

Basic Individual Guidelines

Annual National Seminar
on the Federal Sentencing Guidelines
New Orleans, Louisiana
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Program Discussion

- Guideline sentencing post-*Booker*
- Basic guideline application
- Scenario
- Principles of multiple counts

U.S.S.C.

Web Site

www.usssc.gov

HelpLine

202-502-4545

SENTENCING TABLE (in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
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Zone A	0-6	0-6	1-7	4-10	6-12	9-15
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Zone C	8-14	10-16	12-18	18-24	24-30	27-33
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	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
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	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
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	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Post-*Booker* Sentencing

- Per *Booker*: Guidelines made advisory by striking 18 USC §§ 3553(b)(1) and 3742(e) of the Sentencing Reform Act of 1984 (SRA)
- Per *Gall*: Correct application is required
- Per *Gall*: The “reasonableness” review established by *Booker* is a deferential abuse of discretion standard

§ 3553(a)(1) - (7)

- Factors that must be considered by the district court in imposing a sentence
- Factors that guide appellate courts in determining “reasonableness”

§ 3553(a)(1) - (7) Factors

The court is to impose a sentence sufficient but not greater than necessary to comply with the “purposes of sentencing”

The court shall consider:

- (1) Nature & circumstances of offense;
history & characteristics of defendant
- (2) “Purposes of sentencing”
Punishment, deterrence, incapacitation,
& rehabilitation

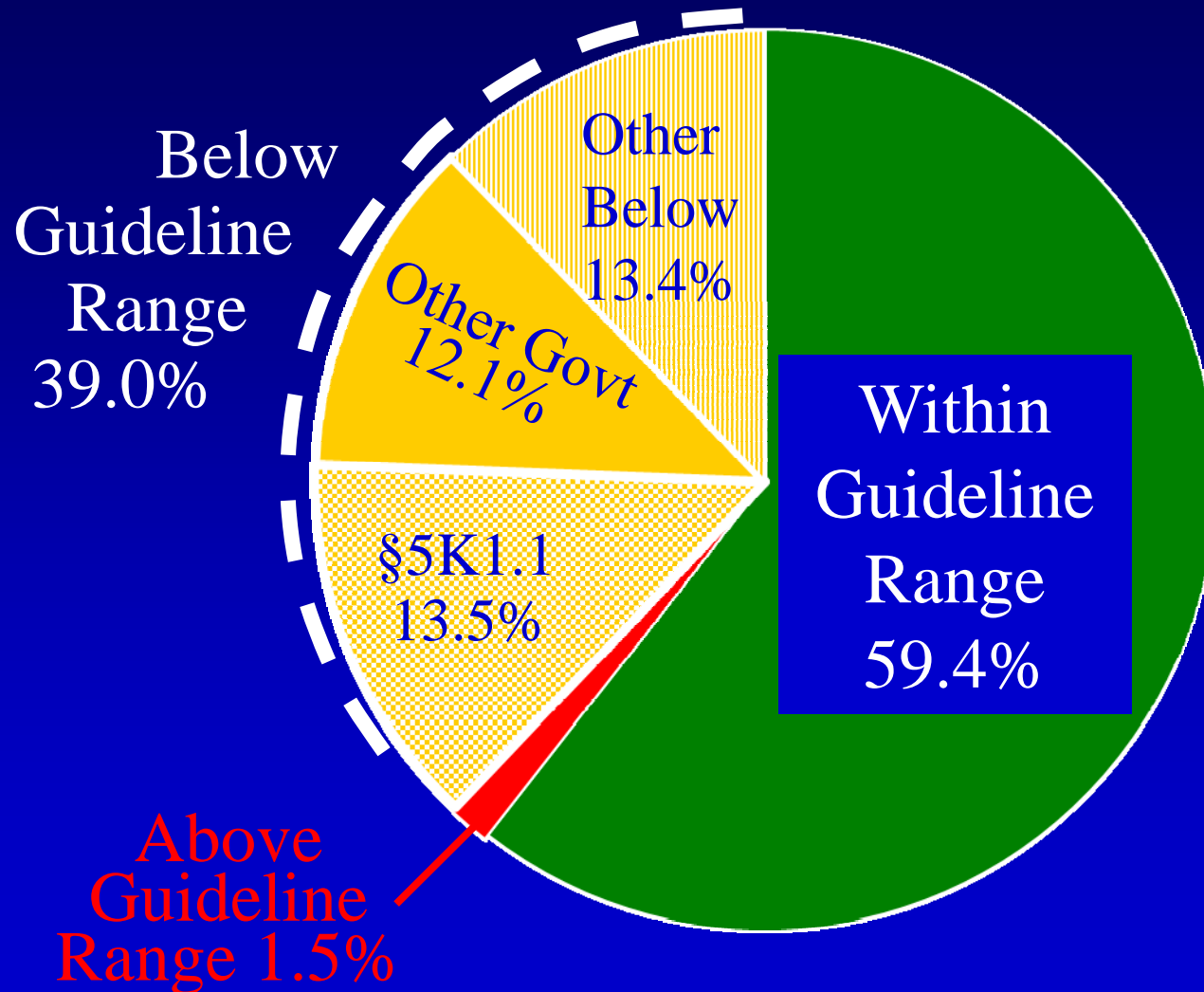
§ 3553(a)(1) - (7) Factors (cont.)

