sup> U.S.S.G. §4A1.2(d)(1); *United States v. Graham*, 622 F.3d 445, 457 (6<sup>th</sup> Cir. 2010). This includes sentences which when imposed constituted incarceration for less than one year but which following revocation of parole resulted in a term of more than one year and one month, U.S.S.G. §4A1.2(k)(1) ("In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable"); *United States v. Wallace*, 663 F.3d 177, 179 (3d Cir. 2011).

<sup>131</sup> U.S.S.G. §4A1.2(d)(2); *Howard v. United States*, 743 F.3d 459, 464-65 (6<sup>th</sup> Cir. 2010); *United States v. Edwards*, 734 F.3d 850, 852-53 (9<sup>th</sup> Cir. 2013).

<sup>132</sup> U.S.S.G. §4A1.2(f).



Sentences of a year and a month or more imposed within 15 years of the present offense of conviction or for which the defendant was imprisoned within 15 years of the present offense of conviction are counted.<sup>133</sup> Older sentences for a year and a month or more are not counted.<sup>134</sup> Other sentences of imprisonment are counted if imposed within 10 years; otherwise they are not.<sup>135</sup> Foreign and tribal court sentences are not counted.<sup>136</sup> Sentences for convictions that have been expunged, reversed, vacated, or invalidated are not counted.<sup>137</sup> General court martial sentences are counted; summary court martial sentences are not.<sup>138</sup>

## Repeat Offenders

The Guidelines make adjustments for four classes of recidivists: career offenders, professional offenders, armed career offenders, and child sex offenders.<sup>139</sup>

### Career Offenders

Career offenders are defendants being sentenced for a federal crime of violence or drug trafficking, committed when they were 18 years of age or older, who have two or more prior state or federal felony convictions for crimes of violence or drug trafficking.<sup>140</sup> “Crimes of violence” are (1) crimes which either have the use, attempted use, or threat of violence as an element; or (2) which constitute arson, burglary, extortion, use of explosives; or (3) which “involve[] conduct that presents a serious potential risk of physical injury.”<sup>141</sup> This last, so-called residual clause, found in the Armed Career Criminal Act as well,<sup>142</sup> has presented more than a few interpretative challenges over the years.<sup>143</sup> The Guidelines’ definition of qualifying drug trafficking offenses covers all such offense punishable as felonies offenses.<sup>144</sup>

There are two classes of career offenders— those convicted of violating 18 U.S.C. 924(c) or 18 U.S.C. 929, and those who are not.<sup>145</sup> Section 929 sets a five-year mandatory minimum term of imprisonment for the use of armor piercing ammunition in the course of a federal crime of violence or drug trafficking offense. Section 924(c) provides a series of mandatory minimum penalties for defendants convicted of a federal crime of violence or drug trafficking offense which

<sup>133</sup> U.S.S.G. §4A1.2(e)(1); *United States v. Ramos-Gonzalez*, 775 F.3d 483, 503-504 (1<sup>st</sup> Cir. 2015); *United States v. Reid*, 751 F.3d 763, 768-69 (6<sup>th</sup> Cir. 2014).

<sup>134</sup> U.S.S.G. §4A1.2(e)(3); *United States v. Blocker*, 612 F.3d 413, 416 (5<sup>th</sup> Cir. 2010).

<sup>135</sup> U.S.S.G. §4A1.2(e)(2), (e)(3); *United States v. Burman*, 666 F.3d 1113, 1119 (8<sup>th</sup> Cir. 2011); *United States v. Armijo*, 651 F.3d 1226, 1238 (10<sup>th</sup> Cir. 2011).

<sup>136</sup> U.S.S.G. §4A1.2(h), (i); *United States v. Yezze*, 704 F.3d 1087, 1090 (9<sup>th</sup> Cir. 2012).

<sup>137</sup> U.S.S.G. §4A1.2(j); U.S.S.G. §4A1.2, cmt. app. n. 6; *United States v. Yezze*, 704 F.3d at 1090.

<sup>138</sup> U.S.S.G. §4A1.2(g); *United States v. Grant*, 753 F.3d 480, 484 (4<sup>th</sup> Cir. 2014).

<sup>139</sup> U.S.S.G. §§4B1.1, 4B1.3, 4B1.4, and 4B1.5, respectively. U.S.S.G. §4B1.2 provides career offender definitions.

<sup>140</sup> U.S.S.G. §§4B1.1(a), 4B1.2.

<sup>141</sup> U.S.S.G. §4B1.2(a).

<sup>142</sup> 18 U.S.C. 924(e)(2)(B)(ii).

<sup>143</sup> *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013); *United States v. Simmons*, 782 F.3d 510, 513 (9<sup>th</sup> Cir. 2015); *United States v. Velazquez*, 777 F.3d 91, 95 (1<sup>st</sup> Cir. 2015).

<sup>144</sup> U.S.S.G. §4B1.2(b); *United States v. Foote*, 784 F.3d 931, 933 (4<sup>th</sup> Cir. 2015); *United States v. Steward*, 761 F.3d 993, 997 (9<sup>th</sup> Cir. 2014).

<sup>145</sup> U.S.S.G. §§4B1.1(c), 4B1.1(b).

involved a firearm.<sup>146</sup> The mandatory minimums of §924(c) and §929 each carry a maximum of life imprisonment. Section 2K2.4 of the Guidelines declares that unless the defendant qualifies as a career offender, the sentence for a violation of §924(c) or §929 shall be the minimum called for there. The offense level adjustments in chapter 3 (victim vulnerability, role in the offense, abuse of trust/use of special skill, multiple counts, acceptance of responsibility) do not apply in such cases.<sup>147</sup>

In the case of §924(c) or §929 career offenders, §4B1.1(c) of the Guidelines is the operable provision.<sup>148</sup> The Guideline sentence for a career offender convicted of violating §924(c) or §929 varies according to whether he is convicted of §924(c) or §929 alone and whether the court awards an acceptance of responsibility reduction (the adjustment under chapter 3 are otherwise inapplicable). A career offender convicted of §924(c) or §929 alone is subject to a sentencing range of either: (1) 262-327 (months)(if given a 3 level responsibility reduction); (2) 292-365 (months) (if given a 2 level responsibility reduction); or (3) 360 (months)-life (if not given a responsibility reduction).<sup>149</sup> If the defendant is convicted of other offenses in addition to §924(c) or §929, his Guidelines sentence is the greater of (1) the Guideline sentence for those offenses with the §924(c) or §929 mandatory minimum tacked on, or (2) the Guideline sentence for a violation of §924(c) or §929 alone.<sup>150</sup>

The Guidelines themselves supply an example of how this last situation might play out:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) [(e.g., trafficking in 5-50 grams of crack cocaine)] (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B) [(the Guideline sentence for conviction of §924(c) alone)], the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).<sup>151</sup>

<sup>146</sup> (1) Imprisonment for not less than 5 years, if none of the following apply; (2) imprisonment for not less than 7 years, if a firearm is brandished; (3) imprisonment for not less than 10 years, if a firearm is discharged; (4) imprisonment for not less than 10 years, if firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon; (5) imprisonment for not less than 15 years, if the offense involves the armor piercing ammunition; (6) imprisonment for not less than 25 years, if the offender has a prior conviction for violation of §924(c); (7) imprisonment for not less than 30 years, if the firearm is a machinegun or destructive device or is equipped with a silencer; and (8) imprisonment for life, if the offender has a prior conviction for violation of §924(c) and the firearm is a machinegun or destructive device or is equipped with a silencer, 18 U.S.C. 924(c).

<sup>147</sup> U.S.S.G. §2K2.4(b), (c).

<sup>148</sup> U.S.S.G. §4B1.1(c).

<sup>149</sup> U.S.S.G §4B1.1(a), (c)(1), (c)(3); *United States v. Shabazz*, 564 F.3d 280, 288-89 (3d Cir. 2009).

<sup>150</sup> U.S.S.G §4B1.1(a), (c)(2), (c)(3).

<sup>151</sup> U.S.S.G. §4B1.1, cmt. app. n.3(E).

Career offenders, convicted of a federal crime of violence or drug trafficking offense that does not involve a firearm or armor piercing ammunition in violation of §924(c) or §929, are assigned minimum offense levels (ranging from 12 to 37), based on the maximum penalty for their crime of conviction and subject to an acceptance of responsibility reduction.<sup>152</sup> They are also assigned to the highest criminal history category, Category VI.<sup>153</sup>

### ***Professional Offenders***

Section 4B1.3 of the Guidelines (Criminal Livelihood) was created in response to a direction in the Sentencing Reform Act<sup>154</sup> and appears to have invoked somewhat less frequently than the other recidivist provisions. It establishes a minimum offense level for professional offenders – a minimum offense level of 13 (an offense level of 11, if the court affords a reduction for acceptance of responsibility). The section applies to defendants whose crime of conviction is “part of a pattern of criminal conduct engaged in as a livelihood.” The section applies to defendants whose primary occupation was crime and who, for at least a year, derived an income equal to more than 2000 times the hourly minimum wage rate.<sup>155</sup> The section makes no modification in the defendant’s criminal history category.

### ***Armed Career Offenders***

Section 4B1.4 implements the Armed Career Criminal Act (ACCA).<sup>156</sup> The ACCA establishes a 15-year mandatory minimum term of imprisonment for defendants convicted of unlawful possession of a firearm under 18 U.S.C. 922(g) who have three prior convictions for violent felonies or serious drug offenses.<sup>157</sup> Although §922(g) bans firearm possession for nine categories of individuals, §924 applies most often to defendants with prior felony convictions for obvious reasons.<sup>158</sup> More often than not, the prior convictions are for violations of state law.

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<sup>152</sup> U.S.S.G. §4B1.1(b)(offense maximum and assigned offense levels: life imprisonment – 37 level; 25 years or more – 34 level; 20 years or more, but less than 25 years – 32 level; 15 years or more, but less than 20 years – 29 level; 10 years or more, but less than 15 years – 24 level; 5 years or more, but less than 10 years – 17 level; and more than 1 year, but less than 5 years – 12).

<sup>153</sup> *Id.*

<sup>154</sup> U.S.S.G. §4B1.3, cmt. bck.

<sup>155</sup> U.S.S.G. §4B1.3, cmt. app. n. 2; *United States v. Bueno*, 703 F.3d 1053, 1067 (7<sup>th</sup> Cir. 2013); *United States v. Burgess*, 180 F.3d 37, 41-2 (2d Cir. 1999); *United States v. Greene*, 71 F.3d 232, 237 (6<sup>th</sup> Cir. 1995)(noting that the section does not apply where criminal activity is not the defendant’s primary occupation).

<sup>156</sup> U.S.S.G. §4B1.4, cmt. app. n. 1; 18 U.S.C. 924(e).

<sup>157</sup> 18 U.S.C. 924(e)(1)(“ In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)”); e.g., *United States v. Sellers*, 784 F.3d 876, 881-887 (2d Cir. 2015); *United States v. Symington*, 781 F.3d 1308, 1311-313 (11<sup>th</sup> Cir. 2015); *United States v. Sewell*, 780 F.3d 839, 848-49 (7<sup>th</sup> Cir. 2015).

The ACCA is not to be confused with the federal three strikes statute, 18 U.S.C. 3559(c), which establishes a mandatory term of life imprisonment upon a third serious violent felony conviction, or with its two strike counterpart in 18 U.S.C. 3559(e), relating to mandatory life imprisonment for repeated child sex offenders.

<sup>158</sup> The other disqualified categories cover fugitives, drug addicts, mental defectives, unlawful aliens, dishonorably discharged members of the armed forces, individuals who have renounced their U.S. citizenship, those under a domestic violence restraining order, and those convicted of misdemeanor domestic violence, 18 U.S.C. 922(g)(2)-(9).

Section 4B1.4 sets a minimum offense level and criminal history category for an ACCA offender. The offense level is the greatest of: (1) a 33 level (less any reductions for acceptance of responsibility); (2) a 34 level (less any reductions for acceptance of responsibility), if the defendant possessed a bomb, machinegun, silencer, or sawed-off rifle or shotgun, or used a firearm in connection with a crime of violence or a drug trafficking offense; (3) an applicable career offender level (under U.S.S.G. §4B1.1); or (4) the offense level for the crime or crimes of conviction. The criminal history category is the greatest of: (1) Category IV; (2) Category VI, if the defendant possessed a bomb, machinegun, silencer, or sawed-off rifle or shotgun, or used a firearm in connection with a crime of violence or a drug trafficking offense; (3) an applicable career offender level (under U.S.S.G. §4B1.1); or (4) the criminal history category for the crime or crimes of conviction (under U.S.S.G. §§4A1.1, 4A1.2).

### *Example*

Neal contends that the district court erroneously calculated his Guidelines range by relying on his mere possession of narcotics to justify the enhancements under U.S.S.G. §4B1.4(b)(3) & (c)(2). We agree.

A defendant is subject to the enhancements in §4B1.4(b)(3) & (c)(2) if he possesses firearms in connection with a “controlled substance offense,” which the Guidelines define as a crime involving “the manufacture, import, export, distribution, or dispensing of a controlled substance ... or the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense.” U.S.S.G. §4B1.2(b). Mere possession of illegal drugs, without more, is not a “controlled substance offense” for these purposes....

Here, Neal was found with “undetermined” amounts of illegal drugs in his home. The district court did *not* make a finding that Neal possessed the drugs “with intent to manufacture, import, export, distribute, or dispense.” *See* §4B1.2(b). Indeed, the government concedes that there is no evidence in the record to support such a finding. Accordingly, Neal did not possess the firearms in connection with a “controlled substance offense,” and application of the enhancements in §4B1.4(b)(3) & (c)(2) was erroneous. Absent these enhancements, Neal’s Guidelines range would have been 180-188 months,<sup>2</sup> instead of the 188-235 months calculated below.

The parties agree that, absent the “controlled substance offense” enhancements, Neal’s total offense level would have been 30 (instead of 31) and his criminal-history category would have been V (instead of VI), which normally would have resulted in a Guidelines range of 155-188 months. *See* U.S.S.G. Sentencing Table. However, because Neal is subject to a statutory mandatory minimum sentence of 180 months, 180 months acts as the low end of the Guidelines range.<sup>159</sup>

### *Child Molesting Recidivists*

Section 4B1.5 of the Guidelines (Repeat and Dangerous Sex Offender Against Minors) establishes a series of minimum offense levels and criminal history categories for a federal defendant who (1) is being sentenced for sexual abuse of a child (under the age of 18), sexual exploitation of a child, sex trafficking of such a child, or interstate or foreign travel with respect

<sup>159</sup> *United States v. Neal*, 578 F.3d 270, 273-74 (5<sup>th</sup> Cir. 2009).

to illicit sexual activities involving such a child, and (2)(a) has a prior federal or state conviction for a similar offense, or (b) has a past pattern of activity involving similar misconduct.<sup>160</sup>

As the distinction makes clear, application of the section on the basis of a pattern of sexual misconduct does not require prior conviction of a predicate offense.<sup>161</sup> A “pattern” under §4B1.5 consists of “at least two separate occasions [during which] the defendant engaged in prohibited sexual conduct with a minor.”<sup>162</sup> A pattern is established by multiple offenses, but does not require multiple victims. The section applies if a single child is abused on several occasions.<sup>163</sup> Possession or trafficking in child pornography does not trigger application of the section either as an offense of conviction or prior state or federal offense, but may be used to establish “pattern” of sexual misconduct.<sup>164</sup>

The offense level of a defendant with a prior conviction is the greatest of: (1) an otherwise applicable career offender offense level (under §4B1.1); (2) the offense level for the offense of conviction; or (3) an offense level ranging from 12 to 37, depending on the maximum statutory penalty for the crime of conviction.<sup>165</sup> The defendant’s criminal history category in such cases is the greater of Category V or the category of the offenses of conviction (under 4A1.1).<sup>166</sup>

The offense level of a defendant sentenced on the basis of a pattern of prior misconduct rather than a prior conviction is the greater of the offense level for the offense of conviction with 5 levels added or offense level 22.<sup>167</sup> The criminal history category is that of the offense of conviction.<sup>168</sup>

## Departures

As a general matter, the Guidelines permit departure on any grounds that a court finds the Guidelines have not taken into account or have not taken into account to the extent appropriate.<sup>169</sup> When a pattern of departures suggests that a factor has not been adequately addressed, the Commission has generally taken up the matter in order to avoid unwarranted sentencing disparity and for compliance with the principles articulated in 18 U.S.C. 3553(a).

Nevertheless, the Guidelines acknowledge that a trial court in an individual case may consider the Guidelines sentence either too severe or insufficiently punitive. They speak to the concern in four

<sup>160</sup> U.S.S.G. §4B1.5(a), (b); U.S.S.G. §4B1.5, cmt. app. nn. 2, 3(A)(ii); 18 U.S.C. 2426(b)(1)(A), (1)(B).

<sup>161</sup> *United States v. Evans*, 782 F.3d 1115, 1117-118 (10<sup>th</sup> Cir. 2015); *United States v. Rojas*, 520 F.3d 876, 883 (8<sup>th</sup> Cir. 2008).

<sup>162</sup> U.S.S.G. §4B1.5, cmt. app. n. 4(B).

<sup>163</sup> *United States v. Pappas*, 715 F.3d 225, 229 (8<sup>th</sup> Cir. 2013); *United States v. Brattain*, 539 F.3d 445, 447 (6<sup>th</sup> Cir. 2008).

<sup>164</sup> U.S.S.G. §4B1.5, cmt. app. nn. 2, 3(A)(ii), 4(A).

<sup>165</sup> U.S.S.G. §4B1.5(a)(1)(B)(maximum term of imprisonment for the offense conviction and assigned offense levels: life imprisonment – 37; 25 years or more – 34; 20 years or more, but less than 25 years – 32; 15 years or more, but less than 20 years – 29; 10 years or more, but less than 15 years – 24; 5 years or more, but less than 10 years – 17; and 1 year or more, but less than 5 years – 12).

<sup>166</sup> U.S.S.G. §4B1.5(a)(2).

<sup>167</sup> U.S.S.G. §4B1.5(b)(1).

<sup>168</sup> U.S.S.G. §4B1.5(b)(2).

<sup>169</sup> U.S.S.G. §5K2.0(b), (c).

ways. First, throughout the Guidelines, they note instances where either an upward or downward departure may be appropriate.<sup>170</sup> Second, they discuss when criminal history-related departures may be appropriate.<sup>171</sup> Third, they identify specific offender characteristics that permit or do not permit departure from the norm.<sup>172</sup> Fourth, they identify offense characteristics that permit or do not permit such a departure.<sup>173</sup>

## Base Offense Guideline Departures

Most of the departures suggested in individual Guidelines indicate when an upward departure may be warranted. Many refer, expressly or implicitly, to one or more of the departures found in Part 5K of the Guidelines.<sup>174</sup> Some are general;<sup>175</sup> some are very specific.<sup>176</sup> A few mention instances under which either an upward or a downward departure may be fitting.<sup>177</sup>

<sup>170</sup> E.g., U.S.S.G. §2A2.1, cmt. app. n. 2 (assault with intent to commit murder; attempted murder) (“If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted”).

<sup>171</sup> U.S.S.G. §4A1.3.

<sup>172</sup> U.S.S.G. Pt. 5H.

<sup>173</sup> U.S.S.G. Pt. 5K.

<sup>174</sup> U.S.S.G. §2A1.2, cmt. app. n. 1 (second degree murder) (“If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. See 5K2.8(Extreme Conduct)”).

U.S.S.G. §2N2.1, cmt. app. n. 1, 3(A) (regulatory offenses) (“This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. See Chapter 5, Part K (Departures).... The following are circumstances in which an upward departure may be warranted: (A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. See Chapter Five, Part K (Departures)”).

U.S.S.G. §2K2.1, cmt. app. n. 7 (destructive devices (bombs): possession/transactions) (“... In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5k2.2 (Physical Injury), and 5K2.14 (Public Welfare)”).

<sup>175</sup> U.S.S.G. §2G1.1, cmt. app. n. 2 (promoting adult, commercial sexual activity) (“Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures) . . .”).

U.S.S.G. §2A2.4, cmt. app. n. 3 (obstructing officers) (“The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Government Function)”).

<sup>176</sup> U.S.S.G. §2H4.1, cmt. app. n. 3 (peonage) (“If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted”).