- (3) Kinds of sentences available
- (4) The sentencing guidelines
- (5) The guideline policy statements
- (6) Avoiding unwarranted sentencing disparities
- (7) Need to provide restitution

3-Step Approach to Federal Sentencing Under *Booker*

1. Apply the sentencing guidelines to establish the guideline sentencing range
2. Determine if a *departure* is consistent with the guidelines
3. Determine if a “*variance*” (a sentence outside the advisory guideline system) is warranted under the authority of § 3553(a)

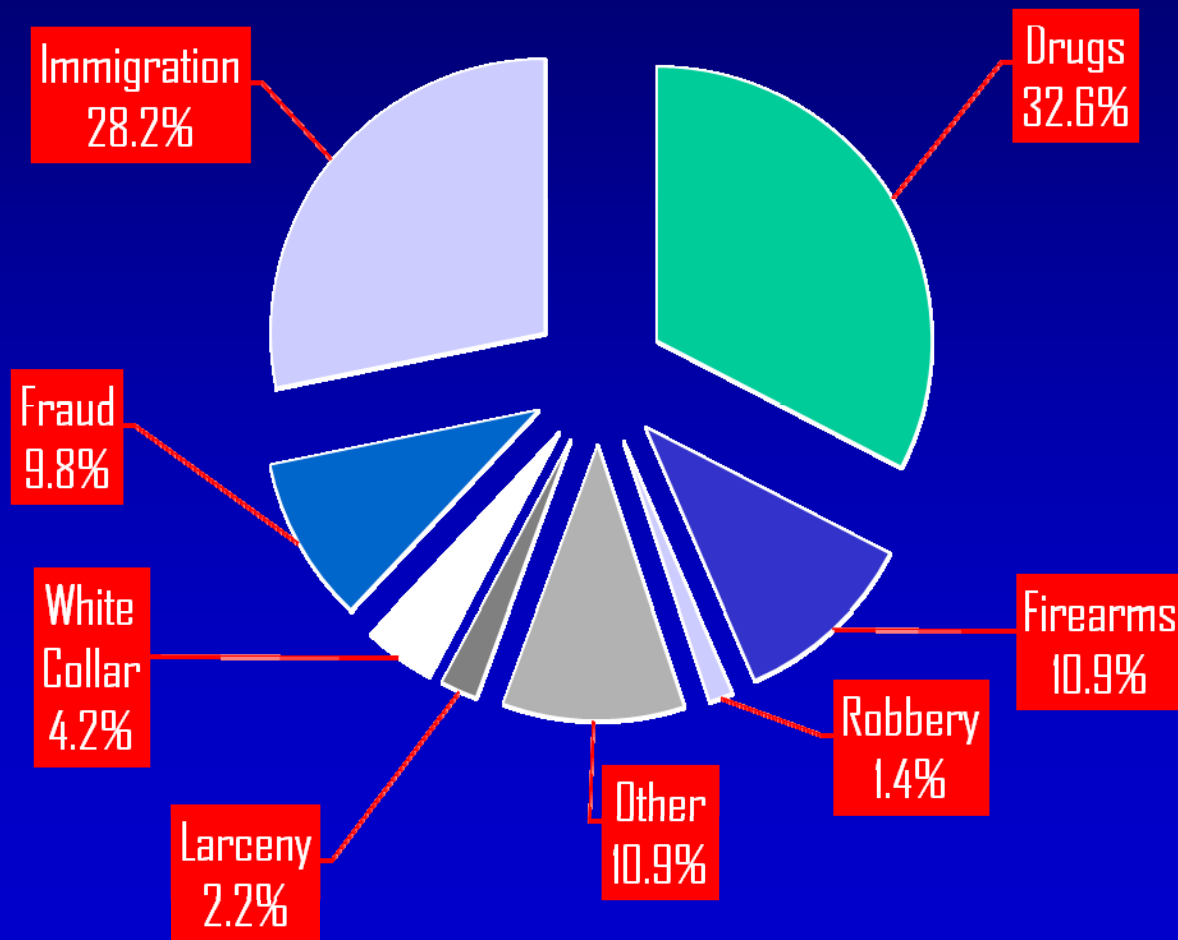
Position of Sentences in Relation to Guideline Range FY 2008



SOURCE: U.S. Sentencing Commission, 2008 Datafile USSCFY08

Primary Offense Types

National - FY 2008



Basic Guideline Application

Points to Remember Regarding Guideline Application Post-*Booker*

- The sentencing judge still resolves disputed issues (§6A1.3)
 - Must articulate specific reasoning
- Standard of proof: preponderance (§6A1.3)
- Burden of persuasion: falls on party seeking the adjustment

Points to Remember Regarding Guideline Application Post-*Booker* (cont.)

- Rules of evidence do not apply
(Fed. R. Evid. 1101(d)(3))
- Evidence must have sufficient indicia of
reliability to support probable accuracy
(§6A1.3(a))

General Approach of the Federal Sentencing Guidelines

- Begins as an offense of conviction system
- Then considers many real offense characteristics

The Statutes “Trump” the Guidelines

Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

*(e.g., statutory maximums
and mandatory minimums)*

-See §§5G1.1 & 5G1.2

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	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
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	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Single Count Application

Chapter Two

- Base Offense Level
- Specific Offense Characteristics
- Cross References

Chapter Three

- Victim
- Role
- Obstruction
- [Multiple Counts]
- Acceptance

Determining the Applicable Chapter Two Guideline

§1B1.2(a)

- Use the Chapter Two guideline applicable to the offense of conviction
- Refer to the Statutory Index (Appendix A) in this determination

Note: If no guideline is listed, use §§2X5.1 or 2X5.2₄₉

Appendix A

Statute

Guideline

18 U.S.C. § 2111

2B3.1

18 U.S.C. § 2112

2B3.1

18 U.S.C. § 2113(a)

2B1.1,

2B2.1,

2B3.1,

2B3.2

18 U.S.C. § 2113(b)

2B1.1

18 U.S.C. § 2113(c)

2B1.1

18 U.S.C. § 2113(d)

2B3.1

- §2B1.1 Larceny, Embezzlement,
Fraud and Forgery
- §2B2.1 Burglary
- §2B3.1 Robbery
- §2B3.2 Extortion by Force or Threat
of Injury or Serious Damage

§2B3.1 Robbery

(a) Base Offense Level: 20

(b) Specific Offense Characteristics	<u>Levels</u>
(1) financial institution or post office	+2
(2) firearm, weapon, death threat	+2 to +7
(3) victim injury	+2 to +6
(max. of 11 offense levels from (b)(2) & (b)(3))	

(b) SOC's (cont.)

Levels

(4) abduction

+4

restraint

+2

(5) carjacking

+2

(6) taking of a firearm,
destructive device,
or controlled substance

+1

(7) loss of \$10,000+ to \$5 million+

+1 to +7

(c) Cross Reference

(1) if victim murdered, apply the guideline
for First Degree Murder (§2A1.1)

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

Level

(1) defendant convicted under certain statutes; death/serious injury from drug use; similar prior conviction

43

(2) defendant convicted under certain statutes; death/serious bodily injury resulted from the drug use

38

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

Level

(3) the offense level from the Drug Quantity Table

except if mitigating role (§3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

Drug Quantity Table

Base Offense Levels for Cocaine

150	KG	↑	Level 38
50	KG	↑	Level 36
15	KG	↑	Level 34
5	KG	↑	Level 32
3.5	KG	↑	Level 30
2	KG	↑	Level 28
500	G	↑	Level 26

400	G	↑	Level 24
300	G	↑	Level 22
200	G	↑	Level 20
100	G	↑	Level 18
50	G	↑	Level 16
25	G	↑	Level 14
Less than 25	G	↑	Level 12

(b) Specific Offense Characteristics

	<u>Level</u>
(1) firearm, dangerous weapon possessed	+2

(11) if defendant meets the <u>subdivision criteria</u> of “the safety valve” (§5C1.2)	-2
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Chapter Three Adjustments

- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

Acceptance of Responsibility

Chapter Three, Part E

- 2-Level Reduction:
If defendant clearly demonstrates affirmative acceptance of responsibility for the offense.
- 1-Level Additional Reduction Possible

Requirements for 1-Level Additional Reduction

§3E1.1(b)

- Only if 2-level reduction applicable
- Must be at least offense level 16
- Government motion required
- Must give timely notification of plea of guilty

Pointers about Chapters Two and Three Application

- Offense levels are cumulative (§1B1.1, App. Note 4)
- Within sections, use greatest (§1B1.1, App. Notes 4(A) & 5)
- No issue of “double counting” unless directed by guidelines (§1B1.1, App. Note 4(B))
- “Adjustments” and “departures” are distinct (Chapter Three & §5K2.0)

Relevant Conduct

§1B1.3

Relevant Conduct

- Sets the limits of information to be used in guidelines application
 - Note however that at sentencing generally ALL information can be used
 - 18 U.S.C. § 3661
 - §1B1.4
 - *Witte, Watts, etc.*
- Sentencing accountability is not always the same as criminal liability

Analysis of Relevant Conduct Acts

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction
- For certain offenses defendant accountable for certain acts beyond the offense of conviction

§1B1.3 Relevant Conduct

(a) Chapters Two and Three.