U.S.S.G. §2K2.1, cmt. app. n. 11 (prohibited transactions involving firearms) (“An upward departure may be warranted in any of the following circumstances: (1) the number of firearms substantially exceeded 200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns ... ); (3) the offense involved large quantities of armor-piercing ammunition ... or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals).

<sup>177</sup> E.g., U.S.S.G. §2D2.3, cmt. bck. (operating a common carrier under the influence) (“... The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, e.g., a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted”).

U.S.S.G. §2L1.2, cmt. app. n. 7 (unlawful entry or reentry into the United States) (“(A) In a case in which subsection (b)(1)(A) or (b)(1)(B) [relating to deportation following conviction for felony drug trafficking, a crime of violence or (continued...)]

## Criminal History Category Departures

The Guidelines sometimes permit a sentencing court to depart from the defendant's otherwise applicable criminal history category, when the circumstances indicate the assignment either underestimates or overestimates the seriousness of the defendant's criminal record.<sup>178</sup> The factors that mark a case in which an upward departure may be fitting include foreign, tribal, or other sentences not counted for criminal history purposes; sentences imposed for different crimes on different occasions; civil or administrative disposition of similar misconduct; pending criminal trial or sentencing on other charges; and similar criminal conduct without a criminal conviction (arrests may not be counted).<sup>179</sup> When an upward departure is appropriate but the defendant is already in Category VI, the court may seek out the offense level where the sentencing range for Category VI is most appropriate.<sup>180</sup>

Downward Category departures may be granted, but no comparable traversing of offense levels is permitted merely because Category I overestimates the seriousness of the defendant's criminal history.<sup>181</sup> Nor may a court depart downward from the Category assigned armed career criminals under §4B1.4 or recidivist child molesters under §4B1.5.<sup>182</sup>

## Defendant Characteristic Departures

The Guidelines recognize a dozen offender characteristics that may be relevant to an offense level departure decision:

- Age (ordinarily not relevant; may be relevant where the defendant is elderly and infirm);<sup>183</sup>
- Education and vocational skills (ordinarily not relevant; may be relevant for purposes of considering a use of special skill enhancement and for purposes of considering probation, supervised release, home detention conditions);<sup>184</sup>
- Mental and emotional conditions (ordinarily not relevant; may be relevant for probation, supervised release conditions or as provided in the specific departure Guidelines (U.S.S.G. Pt. 5K));<sup>185</sup>

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(...continued)

similarly serious offense] does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds the quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. 1101(a)(43), a downward departure may be warranted").

<sup>178</sup> U.S.S.G. §4A1.3.

<sup>179</sup> U.S.S.G. §4A1.3(a)(2), (a)(3).

<sup>180</sup> U.S.S.G. §4A1.3(a)(4).

<sup>181</sup> U.S.S.G. §4A1.3(b)(2)(A).

<sup>182</sup> U.S.S.G. §4A1.3(b)(2)(B). Career offenders, however, may be awarded a reduction of one Category under appropriate circumstances, U.S.S.G. §4A1.3(b)(3)(A).

<sup>183</sup> U.S.S.G. §5H1.1; *United States v. Payton*, 754 F.3d 375, 379 (6<sup>th</sup> Cir. 2010).

<sup>184</sup> U.S.S.G. §5H1.2; *United States v. Christman*, 607 F.3d 1110, 1119 (6<sup>th</sup> Cir. 2014).

<sup>185</sup> U.S.S.G. §5H1.3; *United States v. Lawrence*, 749 F.3d 1092, 1092-93 (8<sup>th</sup> Cir. 2014).

- Physical condition (not ordinarily relevant; may be relevant where impairment is extraordinary; drug or alcohol dependency and gambling addiction are not grounds for a downward departure, but may otherwise be relevant);<sup>186</sup>
- Employment record (not ordinarily relevant; may be relevant for purposes of probation, supervised release, home detention considerations);<sup>187</sup>
- Family (not ordinarily relevant; family responsibilities may be relevant for fine/restitution determinations);<sup>188</sup>
- Role in the offense (not relevant for departure purposes);<sup>189</sup>
- Criminal history (relevant; governed by U.S.S.G. §4A1.3);<sup>190</sup>
- Crime as a livelihood (relevant);<sup>191</sup>
- Invidious discrimination (not relevant: defendant's race, sex, national origin, religion, or social-economic status);<sup>192</sup>
- Public service (ordinarily not relevant: military service, charitable works, or public service);<sup>193</sup>
- Lack of youthful guidance (ordinarily not relevant: disadvantages as a youth).<sup>194</sup>

## Offense Characteristic Departures

In Part 5K, the Guidelines identify 24 circumstances, most related to the crime of conviction, under which departure may be warranted.

- Substantial assistance to authorities (under 18 U.S.C. 3553(e));<sup>195</sup>
- Participation in an early disposition program;<sup>196</sup>

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<sup>186</sup> U.S.S.G. §5H1.4; *United States v. Harris*, 751 F.3d 123, 129 (3d Cir. 2014).

<sup>187</sup> U.S.S.G. §5H1.5; *United States v. Green*, 436 F.3d 449, 459 (4<sup>th</sup> Cir. 2006).

<sup>188</sup> U.S.S.G. §5H1.6; *United States v. Alaniz*, 726 F.3d 586, 627 (5<sup>th</sup> Cir. 2013).

<sup>189</sup> U.S.S.G. §5H1.7.

<sup>190</sup> U.S.S.G. §5H1.8.

<sup>191</sup> U.S.S.G. §5H1.9.

<sup>192</sup> U.S.S.G. §5H1.10; *United States v. Trujillo-Castillon*, 692 F.3d 575, 578-79 (8<sup>th</sup> Cir. 2012).

<sup>193</sup> U.S.S.G. §5H1.11; *United States v. Kulick*, 629 F.3d 165, 176 (3d Cir. 2010); *United States v. Glosser*, 623 F.3d 413, 418 (7<sup>th</sup> Cir. 2010).

<sup>194</sup> U.S.S.G. §5H1.12; *United States v. Wilson*, 481 F.3d 475, 483-84 (7<sup>th</sup> Cir. 2007).

<sup>195</sup> U.S.S.G. §5K1.1; *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-335 (10<sup>th</sup> Cir. 2014); *United States v. Brown*, 771 F.3d 1149, 1155-156 (9<sup>th</sup> Cir. 2014); *United States v. Erwin*, 765 F.3d 219, 227 (3d Cir. 2014). A defendant's sentence may not be enhanced as a consequence of his simple refusal to assist, U.S.S.G. §5K1.2.

<sup>196</sup> U.S.S.G. §5K3.1; *United States v. Castro-Alvarado*, 755 F.3d 472, 475-77 (7<sup>th</sup> Cir. 2014); *United States v. Lopez-Macias*, 661 F.3d 485, 487-93 (10<sup>th</sup> Cir. 2011).



- Death (a sentencing increase may be warranted, if death results from the commission of the offense);<sup>197</sup>
- Physical injury (a sentencing increase may be warranted, if a significant physical injury resulted from the commission of the offense);<sup>198</sup>
- Extreme psychological injury (a sentencing increase may be warranted, if commission of the offense resulted in more serious injury than usual for the offense);<sup>199</sup>
- Abduction or unlawful restraint (a sentencing increase may be warranted, if an individual was abducted or restrained to facilitate commission of, or flight from, the offense);<sup>200</sup>
- Property damage or loss (a sentencing increase may be warranted, if commission of the offense resulted in property damage or loss not otherwise reflected in the Guidelines sentence);<sup>201</sup>
- Weapons and dangerous instrumentalities (the sentence may be enhanced, if used or possessed during the course of the offense);<sup>202</sup>
- Disruption of governmental functions (the sentence may be enhanced, if the offense resulted in a significant disruption);<sup>203</sup>
- Extreme conduct (the sentence may be enhanced, if the defendant's conduct was unusually cruel, brutal, heinous, or victim degrading);<sup>204</sup>
- Criminal purpose (the sentence may be enhanced, if the offense was committed in order to facilitate the commission of another crime);<sup>205</sup>
- Victim's conduct (the sentence may be reduced, if the victim's conduct significantly contributed to the commission of the offense);<sup>206</sup>
- Lesser harm (or reduced harm, the sentence may be reduced, if society's interest in punishment is diminished (e.g., mercy killing, possession of controlled substance as part of an educational display));<sup>207</sup>
- Coercion and duress (a downward departure may be fitting, if the defendant committed the offense under serious coercion, blackmail, or duress);<sup>208</sup>

<sup>197</sup> U.S.S.G. §5K2.1; *United States v. Fitch*, 659 F.3d 788, 798-99 (9<sup>th</sup> Cir. 2011).

<sup>198</sup> U.S.S.G. §5K2.2; *United States v. Franklin*, 695 F.3d 753, 757-58 (8<sup>th</sup> Cir. 2012).

<sup>199</sup> U.S.S.G. §5K2.3; *United States v. White Twin*, 682 F.3d 773, 776-77 (8<sup>th</sup> Cir. 2012).

<sup>200</sup> U.S.S.G. §5K2.4; *United States v. Scott*, 529 F.3d 1290, 1295 (10<sup>th</sup> Cir. 2008).

<sup>201</sup> U.S.S.G. §5K2.5; *United States v. Denny*, 653 F.3d 415, 418-19 (6<sup>th</sup> Cir. 2011).

<sup>202</sup> U.S.S.G. §5K2.6; *United States v. Taylor*, 701 F.3d 1166, 1175 (7<sup>th</sup> Cir. 2012).

<sup>203</sup> U.S.S.G. §5K2.7; *United States v. Pabey*, 664 F.3d 1084, 1098-99 (7<sup>th</sup> Cir. 2011).

<sup>204</sup> U.S.S.G. §5K2.8; *United States v. Begaye*, 635 F.3d 456, 469 (10<sup>th</sup> Cir. 2011).

<sup>205</sup> U.S.S.G. §5K2.9; *United States v. Pollock*, 757 F.3d 582, 591-93 (7<sup>th</sup> Cir. 2014).

<sup>206</sup> U.S.S.G. §5K2.10; *United States v. Dautogvic*, 763 F.3d 927, 932 (8<sup>th</sup> Cir. 2014).

<sup>207</sup> U.S.S.G. §5K2.11; *United States v. Jackson*, 598 F.3d 340, 351-52 (7<sup>th</sup> Cir. 2010).