(Unless otherwise specified)

(1) (A) all acts of the defendant

(B) certain acts of others

During, in preparation, avoiding detection
for the offense of conviction

(2) for offenses at §3D1.2(d), “expanded”
relevant conduct (course of conduct or
common scheme or plan)

(3) harms resulting from (a)(1) and (a)(2)

(4) any information specified in guideline

(b) Chapters Four and Five. Conduct specified
in the respective guidelines

Relevant Conduct

§1B1.3

(a): Establishes what is relevant for
Chapters Two and Three

- Base offense levels (BOL's)
- Specific offense characteristics (SOC's)
- Cross references
- Chapter Three Adjustments

(b): Establishes what is relevant for
Chapters Four and Five

Relevant Conduct Includes:

- Acts - (a)(1) & (a)(2)
 - of the defendant and certain acts of others that occurred in a specified time relationship with the offense of conviction
- Harms - (a)(3)
 - resulting from acts determined to be relevant pursuant to (a)(1) & (a)(2)
- Other specific considerations as directed by a guideline - (a)(4)

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others
to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking ⁴⁰

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination based on each defendant's undertaking
- Can be established by either *explicit* agreements or *implicit* agreements
- Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

Determining Scope in a Conspiracy

“Bright Line Rule”
of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

Scenario - Scope of Undertaking

- Three year conspiracy where medical clinic billed insurance companies for procedures never performed; fraud billings of \$500,000 a year for a total of \$1.5 million
- During course of the conspiracy the clinic had three doctors, each there for a single year, one doctor starting when the previous one left
- Defendant Dr. 2 was at clinic for the second year
- What is scope of Dr. 2's undertaking?

“Reasonably Foreseeable”

§1B1.3, App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Reasonable foreseeability applies only to the conduct of others ((a)(1)(B)); it does not apply to the defendant’s own conduct ((a)(1)(A))

**“Expanded Relevant Conduct”:
Offenses for which Relevant Conduct
Also Includes the Same Course of
Conduct or Common Scheme or Plan**

(a)(2) of §1B1.3

For all offenses using a Chapter Two guideline
in the included list at §3D1.2(d)

Examples of Chapter Two Guidelines in Lists at §3D1.2(d)

Included:
(examples)

- Drug trafficking
- Fraud, theft, embezzlement
- Money laundering
- Firearms

Excluded:
(examples)

- Robbery
- Murder
- Assault
- Kidnapping

“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*

“Same Course of Conduct”

§1B1.3(a)(2); App. Note 9(B);
Appendix C, #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

See: *U.S. v. Hodge*, 354 F.3d 305 (4th Cir. 2004)

Scenario – “Expanded Relevant Conduct”

- Defendant is convicted of one count of fraud citing a “boiler room” solicitation that resulted in \$1,000 loss
- The solicitation was part of a three year boiler room fraud operation with losses of \$100,000 per month (total: \$3.6 million)
- Defendant was one of ten individuals in the boiler room making solicitations, with the callers exchanging leads and making follow-up calls for each other

Scenario - “Expanded Relevant Conduct” (cont.)

- Defendant was active in all aspects of the operation for the full three years
- The count of conviction cites one of the defendant’s solicitations in the second year of the operation
- Is Defendant accountable under relevant conduct for the losses that resulted from his offense of conviction?
- Is Defendant accountable under relevant conduct for any of the other losses that resulted from the boiler room operation?

§1B1.8 Use of Certain Information

Limited protection to defendant regarding self-incriminating statements

- Defendant must agree to cooperate
- Cooperation agreement must provide this protection
- Covered admissions cannot be used to determine guideline range

Note: evidence from other sources not excluded

Criminal History

Chapter Four

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	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
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	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
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	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Criminal History

- ✓ “Prior Sentences”
(1, 2, or 3 points each)
- ✓ “Status”
(2 points)
- ✓ “Recency”
(2 or 1 point)

Criminal History Points

Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Points

Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Length of Prior Sentences

§4A1.2(a) and App. Note 2

- Set by maximum sentence imposed
 - If sentence or any portion is suspended, the maximum is established by the unsuspended portion
- Unaffected by release
 - *E.g.*, release to parole or for “good time”

Criminal History Time Frames and Relevant Conduct

15 years

10 years

5 years

Time Since Earliest
Date of Relevant
Conduct



Earliest Date of
Relevant Conduct

Offense of
Conviction

Date
of
Plea /Verdict

Date of
Sentencing

Other Determinations Regarding Prior Sentences - §4A1.2

- Types of sentences never counted, *e.g.*,
 - Foreign sentences
 - Tribal sentences
 - Certain misdemeanors
- Relationship of prior sentences and relevant conduct

- Treatment of multiple prior sentences
 - Counted separately or as a single prior sentence
 - Additional points for multiple crimes of violence when sentences not counted separately (§4A1.1(f))
- Prior revocations of supervision
- Pardons, set asides, expunged convictions, and diversionary dispositions
- Various other rules

Chapter Three and Chapter Four “Overrides”

§3A1.4

Terrorism

§§4B1.1 - 4B1.2

Career Offender

§4B1.3

Criminal Livelihood

§4B1.4

Armed Career Criminal

§4B1.5

Repeat and Dangerous
Sex Offender Against
Minors

Supreme Court Cases Involving “Crime of Violence”

- *Begay v. U.S.*, 128 S. Ct. 1581 (2008)
 - New Mexico DUI statute not a “violent felony” under Armed Career Criminal Act (ACCA)
 - Key question: “whether the crime involves purposeful, violent, and aggressive conduct”
- *U.S. v. Chambers*, 129 S. Ct. 687 (2009)
 - Illinois offense of “failure to report” is not a “violent felony” under the ACCA

Chapter Five

Sentencing Table

Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	Zone A	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	Zone B	6-12
5	0-6	0-6	1-7	4-10	9-15	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	Zone C	10-16	15-21	21-27	24-30
11	8-14	10-16	14-18	18-24	Zone D	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37

Other Aspects of Sentence

- Probation
- Supervised release
- Restitution, fines, assessments, forfeitures
- Sentencing options
- Undischarged terms
(consecutive/concurrent)

Ex Post Facto

- 18 U.S.C. § 3553(a)(4)
 - Use guidelines in effect at sentencing
- *Miller v. Florida*, 482 U.S. 423 (1987)
- §1B1.11
 - “One Book Rule”

Sentencing Below a Mandatory Minimum

- Substantial Assistance
 - 18 U.S.C. § 3553(e)
- “Safety Valve”
 - 18 U.S.C. § 3553(f)

3-Step Approach to Federal Sentencing Under *Booker*

1. Apply the sentencing guidelines to establish the guideline sentencing range
2. Determine if a *departure* is consistent with the guidelines
3. Determine if a “*variance*” (a sentence outside the advisory guideline system) is warranted under the authority of § 3553(a)

The Guideline Policy Statements

Departures in the *Guidelines Manual*

- Chapter Five, Part K
 - §5K1.1 Substantial Assistance
 - §5K2.0 – 2.23 Grounds for Departure and other specific departures
 - §5K3.1 Early Disposition Programs
- Chapter Five, Part H – Specific Offender Characteristics

The Guideline Policy Statements (cont.)

Departures in the *Guidelines Manual*

- §4A1.3 – Inadequacy of Criminal History Category
- Other specific commentary

Multiple Counts Application

SENTENCING TABLE (in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	4-10	6-12	8-14	12-18	18-24	21-27
	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	8-14	10-16	12-18	18-24	24-30	27-33
	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

Multiple Counts Rationale

- Determine a single offense level
- Prevent “double-counting”
- Provide incremental punishment
- Limit prosecutorial impact

Steps in Multiple Counts

1. Grouping
2. Incremental Increases
 - Assignment of units
 - Additional offense levels

END

Handouts

Statutory Directives to the Commission Regarding the Consideration of § 3553(a) and Other Factors in the Development and Amendment of the Guidelines

- 28 U.S.C. § 994(b)(1) - Meet purposes of § 3553(a)(2); issues of certainty and fairness, disparity, flexibility, advancements in knowledge
- 28 U.S.C. § 994(d) - Factors for which the guidelines are to be neutral
- 28 U.S.C. § 994(e) - Factors which are generally inappropriate for the guidelines to consider in determining imprisonment

Statutory Directives to the Commission Regarding the Consideration of § 3553(a) and Other Factors in the Development and Amendment of the Guidelines (cont.)

- 28 U.S.C. § 994(h) - “Career Offenders”
- 28 U.S.C. § 994(j) - Certain First Offenders
- 28 U.S.C. § 994(l) - “Criminal Livelihood”
- 28 U.S.C. § 994(m) - The consideration of sentence averages in the development of the initial guidelines
- 28 U.S.C. § 994(o) - The review and amendment of the guidelines
- 28 U.S.C. § 994(p) - Congressional review of guideline amendments

Chapter Three Adjustments

- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

Victim Related Adjustments

	Chapter Three, Part A	<u>Levels</u>
• §3A1.1	Hate Crime Motivation or Vulnerable Victim W/Large Number	+3 +2 +2
• §3A1.2	Official Victim	+3, +6 or +6
• §3A1.3	Restraint of Victim	+2
• §3A1.4	Terrorism	+12 ₃₀ (Floor 32; CHC VI)

Role in the Offense

Chapter Three, Part B

Levels

- §3B1.1 Aggravating Role +4,+3, or +2
- §3B1.2 Mitigating Role -4, -3, or -2
- §3B1.3 Abuse of a Position of Trust or Use of a Special Skill +2

Role in the Offense (cont.)

Chapter Three, Part B

Levels

- §3B1.4 Using a Minor To Commit a Crime +2
- §3B1.5 Use of Body Armor in Drug Trafficking and Crimes of Violence +2 or +4

Obstruction

Chapter Three, Part C

Levels

- §3C1.1 Obstructing or Impeding the Administration of Justice +2
- §3C1.2 Reckless Endangerment During Flight +2

Obstruction (cont.)

Chapter Three, Part C

Levels

- §3C1.3 Commission of an Offense While on Release +3
- §3C1.4 False Registration of Domain Name +2

Acceptance of Responsibility

Chapter Three, Part E

- 2-Level Reduction:
If defendant clearly demonstrates affirmative acceptance of responsibility for the offense.
- 1-Level Additional Reduction Possible

The Statutes “Trump” the Guidelines

Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

*(e.g., statutory maximums
and mandatory minimums)*

-See §§5G1.1 & 5G1.2

Impact of Statutory Penalties on the Guideline Range

§5G1.1

Statutory Maximum's Impact on Sentencing Range

Guideline Range Computed
51-63

Statutory Maximum
5 years
(60 months)

51-60

Mandatory Minimum's Impact on Sentencing Range

Guideline Range Computed
51-63

Mandatory Minimum
5 years
(60 months)