<sup>208</sup> U.S.S.G. §5K2.12; *United States v. Torres-Landrua*, 793 F.3d 58, 67-8 (1<sup>st</sup> Cir. 2015); *United States v. Zaragoza-Moreira*, 780 F.3d 971, 981 (9<sup>th</sup> Cir. 2015).

- Diminished capacity (a downward departure may be fitting, if the defendant's diminished capacity (other than intoxication induced) significantly contributed to the commission of the offense (other than a crime involving sexual misconduct));<sup>209</sup>
- Public welfare (an upward departure may be appropriate to reflect a significant threat to national security, public health, or public safety);<sup>210</sup>
- Voluntary disclosure of offense (a downward departure may be fitting, if the defendant disclosed a well-concealed, undisclosed crime);<sup>211</sup>
- Semiautomatic firearms capable of accepting large capacity magazines (an upward departure may be appropriate);<sup>212</sup>
- Violent street gangs (an upward departure may be appropriate, if the defendant was convicted under 18 U.S.C. 521 (relating to criminal street gangs));<sup>213</sup>
- Aberrant behavior (may be the basis for a downward departure, if it does not involve a child victim of sexual misconduct, result in death or serious bodily injury, involve the use or discharge of a firearm, a serious drug trafficking offense as the crime of conviction, or if the defendant had a prior qualifying conviction);<sup>214</sup>
- Dismissed and uncharged conduct (an upward departure may be appropriate for serious misconduct washed away in a plea bargain);<sup>215</sup>
- Specific offender characteristics as grounds for downward departure in child abuse and sexual offenses (age and extraordinary physical impairment of the defendant may be a basis for downward departure only under U.S.S.G. §§5H1.1, 5H1.4);<sup>216</sup>
- Discharge terms of imprisonment (a downward departure may be fitting in light of U.S.S.G. §5G1.3);<sup>217</sup> and
- Commission of offense while wearing or displaying unauthorized or counterfeit insignia or uniform (an upward departure may be appropriate, if the defendant used the official or apparently official paraphernalia during commission of the offense).<sup>218</sup>

## Forbidden Departures

Some departures, the Guidelines simply proscribe. Numbered among them are prohibited departures based on the defendant's:

<sup>209</sup> U.S.S.G. §5K2.13; *United States v. Conaway*, 713 F.3d 897, 903-904 (7<sup>th</sup> Cir. 2013).

<sup>210</sup> U.S.S.G. §5K2.14; *United States v. Taylor*, 701 F.3d 1166, 1175 (10<sup>th</sup> Cir. 2012).

<sup>211</sup> U.S.S.G. §5K2.16; *United States v. Castaldi*, 743 F.3d 589, 597 (7<sup>th</sup> Cir. 2014); *United States v. Brinley*, 684 F.3d 629, 633-34 (6<sup>th</sup> Cir. 2012).

<sup>212</sup> U.S.S.G. §5K2.17.

<sup>213</sup> U.S.S.G. §5K2.18.

<sup>214</sup> U.S.S.G. §5K2.20; *United States v. Townsend*, 724 F.3d 749, 750-52 (7<sup>th</sup> Cir. 2013).

<sup>215</sup> U.S.S.G. §5K2.21; *United States v. White*, 682 F.3d 773, 777-78 (8<sup>th</sup> Cir. 2012).

<sup>216</sup> U.S.S.G. §5K2.22.

<sup>217</sup> U.S.S.G. §5K2.23; *United States v. Pietkiewicz*, 712 F.3d 1057, 1059-62 (7<sup>th</sup> Cir. 2013).

<sup>218</sup> U.S.S.G. §5K2.24.

- race,
- sex,
- national origin,
- creed,
- religion,
- economic status,
- youthful want of guidance,
- dependence on alcohol or drugs,
- gambling addiction,
- financial difficulties,
- legally required restitution.<sup>219</sup>

Neither may a court depart based on the defendant's acceptance of responsibility beyond the reductions generally available under the Guidelines,<sup>220</sup> nor enhance or reduce a defendant's sentence based on his role in the offense beyond the general boundaries supplied in the Guidelines.<sup>221</sup>

## Determination of Sentence

The final offense level and criminal history category for the offense(s) of conviction after any departures help to determine whether a particular type of sentence should be imposed and if so to what extent.

### *Probation*

The Guidelines limit probation, imposed without any condition of accompanying confinement, to cases in which the applicable offense levels and criminal history categories translate to a sentencing range that tops out at 6 months imprisonment (Zone A).<sup>222</sup> If the top of the applicable

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<sup>219</sup> U.S.S.G. §5K2.0(d)(1), (d)(5).

<sup>220</sup> U.S.S.G. §5K2.0(d)(2) (i.e., the court may not award a reduction greater than the 3 offense levels authorized under U.S.S.G. §3E1.1).

<sup>221</sup> U.S.S.G. §5K2.0(d)(3) (i.e., the court may not assess an enhancement, nor award a reduction, greater than the 2, 3, or 4 offense levels authorized under U.S.S.G. §§3B1.1, 3B1.2).

<sup>222</sup> U.S.S.G. §5B1.1; U.S.S.G. Sentencing Table. The offense levels and criminal history categories are organized within the Sentencing Table into four Zones. Zone A includes those offense levels and criminal history categories where probation may be granted without any sentence of incarceration. Zone B includes those where a defendant may be sentenced to probation along with some form of periodic incarceration. Zone C includes those where a defendant is ineligible for probation but may receive a sentence split between imprisonment and some other less onerous form of incarceration, such home detention or a halfway house. Zone D, by far the largest Zone, includes those who are ineligible for probation or a split sentence, U.S.S.G. §5C1.1.

range is imprisonment for 14 months (15 months in the case of Categories V and VI)(Zone B),<sup>223</sup> the Guidelines authorize probation as long as it is accompanied by a requirement for some form of confinement (a halfway house, weekend imprisonment, home confinement).<sup>224</sup> Probation may be for no more than five years or less than a year.<sup>225</sup>

Section 5B1.3 of the Guidelines identifies and fleshes out a series of statutory mandatory and discretionary conditions for probation.<sup>226</sup> The mandatory statutory conditions include requirements that the defendant: (1) refrain from committing any additional federal, state, or local crimes; (2) if convicted of a felony, make restitution or perform community service (subject to certain exceptions); (3) refrain from the unlawful possession of controlled substances; (4) participate in a domestic violence rehabilitative program, if convicted of domestic violence and a program can be found within 50 miles of his residence; (5) submit to periodic drug testing, unless court suspends the condition; (6) make restitution and pay the special assessment; (7) notify the court of any change in financial circumstances that implicate the defendant's ability to pay restitution, fines, or assessment; (8) comply with a court-ordered installment plan for the payment of fines; (9) comply with applicable sex offender registration requirements; and (10) submit to DNA testing.<sup>227</sup>

The section, like the statute, also lists a series of "standard" conditions, regularly imposed at the discretion of the court in light of the defendant's circumstances and the nature of the offense of conviction (e.g., restrictions on travel and associates, community service), as well as some that apply in particular cases (e.g., ban on firearms possession by felons, limitations on computer use by sex offenders, occupational restrictions).<sup>228</sup>

The Guidelines mention four forms of confinement that may be imposed in conjunction with probation: community confinement, home detention, shock incarceration, and intermittent confinement.<sup>229</sup> Community confinement refers to being a resident in a halfway house, a rehabilitation center, or the like.<sup>230</sup> Home detention, as the name implies, is supervised confinement at home that permits the defendant to work, go to school, perform community service, or attend to personal needs elsewhere.<sup>231</sup> Intermittent confinement refers to imprisonment on less than a full schedule – night-time, weekend or some other form of less than full time imprisonment.<sup>232</sup> A shock incarceration program is a boot camp program, a program that apparently was discontinued at the federal level some years ago.<sup>233</sup>

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> U.S.S.G. §5B1.2 (if the offense level is less than 6, probation may be imposed for no more than 3 years).

<sup>226</sup> U.S.S.G. §5B1.3(a), (b)-(e); 18 U.S.C. 3563(a), (b).

<sup>227</sup> 18 U.S.C. 3563(a); U.S.S.G. 5B1.3(a).

<sup>228</sup> U.S.S.G. §5B1.3(b)-(e); 5F1.3; 18 U.S.C. 3563(b). A court may impose an occupational restriction as a condition of probation as long as the occupation has a reasonably direct relationship to the crime of conviction and as long as the restriction is imposed for no longer than necessary for public protection, U.S.S.G. §5F1.5.

<sup>229</sup> U.S.S.G. §§5F1.1, 5F1.2, 5F1.7, 5F1.8.

<sup>230</sup> U.S.S.G. §5F1.1.

<sup>231</sup> U.S.S.G. §5F1.2.

<sup>232</sup> U.S.S.G. §5F1.8, cmt. app. n. 1.

<sup>233</sup> U.S.S.G. §5F1.7; *Serrato v. Clark*, 486 F.3d 560, 563 (9<sup>th</sup> Cir. 2007)(rejecting a challenge to the Bureau of Prisons' decision to terminate the program).

## ***Imprisonment***

Unless the sentence of conviction carries a statutory mandatory minimum, the Guidelines sentence is one that is within the sentencing range for the final offense level and criminal history category for the defendant's crime of conviction.<sup>234</sup> If the sentencing range is between 12 and 18 months or higher (Zone D), the defendant is ineligible for a split sentence involving incarceration in prison as well as at home, in a halfway house, or on an intermittent schedule.

## ***Supervised Release***

Supervised release is imposed at sentencing and served after the defendant has served his full sentence of imprisonment (less any reduction for good behavior).<sup>235</sup> As a general rule, the maximum for a term of supervised release is not more than 5 years, if the defendant was convicted of an offense with a maximum penalty of 25 years' imprisonment or higher; not more than 3 years, if the maximum is less than 25 years but more than 5 years; and not more than 1 year for other offenses.<sup>236</sup> Most controlled substance offenses, however, have mandatory minimum terms of supervised release, often higher than the general maximum.<sup>237</sup> The same is true of terrorism offenses and sexual offenses committed against children.<sup>238</sup>

In the absence of statutory mandatory minimum term of supervised release, imposition of a term supervised release is discretionary.<sup>239</sup> Both by statute and under the Guidelines, conditions that attend supervised release are essentially those that accompany probation. They include a series of mandatory conditions (e.g., refrain from committing further crimes), a series of generally imposed conditions (e.g., travel restrictions), and a series of conditions that may be appropriate in a particular type of case (e.g., restrictions on internet use from sex offenders).<sup>240</sup>

## **Assessments, Fines, Forfeiture, and Restitution**

### ***Assessments***

The Guidelines replicate the statute which dictates that a convicted defendant is to be assessed \$100 for a felony conviction; \$25 for a Class A misdemeanor (punishable by imprisonment for from 6 months to 1 year); \$10 for a Class B misdemeanor (punishable by imprisonment for from

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<sup>234</sup> U.S.S.G. §§5C1.1, 5C1.2.

<sup>235</sup> See generally, CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*, by Charles Doyle.

<sup>236</sup> 18 U.S.C. 3583(b), 3558. The Guidelines set a 2-year minimum term of supervised release for crimes with maximum sentence of 25 years or more, and a 1-year minimum term for crimes with a maximum sentence of between 5 and 25 years, U.S.S.G. §5D1.2.

<sup>237</sup> 21 U.S.C. 841.

<sup>238</sup> 18 U.S.C. 3583(j), (k).

<sup>239</sup> 18 U.S.C. 3583(a). The Guidelines instruct the courts to impose a term of supervised release in felony cases, but indicate that they may decline to do so, in the absence of a statutory requirement, as long as the court feels no supervision is necessary: "(1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute," U.S.S.G. §5D1.1(b); U.S.S.G. §5D1.1, cmt. app. n. 1.

<sup>240</sup> 18 U.S.C. 3583(d); U.S.S.G. §5D1.3.

30 days to 6 months); \$5 for a Class C misdemeanor or infraction (not punishable by imprisonment or punishable by imprisonment for not more than 30 days).<sup>241</sup>

The Justice for Victims of Trafficking Act of 2015 calls for a second assessment in the amount of \$5,000, imposed on non-indigents convicted of certain sex or human trafficking offenses.<sup>242</sup>

## Fines

Federal law sets an upper limit on fines in felony cases at \$250,000, although a few statutes authorize a higher fine for specific offenses.<sup>243</sup> For example, the maximum fine for trafficking in 5 kilograms or more of cocaine is \$4 million.<sup>244</sup> The Guidelines establish an escalating series of fine ranges based on the offense level for crimes subject to the \$250,000 cap.<sup>245</sup> The range for crimes with an offense level of 3 and below is \$100 to \$5,000.<sup>246</sup> At the other end of the spectrum, crimes with an offense level of 38 or higher have a fine range of \$25,000 to \$250,000.<sup>247</sup> The Guidelines permit the court to consider the extent of restitution, which the defendant has paid or owes, when it determines the amount of the fine to impose.<sup>248</sup>

## Forfeiture

The forfeiture Guideline declares in its entirety, “Forfeiture is to be imposed upon a convicted defendant as provided by statute.”<sup>249</sup> Forfeiture is the confiscation of property occasioned by the property’s proximity to a particular crime.<sup>250</sup> Some federal criminal statutes, including the Controlled Substance Act, provide that property derived from or used to facilitate a violation of their provisions are subject to confiscation.<sup>251</sup> Confiscation may be accomplished either through civil or criminal procedures. The forfeiture referred to in the Guidelines is criminal forfeiture and

<sup>241</sup> 18 U.S.C. 3013, 3559; U.S.S.G. §5E1.3.

<sup>242</sup> 18 U.S.C. 3014. The assessment applies to those convicted of offenses under 18 U.S.C. chs. 77 (human trafficking), 109A (sexual abuse), 110 (sexual exploitation of children), or 117 (transportation for unlawful sexual purposes); or 8 U.S.C. 1324 (smuggling human beings other than family members), 18 U.S.C. 3014(a).

<sup>243</sup> 18 U.S.C. 3571(b). As an alternative, a court may impose a fine of not more than twice the loss or gain associated with the offense, 18 U.S.C. 3571(d).

<sup>244</sup> 21 U.S.C. 841(b)(1)(A).

<sup>245</sup> U.S.S.G. §5E1.2(c)(3).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> U.S.S.G. §5E1.2(d) (“In determining the amount of the fine, the court shall consider: (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence; (2) any evidence presented as to the defendant’s ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources; (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments; (4) any restitution or reparation that the defendant has made or is obligated to make; (5) any collateral consequences of conviction, including civil obligations arising from the defendant’s conduct; (6) whether the defendant previously has been fined for a similar offense; (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and (8) any other pertinent equitable considerations. The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive”).

<sup>249</sup> U.S.S.G. §5E1.4.

<sup>250</sup> See generally, *Crime and Forfeiture*, CRS Rept. 97-139.

<sup>251</sup> 21 U.S.C. 853.

proceedings are conducted pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure following conviction.

### ***Restitution***

Without statutory authorization, a sentencing court may not order a defendant to pay restitution to his victims.<sup>252</sup> Several federal statutes supply the necessary authorization under most circumstances.<sup>253</sup> As a general rule, a court must order restitution following conviction for a crime of violence, fraud or other crime against property proscribed in title 18 of the U.S. Code, or for product tampering.<sup>254</sup> A court may order restitution following conviction for a controlled substance offense, any offense proscribed in title 18 of the Code, for certain crimes committed aboard an aircraft, or as a condition of probation or supervised release.<sup>255</sup> There are also several restitution provisions that apply to specific offenses.<sup>256</sup> The Guidelines track the statutory provisions.<sup>257</sup>

### **Other Sentencing Matters**

#### ***Cost of Prosecution***

The Guidelines note that a handful of statutes authorize the court to assess the costs of the prosecution against convicted defendants.<sup>258</sup>

#### ***Victim Notification***

The court may order a defendant in fraud cases to notify his victims of his conviction and sentence, and to bear the cost of notification (up to \$20,000).<sup>259</sup>

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<sup>252</sup> *United States v. Doering*, 759 F.3d 862, 866 (8<sup>th</sup> Cir. 2014); *United States v. Maynard*, 743 F.3d 374, 379 (2d Cir. 2014); *United States v. Freeman*, 741 F.3d 426, 431 (4<sup>th</sup> Cir. 2014).

<sup>253</sup> See generally, CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle.

<sup>254</sup> 18 U.S.C. 3663A.

<sup>255</sup> 18 U.S.C. 3663, 3583(d), 3563.

<sup>256</sup> E.g., 18 U.S.C. 2327 (telemarketing fraud), 2323 (copyright infringement), 2264 (stalking or domestic violence), 2259 (sexual exploitation of children), 2248 (sexual abuse), 1593 (human trafficking), 228 (failure to provide child support).

<sup>257</sup> 18 U.S.S.G. §5E1.1.

<sup>258</sup> U.S.S.G. §5E1.5; U.S.S.G. §5E1.5, cmt. bck. (“Various statutes require the court to impose the costs of prosecution: 7 U.S.C. §13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S.C. §844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S.C. §7201 (attempt to defeat or evade income tax); 26 U.S.C. §7202 (willful failure to collect or pay tax); 26 U.S.C. §7203 (willful failure to file income tax return, supply information, or pay tax); 26 U.S.C. §7206 (fraud and false statements); 26 U.S.C. §7210 (failure to obey summons); 26 U.S.C. §7213 (unauthorized disclosure of information); 26 U.S.C. §7215 (offenses with respect to collected taxes); 26 U.S.C. §7216 (disclosure or use of information by preparers of returns); 26 U.S.C. §7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. §1302c-9 (improper FOIA disclosure); 42 U.S.C. §942-6 (rights of way for Alaskan wagon roads)”).

<sup>259</sup> 18 U.S.C. 3555; U.S.S.G. §5F1.4.

## Denial of Benefits

The court may also deny a defendant in certain drug trafficking cases eligibility to receive various federal benefits: “any grant, contract, loan, professional license, or commercial license provided by an agent of the United States or by appropriated funds of the United States.”<sup>260</sup>

## Procedures

Chapter 6 of the Guidelines replicates and parses some of the statutory and rule provisions that govern sentencing: 18 U.S.C. 3553, as well as Rules 32 and 11 of the Federal Rules of Criminal Procedure. Unless otherwise directed by the court, a probation officer must conduct a presentencing investigation and report.<sup>261</sup> Copies of the report must be presented to the prosecution and defense, who may object to any of its provisions or omissions.<sup>262</sup> The court is to rule on any unresolved disputes following a sentencing hearing.<sup>263</sup> If the court intends to depart from the sentence prescribed by the Guidelines, it must give the parties prior notice.<sup>264</sup> The Guidelines point out that the court will honor the victims’ rights provisions of 18 U.S.C. 3771 during the sentencing process.<sup>265</sup> They describe the plea bargain procedures articulated in Rule 11 of the Federal Rules of Criminal Procedure.<sup>266</sup> They close with the observation that a plea agreement may include a statement of stipulated facts, which is not binding on the court and may be subject to local court rules.<sup>267</sup>

## Violations of Probation or Supervised Release

Chapter 7 of the Guidelines addresses the sentencing consequences of a violation of the conditions of probation or supervised release. The options available to the court under the Guidelines depend upon the nature of the violation. Commission of a state or federal felony requires revocation.<sup>268</sup> The additional terms of imprisonment that may be imposed as a consequence of a violation are assigned sentencing ranges based on the nature of the violation and the defendant’s criminal history Category, with no credit for time served under supervision prior to the violation or thereafter.<sup>269</sup>

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<sup>260</sup> 21 U.S.C. 862; U.S.S.G. §5F1.6. Several federal benefits are explicitly excluded from the statute’s reach and consequently from the Guideline which implements it, 21 U.S.C. 862. The Guidelines do not mention a second statute, 21 U.S.C. 862a, which denies defendants convicted of certain controlled substance offenses eligibility for some of the benefits exempted in §862.

<sup>261</sup> U.S.S.G. §6A1.1(a); 18 U.S.C. 3552; Fed. R. Crim. P. 32.

<sup>262</sup> U.S.S.G. §6A1.2; 18 U.S.C. 3552; Fed. R. Crim. P. 32.

<sup>263</sup> U.S.S.G. §6A1.3; Fed. R. Crim. P. 32.

<sup>264</sup> U.S.S.G. §6A1.4; Fed. R. Crim. P. 32.

<sup>265</sup> U.S.S.G. §6A1.5.

<sup>266</sup> U.S.S.G. §§6B1.1, 6B1.2, 6B1.3.