60-63

Ex Post Facto

Ex Post Facto

- 18 U.S.C. § 3553(a)(4)
 - Use guidelines in effect at sentencing
- *Miller v. Florida*, 482 U.S. 423 (1987)
- §1B1.11
 - “One Book Rule”

“One Book Rule”

§1B1.11

Use the *Guidelines Manual*
in effect at the time of sentencing

If *ex post facto* is implicated,
use the *Guidelines Manual*
in effect at the time of the offense

Guidelines Amendments

- Cited at “Historical Notes” and found at Appendix C of the *Manual*
- Can resolve circuit conflicts
 - *Braxton v. U.S.*, 500 U.S. 344 (1991)

Use of a Clarifying Amendment

§1B1.11(b)(2) & App. Note 1

- In application of the *Guidelines Manual* in effect at the time of the offense, subsequent clarifying amendments are also used
- While the *Guidelines Manual* may characterize an amendment as clarifying, the courts must decide if clarifying or substantive

“Safety Valve”

18 USC § 3553(f) & §5C1.2

“Safety Valve”

18 U.S.C. § 3553(f)

- Court makes determination;
no government motion required
- Sentence without regard to mandatory
minimums for violations of select drug
statutes
- Downward departures for mitigating
factors or variances possible

“Safety Valve”

§5C1.2(a)

In the case of an offense subject to a mandatory minimum sentence (21 U.S.C. §§ 841, 844, 846, 960, or 963), the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds the defendant meets the criteria set forth below:

§5C1.2(a)

Subdivisions (1) – (5)

1. Defendant does not have more than 1 Criminal History Point
2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense
3. Offense did not result in death or serious bodily injury

4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE
5. Defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.

§5C1.2(b)

In the case of a defendant

1. Who meets the criteria set forth in subsection (a); and
2. Who is facing a mandatory minimum sentence of at least five years,

The offense level applicable from Chapters Two and Three shall not be less than level **17**

Departures

Guidelines Manual

Policy Statements on Departures

- Chapter Five, Part K
 - §5K1.1 Substantial Assistance
 - §5K2.0 Grounds for Departure
 - §5K2.1 – 2.23 Various bases for departures
 - §5K3.1 Early Disposition Programs
- Chapter Five, Part H - Specific Offender Characteristics

Guidelines Manual
Policy Statements on Departures (cont.)

- §4A1.3 - Inadequacy of Criminal History Category
- Other specific commentary

Substantial Assistance Departures

§5K1.1
& 18 USC § 3553(e)

Substantial Assistance

§5K1.1

Permits a sentence below
the minimum of the guideline range

18 USC § 3553(e)

Permits a sentence below
a mandatory minimum

Substantial Assistance (cont.)

§5K1.1 & 18 USC § 3553(e)

- Each requires a government motion
 - *Wade v. U.S.*, 504 U.S. 181 (1992)
- A separate government motion under 18 USC § 3553(e) is required to go below a mandatory minimum
 - *Melendez v. U.S.*, 518 U.S. 120 (1996)

Substantial Assistance (cont.)

18 U.S.C. § 3553(e)

- A sentence below mandatory minimum is to be based only on substantial assistance

“Fast Track” Departures

§5K3.1

Early Disposition Programs

DOJ “Fast Track” Programs

Approved by the Attorney General
and Respective U.S. Attorneys:

- Programs cover various immigration and drug offenses
- Some programs are based on departures pursuant to the PROTECT Act and §5K3.1
- Other programs based on “charge bargaining” are not covered by §5K3.1

§5K3.1

Early Disposition Programs

“Fast Track” Departures

- Only under a program authorized by the Attorney General and the U.S. Attorney
- Requires a motion from the government
- Departure not more than 4 levels

Other Departures

“Prohibited” Circumstances

§5K2.0(d)

- §5H1.10 – Race, sex, national origin, creed, religion, and socio-economic status
- §5H1.12 – Lack of guidance as a youth
- §5H1.4 – Alcohol and drug dependence and gambling addiction

§5K2.0(d) (cont.)

- §5K2.12 – Personal financial difficulties and economic pressures upon a trade or business
- §5K2.19 – Post-sentencing rehabilitative efforts
- Acceptance of responsibility
- Aggravating or mitigating role in the offense

§5K2.0(d) (cont.)

- Guilty plea or plea agreement, in and of itself
- Restitution as required by law or the guidelines
- Any other circumstance specifically prohibited

Notice of Possible Departure

§6A1.4

- Required by Rule 32(h)
 - Established in *Burns v. U.S.*, 501 U.S. 129 (1991)
- Parties must be given reasonable notice of departure ground
 - PSR or a party's prehearing submission is sufficient notice

The following slides are given as a supplemental handout:

- *HelpLine* & website
- Sentencing table
- Relevant conduct analysis
- Criminal history tables; “single sentence” analysis
- Zones A, B, C and D
- Cooperation issues chart and table
- Classification of offenses, probation, supervised release tables
- Revocation table and options available
- Worksheets on the reimposition of supervised release

U.S.S.C.