<sup>267</sup> U.S.S.G. §6A1.4.

<sup>268</sup> U.S.S.G. §§7B1.1, 7B1.3; 18 U.S.C. 3583.

<sup>269</sup> U.S.S.G. §§7B1.4, 7B1.5.



## Sentencing Organizations

Under federal law, a corporation is criminally liable for the crimes, committed at least in part for its benefit, by its authorized employees and agents,<sup>270</sup> unless Congress has provided otherwise by statute. Chapter 8 of the Guidelines establishes a separate, related but distinct, sentencing regime for organizations. For purposes of the Guidelines, an organization is any legal entity that is not an individual.<sup>271</sup> Chapter 8 establishes its own governing principles and scoring procedure to determine the recommended sentence under the Guidelines. Organizational sentences must: (1) compel the defendant organization to remedy any harm caused by the offense of conviction to the extent practicable; (2) strip the assets of any entity operated primarily for criminal purposes or by criminal means; (3) reflect the seriousness of the offense and the organization's culpability; and (4) include probation when needed.<sup>272</sup>

Chapter 8's procedure involves: (a) an identification of the appropriate remedial measures; (b) calculation of the applicable fine; (c) determination of whether and under what conditions probation should be imposed; and (d) compliance with statutory requirements for special assessments, forfeitures, and costs.<sup>273</sup>

## Remedial Measures

Chapter 8 provides for four types of remedial measures: notice to victims, community service, restitution, and a residual guideline.<sup>274</sup> As with individual defendants, a court may order a defendant in fraud cases to notify his victims of his conviction and sentence, and to bear the cost of notification (up to \$20,000).<sup>275</sup> A court may also order an organization to use its employees or to otherwise pay for community service, if the service is reasonably calculated to remedy the damage attributable to its offense.<sup>276</sup> If the organization has not already done so, a court may order it to make restitution to the extent and under the provisions applicable in cases of individual offenders.<sup>277</sup> Finally, a sentencing court enjoys broad authority to establish conditions of probation for both remedial and preventive purposes, including the authority to order an organization to create a fund to address reasonably foreseeable future harm associated with its offense.<sup>278</sup>

<sup>270</sup> *United States v. Agosto-Vega*, 617 F.3d 541, 552-53 (1<sup>st</sup> Cir. 2010); *United States v. Singh*, 518 F.3d 236, 249 (4<sup>th</sup> Cir. 2008); accord, *United States v. Jorgensen*, 144 F.3d 550, 560 (8<sup>th</sup> Cir. 1998); *United States v. Investment Enterprises, Inc.*, 10 F.3d 263, 266 (5<sup>th</sup> Cir. 1994); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *United States v. Gold*, 743 F.2d 800, 822-23 (11<sup>th</sup> Cir. 1984); *United States v. Beusch*, 596 F.2d 871, 877-78 (9<sup>th</sup> Cir. 1979); *United States v. Carter*, 311 F.2d 934, 941-42 (6<sup>th</sup> Cir. 1963); cf., *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009).

<sup>271</sup> U.S.S.G. §8A1.1, cmt. app. n. 1 (“‘Organization’ means ‘a person other than an individual.’ 18 U.S.C. §18 [‘As used in this title “organization” means a person other than an individual’]. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations”).

<sup>272</sup> U.S.S.G. ch. 8, Intro. Cmt.

<sup>273</sup> U.S.S.G. §8A1.2.

<sup>274</sup> U.S.S.G. §§8B1.4, 8B1.3, 8B1.1, and 8B1.2, respectively.

<sup>275</sup> 18 U.S.C. 3555; U.S.S.G. §§, 8B1.4, 5F1.4.

<sup>276</sup> U.S.S.G. §8B1.3.

<sup>277</sup> U.S.S.G. §8B1.1.

<sup>278</sup> U.S.S.G. §8B1.2.

## Fines

If a sentencing court determines that an entity is inherently corrupt – operated primarily for illicit purposes or primarily using illicit means – it is to set the organization’s fine at a level sufficient to strip it of all its assets.<sup>279</sup> Otherwise, the procedures used to determine an organization’s criminal fine under the Guidelines depend upon the classification of the offense of conviction. Chapter 8’s fine provisions apply to certain offenses.<sup>280</sup> They do not apply when an organization is liable for crimes like homicide, assault, kidnaping, robbery, extortion, civil rights offenses, and environmental offenses, among others.<sup>281</sup> The statutory sentencing factors and the general guidelines for fines, rather than the fine guidelines specific to chapter 8, govern the fines imposed for those offenses.<sup>282</sup>

When chapter 8’s fine provisions do apply, a sentencing court must begin by deciding whether the defendant entity is able to pay a fine.<sup>283</sup> If so, the amount of an organization’s fine is determined by the applicable offense level and the level of its culpability.<sup>284</sup> An organization’s offense level is calculated in the same manner as an offense level for an individual but without the adjustments for things like vulnerability of the victim or role in the offense.<sup>285</sup> Unless the amount of gain or loss associated with the offense is greater, the organization’s base fine is pegged at one of 33 levels corresponding to its offense level – from \$5,000 for an offense level of 6 or less to \$72.5 million for an offense level of 38 or more.<sup>286</sup>

The applicable fine range is then ascertained by multiplying the amount of the base offense level by minimum and maximum factors determined by the organization’s culpability score.<sup>287</sup> The lowest multiplier range is .05 to 0.2, and the highest 2.0 to 4.0.<sup>288</sup> The Guidelines then articulate

<sup>279</sup> U.S.S.G. §8C1.1; *United States v. Najjar*, 300 F.3d 466, (4<sup>th</sup> Cir. 2002) (“Tri-City was exposed to a \$500,000 fine under the statute and what has been called a death penalty fine under §8C1.1 of the Sentencing Guidelines.... It is clear that Tri-City was conceived in crime and performed little or no legitimate activity ...”).

<sup>280</sup> U.S.S.G. §8C2.1 (“The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under: §§2B1.1[theft], 2B1.4[insider trading], 2B2.3[trespass], 2B4.1[commercial bribery], 2B5.3[copyright or trademark infringement], 2B6.1[vehicle identification numbers]; §§2C1.1[bribery], 2C1.2[illegal gratuity], 2C1.6 [deleted]; §§2D1.7[sale of drug paraphernalia], 2D3.1[controlled substance regulatory offenses], 2D3.2[same]; §§2E3.1[gambling], 2E4.1[contraband tobacco products], 2E5.1[labor racketeering], 2E5.3[labor record false statements]; §2G3.1[dealing in obscenity]; §2K1.1[failure to report stolen explosives], 2K2.1[unlawful firearms transactions]; §2L1.1[smuggling]; §2N3.1[odometer offenses]; §2R1.1[antitrust]; §§2S1.1[money laundering], 2S1.3[smurfing]; §§2T1.1[tax evasion], 2T1.4[tax fraud principal], 2T1.6[failure to collect taxes], 2T1.7[failure to deposit collected taxes], 2T1.8[withholding offenses], 2T1.9[tax conspiracy], 2T2.1[nonpayment of alcohol tax], 2T2.2[regulatory tax offenses], 2T3.1[evade customs duties];” or when one of these guidelines is determinative, §§2E1.1[racketeering], 2X1.1[attempt or conspiracy], 2X2.1 [aiding and abetting], 2X3.1[accessory after the fact], 2X4.1[misprision of a felony].

<sup>281</sup> U.S.S.G. §§8C2.1, 8C2.10; *United States v. Ionia Management S.A.*, 555 F.3d 303, 310-11(2d Cir. 2009).

<sup>282</sup> U.S.S.G. §8C2.10; 18 U.S.C. 3553, 3572.

<sup>283</sup> U.S.S.G. §8C2.2.

<sup>284</sup> U.S.S.G. §§8C2.3 to 8C2.9.

<sup>285</sup> U.S.S.G. §8C2.3(“(a) For each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that [Chapter Two] guideline. (b) Where there is more than one such count, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level”).

<sup>286</sup> U.S.S.G. §8C2.4.

<sup>287</sup> U.S.S.G. §§8C2.5 TO 8C2.8.

<sup>288</sup> U.S.S.G. §8C2.6.

11 factors to be considered when deciding where within the applicable range a corporation ought to be fined.<sup>289</sup> The existence of an ethics and compliance program is perhaps the most distinctive factor on the list. The program, whose specifics are detailed at great length in an earlier guideline, is designed to demonstrate an organization's managerial commitment to operate in a lawful manner.<sup>290</sup>

Guidelines insist upon disgorgement when this calculation is insufficient to account for the entity's financial gain after restitution and remedial costs have been paid.<sup>291</sup> A court may reduce the fine called for by the Guidelines in light of a defendant organization's inability to pay.<sup>292</sup> It may also adjust the fine to be imposed in consideration of a number of other factors, some aggravating, others mitigating. For instance, the fines of a closely held entity may be offset by fines imposed upon its owners.<sup>293</sup> Other mitigating factors include the extent of organizational assistance to prosecutors; the fact the entity is a governmental body; the extent to which the innocent members or beneficiaries of the entity will have to bear the burden of the fine; the fact that the applicable remedial costs greatly exceed the gain associated with the organization's offense; and an exceptionally low level of culpability, marked for instance by the presence of a compliance program.<sup>294</sup> Factors that may warrant an increase in the amount of the fine to be imposed include the risk of physical injury; the threat to national security, the environment, or a particular economic market; the involvement of official corruption; and the absence of a prior compliance program.<sup>295</sup>

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<sup>289</sup> U.S.S.G. §8C2.8(a) (“In determining the amount of the fine within the applicable guideline range, the court should consider: (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization; (2) the organization's role in the offense; (3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct; (4) any nonpecuniary loss caused or threatened by the offense; (5) whether the offense involved a vulnerable victim; (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct; (7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5; (8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0; (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score); (10) any factor listed in 18 U.S.C. §3572(a); and (11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program)”).

<sup>290</sup> U.S.S.G. §8B2.1, cmt. n. 1 (“For purposes of this guideline: ‘Compliance and ethics program’ means a program designed to prevent and detect criminal conduct”).

<sup>291</sup> U.S.S.G. §8C2.9.