Web Site

www.usssc.gov

HelpLine

202-502-4545

SENTENCING TABLE (in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	4-10	6-12	8-14	12-18	18-24	21-27
	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	8-14	10-16	12-18	18-24	24-30	27-33
	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others
to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking₁₂₀

Criminal History Points

Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Points

Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

Criminal History Time Frames and Relevant Conduct

15 years

10 years

5 years

Time Since Earliest
Date of Relevant
Conduct



Earliest Date of
Relevant Conduct

Offense of
Conviction

Date
of
Plea /Verdict

Date of
Sentencing

Single Sentence Criteria

§4A1.2(a)(2)

Multiple prior sentences will be treated as a “single sentence” *if*

1. Prior sentences are for offenses **NOT** separated by an intervening arrest

AND

2. The offenses *either*

- Were named in the same charging document, *or*
- Resulted in sentences imposed on the same day

Examples: Separated by Intervening Arrest

offense
arrested
offense
arrested

**Intervening
Arrest**

offense
offense
offense
arrested

**Not an
Intervening
Arrest**

offense
offense
offense
arrested
arrested
arrested

**Not an
Intervening
Arrest** 125

Impact of a “Single Sentence”

§4A1.2(a)(2)

Rather than add points for each prior sentence:

- If concurrent sentences
 - Use the longest sentence
- If consecutive sentences
 - Use the aggregate length of the sentences

Example:
Point Assignments and “Single” Sentences

Length

Point Assignments

“Single
Sentence”

Counted
Separately

1 mo.
4 mos. **consec.**
9 mos. **consec.** }

14 mos.

3 pts.

1 pt.
2 pts.
2 pts.

5 pts.

Example:

Point Assignments and “Single” Sentences

Length

Point Assignments

“Single Sentence”

Counted Separately

1 mo.
4 mos. **concur.**
9 mos. **concur.**

9 mos.

2 pts.

1 pt.

2 pts.

2 pts.

5 pts.

A “Single Sentence” That Includes Crimes of Violence

§4A1.1(f)

- Under the definition of “single sentence,” §4A1.1(f) adds 1 point for each crime of violence that did not result in additional points under §4A1.1(a), (b), or (c)

A “Single Sentence” That Includes Crimes of Violence (cont.)

§4A1.1(f)

- Example:
 - Robbery of bank and assault of the teller
 - Five year sentence for each on same day
 - Single sentence: 3 points (§4A1.1(a))
 - 1 point added for crime of violence that did not receive points (§4A1.1(f))

Zone A Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	0-6
3	0-6	0-6	0-6	0-6	0-6	0-6
4	0-6	0-6	0-6	0-6	0-6	0-6
5	0-6	0-6	0-6	0-6	0-6	0-6
6	0-6	0-6	0-6	0-6	0-6	0-6
7	0-6	0-6	0-6	0-6	0-6	0-6
8	0-6	0-6	0-6	0-6	0-6	0-6

- Fine
- Straight Probation
- Imprisonment

Zone B Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						1-7
3					2-8	3-9
4				2-8	4-10	6-12
5			1-7	4-10	6-12	
6		1-7	2-8	6-12		
7		2-8	4-10			
8		4-10	6-12			
9	4-10	6-12				
10	6-12					

- Probation plus a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment.
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment.
- Imprisonment

Zone C Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						
3						
4						
5						9-15
6					9-15	
7				8-14		
8				10-16		
9			8-14			
10		8-14	10-16			
11	8-14	10-16				
12	10-16					

- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.

- Imprisonment

Zone D

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
6						12-18
7					12-18	15-21
8					15-21	18-24
9				12-18	18-24	21-27
10				15-21	21-27	24-30
11			12-18	18-24	24-30	27-33
12		12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	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

• Imprisonment

Guidelines Consideration of Cooperation

§3E1.1(a)

Defendant usually pleads guilty and admits to count of conviction

§3E1.1(b)

Defendant pleads guilty early
(government motion required)

§5C1.2

Defendant tells government all about offense before sentencing hearing (and meets other four criteria)

§5K1.1

Defendant gives government substantial assistance in the investigation or prosecution of another person
(government motion required)

Guidelines Treatment of Information

	§3E1.1(a)	§5C1.2	§5K1.1
Type/Amount of Information	Admit to court offense of conviction (Do not deny balance)	Provide all information on offense	Truthful and complete information on another person
Usefulness of Information	Not essential	Not essential	Essential
Timeliness of Information	One of many considerations (essential for §3E1.1(b))	Not later than sentencing hearing	One of many considerations
Information Provided to Government	Not necessary	Essential	Essential
Government Motion	Not necessary (essential for §3E1.1(b))	Not necessary	Essential

Classification of Offenses

18 U.S.C. § 3559(a)

Maximum Sentence

Authorized

Life or Death

25 years +

10 years +

5 years +

1 year & 1 day +

More than 6 months

to 1 year

6 months or less

Class

Class A Felony

Class B Felony

Class C Felony

Class D Felony

Class E Felony

Class A Misdemeanor

Class B & C

Misdem. & Infractions¹³⁷

Probation

Class of Offense *	Authorized Term of Probation **	Max. Imprisonment Upon Revocation ***
A or B Felony	Not authorized	The maximum statutory penalty for the offense
C, D, or E Felony	5 years but not less than 1 year	The maximum statutory penalty for the offense
Class A Misdemeanor	5 years	The maximum statutory penalty for the offense

* 18 U.S.C. § 3559(a)

** 18 U.S.C. § 3561(b)

*** 18 U.S.C. § 3565(a)(2) – subsequent to Crime Bill 9/13/94

Supervised Release

Class Of Offense *	Authorized Term Of Supervised Release**	Max. Imprisonment Upon Revocation ***
A Felony	5 Years	5 Years
B Felony	5 Years	3 Years
C or D Felony	3 Years	2 Years
E Felony or Class A Misdem.	1 Year	1 Year
	* 18 U.S.C. § 3559(a)	
	** 18 U.S.C. § 3583(b)	
	*** 18 U.S.C. § 3583(e)(3) – subsequent to Crime Bill 9/13/94	

Look to statutes for specific exceptions to these general rules

Violations of Probation and Supervised Release

Chapter Seven

Chapter Seven of the *Guidelines Manual*

- Applicable to both probation and supervised release violations
- Policy statements
- Must be considered, but not binding
- Sanctions the “breach of trust”

Application of Chapter Seven

- Criminal History Category is that at original sentencing
- Three grades of violations based on *actual* conduct
 - Grades A & B are felonious conduct
 - Grade C is misdemeanor conduct or a technical violation
- Revocation sentence to be consecutive

Revocation Table

Criminal History Category

Grade of
Violation

	I	II	III	IV	V	VI
C	3-9	4-10	5-11	6-12 ¹	7-13	8-14 ²
B	4-10	6-12	8-14	12-18	18-24	21-27
A(1)*	12-18	15-21	18-24	24-30	30-37	33-41
A(2)**	24-30	27-33	30-37	37-46	46-57	51-63

* Except as provided in (2) below.

** Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony.

1 See 7B1.3(c)(1)

2 See 7B1.3(c)(2)

Sentencing Options Available Under §7B1.3(c)(1)

(In months of imprisonment)
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C	3-9	4-10	5-11	6-12 ¹		
B	4-10	6-12				

- Imprisonment
- Imprisonment plus supervised release with a condition that substitutes community confinement or home detention for any portion of the minimum term

Sentencing Options Available Under §7B1.3(c)(2)

(In months of imprisonment)
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C					7-13	8-14
B			8-14			

- Imprisonment
- Imprisonment of at least one half the minimum term plus supervised release with a condition of community confinement or home detention for the balance

Supervised Release Following Revocation

18 U.S.C. § 3583(h)

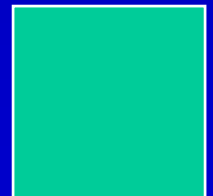
Decision to Order Supervised Release to Follow Revocation Imprisonment

- “Reimposition” of supervised release is not required, but is discretionary
 - Not required by statute at § 3583(h)
 - Not addressed by Chapter Seven of the *Guidelines Manual*
- § 3583(c) gives the § 3553(a) factors to be considered in deciding generally whether to include a term of supervised release, its length and conditions
 - Note that § 3553(a)(2)(A) is not a factor in this consideration

Determining the Term of Supervised Release Available Upon Revocation

Original offense on/after 4/30/03

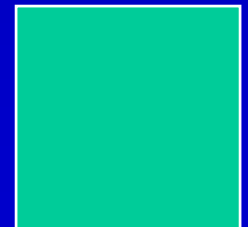
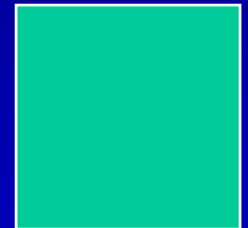
1. Determine the statutorily authorized maximum term of supervised release available for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (without regard to any term of imprisonment imposed on prior revocation of the supervised release)
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



I. Upon Revocation of Supervised Release Can a New Term be Imposed?

Original offense on/after 9/13/94 through 4/29/03

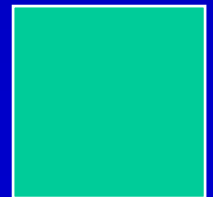
1. Determine the statutorily authorized maximum imprisonment available upon revocation (§ 3583(e)(3))
2. Subtract the amount of imprisonment to be imposed (in addition to any term of imprisonment imposed on prior revocation of the supervised release) upon revocation
3. If the difference is greater than zero an additional term of supervised release can be imposed



II. Determining the Term of Supervised Release Available Upon Revocation

Original offense on/after 9/13/94 through 4/29/03

1. Determine the statutorily authorized maximum term of supervised release available for the original offense
2. Subtract the amount of imprisonment to be imposed (in addition to any term of imprisonment imposed on prior revocation of the supervised release) upon revocation
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



Determining the Term of Supervised Release Available Upon Revocation

Original offense prior to 9/13/94

1. Determine the length of the current supervised release term being revoked (NOTE: Court may first extend term to statutory maximum (§3583(e)(2)))
2. Subtract the amount of imprisonment to be imposed (in addition to any term of imprisonment imposed on prior revocation of the supervised release) upon revocation
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release