<sup>292</sup> U.S.S.G. §8C3.3; e.g., *United States v. Patient Transfer Service, Inc.*, 465 F.3d 826, 827 (8<sup>th</sup> Cir. 2006) (“Based on the presentence report's financial data for PTS for the year 2002, the district court found the market value of the company's assets to be \$2,369,724. It then deducted \$871,357 in liabilities and applied discounts for depreciation and for the fact that any sale or liquidation would take place in ‘less than ideal market conditions.’ The court concluded that PTS had approximately \$1 million in net assets and then examined the company's reported cash flow for 2002 in order to estimate future annual income. After taking into account ‘write-down’ depreciation and extraordinary legal expenses incurred as a result of the prosecution, it estimated that future operating expenses would be lower than those reported in 2002 and that the company's annual net income would be approximately \$200,000. After making these findings, the district court imposed a fine of \$500,000 to be paid in quarterly installments of \$25,000 over a period of five years”).

<sup>293</sup> U.S.S.G. §8C3.4.

<sup>294</sup> U.S.S.G. §§8C4.1, 8C4.7, 8C4.8, 8C4.9, 84.11.

<sup>295</sup> U.S.S.G. §§8C4.2, 8C4.3, 8C4.4, 8C4.5, 8C4.6, 8C4.10.

### Example

The PSI [Presentence Report]: (1) assigned PUGH [Roland Pugh Construction, Inc.] a base offense level of 10, pursuant to U.S.S.G. §2c1.1(A)(2003); (2) added 2 levels because the offense involved more than one bribe, pursuant to §2c1.1(b)(1); and (3) added 22 levels because the net profit to PUGH was between \$20 million and \$50 million, pursuant to §§2C1.1(b)(2)(A) and 2B1.1, yielding a total offense level of 34. Under the § 8C2.4(d) table, this total offense level of 34 required a *base fine* amount of \$28.5 million.

However, the PSI determined PUGH's pecuniary gain under § 8C2.4(a)(2) was its \$47.92 million profit from the County contracts. Under § 8C2.4(a), the *base fine* amount became \$47.92 million, because PUGH's \$47.92 million pecuniary gain was greater than the \$28.5 million amount from the § 8C2.4(d) fine table and greater than the pecuniary loss of \$319,425 suffered by the victim County.

The PSI determined PUGH's culpability score was 7 under § 8C2.5, because (1) PUGH had 50 or more employees and (2) individuals with substantial authority (Board Chairman Roland Pugh, CEO Grady Pugh, and President Yessick) participated in the offenses. This culpability score of 7 resulted in a minimum fine multiplier of 1.4 and a maximum multiplier of 2.8, under § 8C2.6. Based on these multipliers and the base fine of approximately \$47.92 million, the PSI calculated the guidelines fine range to be \$67,089,446.48 to \$134,178,892.96.

The statutory maximum fine was \$95,842,066, pursuant to 18 U.S.C. §3571(b), (d) (*i.e.*, double the pecuniary gain of \$47.92 million). Thus, the PSI concluded PUGH's advisory guidelines fine range was \$67,089,446 to \$95,842,066.

The PSI stated PUGH appeared unable to pay a fine within that \$67 million to \$95 million guidelines range and recommended the district court reduce the fine if it determined PUGH was unable to pay the minimum fine amount. The PSI noted that, under § 8C3.4, the guidelines fine could be offset by 67.75%, because (1) PUGH was a closely held organization, (2) three of PUGH's owners (Roland Pugh, Yessick, and Grady Pugh) whose total interests amounted to 67.75% had already been fined for the same offense conduct, and (3) one owner (Andy Pugh) had a 32.25% interest and was not convicted in the bribery scheme....

The district court found that PUGH made its first bribe in August 1999 and its final bribe in September 2002. The court found that (1) from September 1, 1999 to December 31, 2002, PUGH benefitted from the bribes, (2) during this 1999-2002 period PUGH generated from its County contracts a total profit of \$43,985,869, and (3) given PUGH's \$107,887,832 in revenues, this \$43,985,869 profit was a 40.77% profit margin during that period. Using that profit to calculate the base fine amount, the district court determined the guidelines fine range was \$61,580,216 to \$87,971,738. *See* U.S.S.G. §§8C2.5, 8C2.7. After considering PUGH's ability to pay, the district court reduced the fine to \$21 million. The district court then gave a \$1.6 million offset for fines paid by individuals who owned at least 5% of PUGH, which resulted in a final fine of \$19.4 million.<sup>296</sup>

<sup>296</sup> *United States v. McNair*, 605 F.3d 1152, 1235, 1237 (11th Cir. 2010).

## Probation

The Guidelines insist upon an order of probation when necessary to ensure an organization's payment of restitution, fine, and other assessments; to ensure the establishment of a compliance program; and under a number of other circumstances.<sup>297</sup> The term of probation must be not less than one year or more than five.<sup>298</sup> The only truly mandatory condition of probation is that the organization refrain from subsequent criminal misconduct, but the Guidelines recommend several discretionary conditions including the establishment of a compliance program.<sup>299</sup>

## Special Assessments, Forfeitures, and Costs

Finally, Chapter 8 notes the obligation or prerogative of a sentence court to issue orders pursuant to statute for special assessments, forfeitures, and costs.<sup>300</sup>

## Section 3553(a) Considerations

Having discerned the sentencing range recommended by the Guidelines for either individual or organizational defendants, a court must consult the provisions of 18 U.S.C. 3553(a) to determine the appropriate sentence. Section 3553(a) begins with the observation that the court should impose “a sentence sufficient, but not greater than necessary, to comply with purposes set forth” in the section. It then identifies factors other than the recommendations of the Guidelines to be considered before imposing sentence.

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed -
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

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<sup>297</sup> U.S.S.G. §8D1.1.

<sup>298</sup> U.S.S.G. §8D1.2.

<sup>299</sup> U.S.S.G. §§8D1.3, 8D1.4.

<sup>300</sup> U.S.S.G. §§8E1.1, 8E1.2, and 8E.13, respectively.

- (4) the kinds of sentence and the sentencing range established for -
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines -
    - (i) issued by the Sentencing Commission ... ; and
    - (ii) that ... are in effect on the date the defendant is sentenced; or
  - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission ... ;
- (5) any pertinent policy statement -
  - (A) issued by the Sentencing Commission ... ; and
  - (B) that ... is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

The no “greater than necessary” reference in the introductory clause of subsection 3553(a) above means that “if a district court were to conclude that two sentences equally served the statutory purpose of §3553, it could not ... impose the higher.”<sup>301</sup> Since it is already the task of the Guidelines to calibrate sentencing ranges that reflect “the nature and circumstances of the offense and the history and characteristics of the defendant,” §3553(a)(1) comes into play only in presence of circumstances that are out of the ordinary.<sup>302</sup>

Section 3553(a)(2) encapsulates the purposes for sentencing: just punishment, deterrence, public safety, and defendant rehabilitation. Here, trial courts are afforded considerable deference, unless the sentencing imposed “shockingly high, shockingly low,” or justified on a ground which the law will not accept.<sup>303</sup> Section 3553(a)(2)(A) requires sentencing courts to impose a sentence which reflects “the seriousness of the offense,” which “promote[s] respect for the law,” and which “provide[s] just punishment.” Section 3583(e), which governs sentencing of those who violate the terms of their supervised release, omits §3553(a)(2)(A) from the list of factors which the court

<sup>301</sup> *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010).

<sup>302</sup> *United States v. Irej*, 612 F.3d 1160, 1202 (11<sup>th</sup> Cir. 2010) (“[T]he ‘history and characteristics of the defendant’ component of the §3553(a)(1) factor is aimed at distinguishing among defendants who commit a particular offense or type of offense.... this point is important because it matters whether the reason for the variance is a fact that takes the present case outside the heartland of cases covered by the individual guideline”); *United States v. Autery*, 555 F.3d 864, 875 (9<sup>th</sup> Cir. 2009); *United States v. Moon*, 513 F.3d 527, 543-44 (6<sup>th</sup> Cir. 2008).

<sup>303</sup> *United States v. Musgrave*, 761 F.3d 602, 608-609 (6<sup>th</sup> Cir. 2014); *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010); see also *United States v. Irej*, 612 F.3d 1160, 1206-217(11<sup>th</sup> Cir. 2010); *United States v. Marsh*, 561 F.3d 81, 86 (1<sup>st</sup> Cir. 2009).

may consider.<sup>304</sup> The lower federal appellate courts are divided over whether a sentencing court may nevertheless take the §3553(a)(2)(A) factors in consideration in a revocation case.<sup>305</sup>

Section 3553(a)(3) instructs a sentencing court to consider the kinds of sentences available. The section seldom causes debate. Probation, the principal alternative to imprisonment, is only available at relatively low sentencing ranges. As noted earlier, the Guidelines specifically call for a sentencing court to address the other primary kinds of sentences – fines, forfeiture, and restitution. This may be one of reasons why sentencing courts are not required to document their consideration of §3553(a)(3), unless a defendant asserts its importance.<sup>306</sup>

Sections 3553(a)(4) and (a)(5) require sentencing courts to consider the recommendations of the Guidelines. These are the statutory mandates that command sentencing courts to begin with a calculation of the appropriate sentence under the Guidelines, which the Supreme Court in *Booker* recognized as a counterbalance to the constitutional prohibition against mandatory guidelines.<sup>307</sup>

“Under 18 U.S.C. §3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing Guidelines issued by the United States Sentencing Commission that are ‘in effect on the date the defendant is sentenced.’ The Sentencing Guidelines reiterate that statutory directive, with the proviso that ‘[i]f the Court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.’”<sup>308</sup>

The obligation found in §3553(a)(6) to avoid unwarranted disparity among the sentences for similar situated defendants speaks to federal sentencing disparity nation-wide.<sup>309</sup> Nevertheless, the defendants raise the section most often to question disparity between their sentences of their

<sup>304</sup> 18 U.S.C. 3583(e)(“The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . .”).

<sup>305</sup> *United States v. Vandergrift*, 754 F.3d 1303, 1308 (11<sup>th</sup> Cir. 2014)(internal citations omitted)(“The First, Second, Third, and Sixth Circuits have concluded that it is not error to consider §3553(a)(2)(A) when revoking supervised release, while the Fourth, Fifth, and Ninth Circuits concluded that it is error”); see also, *United States v. Clay*, 752 F.3d 1106, 1107 (7<sup>th</sup> Cir. 2014)(consideration of §3553(a)(2)(A) is not procedural error).

<sup>306</sup> *United States v. Staton*, 626 F.3d 584, 585 (D.C.Cir. 2010). As one court suggested where mandatory sentencing requirements apply they effectively remove any judicial sentencing discretion and with it the ability to consider and act upon the sentencing factors in §18 U.S.C. 3553(a), including §3553(a)(3), *United States v. Hoffman*, 710 F.3d 1228, 1233-234 (11<sup>th</sup> Cir. 2013)(“The district court remains bound by statutory mandatory minimum sentences . . . . The district court stated that it had considered the §3553(a) factors – which include the kinds of sentences available, 18 U.S.C. §3553(a)(3) – and imposed the sentence mandated by the statute. The district court was statutorily required to sentence Hoffman to life, regardless of the other §3553(a) factors”).

<sup>307</sup> *United States v. Booker*, 543 U.S. 220, 245 (2005); *United States v. Merced*, 603 F.3d 203, 213 (3d Cir. 2010); *United States v. Martin*, 596 F.3d 284, 285 (5<sup>th</sup> Cir. 2010).

<sup>308</sup> *Peugh v. United States*, 133 S.Ct. 2072, 2081 (2013), quoting, USSG §§1B1.11(a), (b)(1) (Nov. 2012).

<sup>309</sup> *United States v. Rossignol*, 780 F.3d 475, 478 n.4 (1<sup>st</sup> Cir. 2015); *United States v. Sierra-Villegas*, 774 F.3d 1093, 1103 (6<sup>th</sup> Cir. 2014); *United States v. Cedillo-Narvaez*, 761 F.3d 397, 406 (5<sup>th</sup> Cir. 2014); *United States v. Lente*, 759 F.3d 1149, 1168 (10<sup>th</sup> Cir. 2014). It is not concerned with any disparity between state and federal sentences for similar misconduct, *United States v. Ringgold*, 571 F.3d 948, 952 (9<sup>th</sup> Cir. 2009), citing in accord inter alia *United States v. Johnson*, 505 F.3d 120, 123-24 (2d Cir. 2007) and *United States v. Malone*, 503 F.3d 481, 486 (6<sup>th</sup> Cir.2007); see also, *United States v. Williams*, 773 F.3d 98, 108 (D.C.Cir. 2014)(It is likewise not concerned with disparities between defendants sentenced under the U.S. Sentencing Guidelines and those sentenced under the District of Columbia sentencing guidelines).

codefendants or coconspirators. Some courts reject the argument out of hand;<sup>310</sup> some that disparity is one of the factors it may consider;<sup>311</sup> some that it must be addressed as circumstances dictate;<sup>312</sup> most, however, point out that it carries no sway when disparity is warranted.<sup>313</sup> The courts are more clearly divided over whether the discretionary downward departure under U.S.S.G §5K3.1 for early disposition programs available in some districts and unavailable in others permits a departure under §3553(a) in those districts in which no such program exists.<sup>314</sup>

Finally, §3553(a)(7) compels the sentencing court to consider the need to provide victim restitution. The factor seems most likely to come into play when a split or probationary sentence is possible under the Guidelines.<sup>315</sup>

<sup>310</sup> *United States v. Rossignol*, 780 F.3d at 478 n.4 (“In any event, the comparison to individual co-defendants is not particularly relevant for purposes of 18 U.S.C. §3553(a)(6). That section is primarily concerned with national disparities”); *United States v. Wallace*, 597 F.3d 794, 803 (6<sup>th</sup> Cir. 2010) (“[T]his factor [18 U.S.C. 3553(a)(6)] concerns national disparities between defendants with similar criminal histories convicted of similar criminal conduct – not disparities between co[conspirators]”); *United States v. Gooden*, 564 F.3d 887, 891 (7<sup>th</sup> Cir. 2009).

<sup>311</sup> *United States v. Sierra-Villegas*, 774 F.3d at 1103 (“[U]nder 18 U.S.C. §3553(a)(6) the district court may consider the defendant’s sentence in comparison with that of co-defendants at sentencing, but need not do so; it is a matter of discretion . . . . Further, eliminating inconsistencies among co-defendants might be in tension with the statutory purpose, embodied in 18 U.S.C. §3553(a)(6), of limiting national disparities among . . . .”); *United States v. Lente*, 759 F.3d at 1168; *United States v. Key*, 599 F.3d 469, 475 (5<sup>th</sup> Cir. 2010) (“[D]isparity in sentencing, standing alone, is insufficient to render a sentence substantively unreasonable”).

<sup>312</sup> *United States v. Irey*, 612 F.3d 1160, 1221 (11<sup>th</sup> Cir. 2010) (“While the criminal conduct of all the defendants in the cited cases ranges from serious to truly depraved, none of it is worse than Irey’s criminal conduct, yet he received a sentence far more lenient than they did”); *United States v. Wallace*, 573 F.3d 82, 97 (1<sup>st</sup> Cir. 2009) (internal citations omitted) (“Although this section is primarily aimed at national disparities, rather than those between co-defendants . . . , a district court may consider differences and similarities between co-defendants at sentencing”); but see *United States v. Irving*, 554 F.3d 64, 76 (2d Cir. 2009) (“More importantly, a reviewing court’s concern about unwarranted disparities is at a minimum when a sentence is within the Guidelines range”).

<sup>313</sup> *United States v. Lara-Ruiz*, 781 F.3d 919, 924-25 (8<sup>th</sup> Cir. 2015); *United States v. Holt*, 777 F.3d 1234, 1270 (11<sup>th</sup> Cir. 2015) (“However, we will not find a sentence disparity among codefendants to be unwarranted when they are not similarly situated”); *United States v. Durham*, 766 F.3d 672, 685-86 (7<sup>th</sup> Cir. 2014); *United States v. Quiles*, 618 F.3d 383, 397 (3d Cir. 2010); *United States v. Mejia*, 597 F.3d 1329, 1344 (D.C. Cir. 2010); *United States v. Ahrendt*, 560 F.3d 69, 77 (1<sup>st</sup> Cir. 2009).

<sup>314</sup> *United States v. Reyes-Hernandez*, 624 F.3d 405, 419-20 (7<sup>th</sup> Cir. 2010) (Section 5K3.1 affords “district court judges the ability to consider the absence of a fast-track program in crafting an individual sentence”); see also *United States v. Camacho-Arellano*, 614 F.3d 244, 250 (6<sup>th</sup> Cir. 2009); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 150-51 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 229 (1<sup>st</sup> Cir. 2008); *contra*, *United States v. Gonzalez-Zolelo*, 556 F.3d 736, 739-41 (9<sup>th</sup> Cir. 2009); *United States v. Vega-Castilla*, 540 F.3d 1235, 1239 (11<sup>th</sup> Cir. 2008); *United States v. Gomez-Herrera*, 523 F.3d 554, 562-63 (5<sup>th</sup> Cir. 2008); see generally, *Fast-Track Sentencing Disparity: Congressional Intent to Resolve the Circuit Split*, 77 UNIVERSITY OF CHICAGO LAW REVIEW 479 (2010).

<sup>315</sup> *United States v. Cole*, 765 F.3d 884, 886 (8<sup>th</sup> Cir. 2014) (“Finally, the district court explained that the probationary sentence would allow Cole to work and earn money to make restitution to the victims of the fraud”); *United States v. Rangel*, 697 F.3d 795, 803-804 (9<sup>th</sup> Cir. 2012) (“[T]he district court’s goal of obtaining restitution for the victims of Defendant’s offense, 18 U.S.C. §3553(a)(7), is better served by a non-incarcerated and employed defendant”); see also, *United States v. Muzio*, 757 F.3d 1243, 1254-256 (11<sup>th</sup> Cir. 2014) (noting that a sentencing court may not be able to determine the amount of restitution owed and therefore the amount to be ordered until years after it has set a defendant’s term of imprisonment).



## Appellate Review

The trial court must present in open court and justify the sentence it imposes.<sup>316</sup> The sentence and court's justifications may be appealed by either the defendant or the government or both.<sup>317</sup> The sentence will be upheld on appeal if it is substantively and procedurally reasonable.<sup>318</sup>

A sentence is procedurally reasonable if it is free of “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.”<sup>319</sup>

A sentence is substantively reasonable if it is reasonable under the circumstances; it is substantively unreasonable if it ignores a relevant sentencing factor, if it overvalues a relatively minor sentencing consideration, or if it undervalues a significant sentencing factor.<sup>320</sup> The appellate court may consider reasonable a sentence within the Guidelines sentencing range, but it may not consider a sentence unreasonable simply because it rests outside that range.<sup>321</sup>

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<sup>316</sup> 18 U.S.C. 3553(c).

<sup>317</sup> 18 U.S.C. 3742.

<sup>318</sup> *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Moore*, 784 F.3d 398, 402 (7<sup>th</sup> Cir. 2015); *United States v. Kerley*, 784 F.3d 327, 347 (6<sup>th</sup> Cir. 2015); *United States v. Grose*, 784 F.3d 291, 294 (5<sup>th</sup> Cir. 2015).

<sup>319</sup> *Gall v. United States*, 552 U.S. at 51 (2007); *Peugh v. United States*, 133 S.Ct. 2072, 2080 (2013); *United States v. Serrano-Mercado*, 784 F.3d 838, 840 (1<sup>st</sup> Cir. 2015); *United States v. Grose*, 784 F.3d at 294; *United States v. Hill*, 783 F.3d 842, 844 (11<sup>th</sup> Cir. 2015).

<sup>320</sup> *Gall v. United States*, 552 U.S. at 51; *United States v. Usherry*, 785 F.3d 210, 223-24 (6<sup>th</sup> Cir. 2015); *United States v. Grose*, 784 F.3d at 297; *United States v. Correa-Osorio*, 784 F.3d 11, 27-8 (1<sup>st</sup> Cir. 2015).

<sup>321</sup> *Gall v. United States*, 552 U.S. at 51; *Peugh v. United States*, 133 S.Ct. at 2080 ; *United States v. Chavez*, 611 F.3d 1006, 1011 (9<sup>th</sup> Cir. 2010), quoting *Rita v. United States*, 551 U.S. 338, 355 (2007) (“Where judge and [the Sentencing] Commission both determine that the Guidelines sentence is an appropriate sentence for the case at hand, that sentence likely reflects the §3553(a) factors”).