

Basic Individual Guidelines

Annual National Seminar
on the Federal Sentencing Guidelines

San Diego, CA

Wednesday, May 18, 2011

Hon. Ricardo H. Hinojosa

Commissioner, USSC

Chief U.S. District Judge, SD/Texas

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U.S. Sentencing Commission

Program Discussion

- Sentencing post-*Booker*
- Basic guideline application
 - Robbery scenario
 - Drug scenario
- Sentencing below a mandatory minimum
- *Ex post facto*

U.S.S.C.

Website

www.usssc.gov

HelpLine

202-502-4545

Sentencing Post-*Booker*

Advisory Guidelines

- The guidelines are advisory, not mandatory
 - *U.S. v. Booker*, 543 U.S. 220 (2005)
 - Remedied the 6th Amendment problem of mandatory guidelines
 - Invalidated 18 USC §§ 3553(b)(1) and 3742(e) of the Sentencing Reform Act of 1984 (SRA)
- Sentences are to be based on the factors at 18 USC § 3553(a)(1)-(7)

Advisory Guidelines (cont.)

- Correct guideline application is the required starting point in sentencing
 - *Gall v. U.S.*, 552 U.S. 38 (2007)
- Sentences are reviewed for “reasonableness”
 - Per *Gall*: Deferential abuse of discretion standard

§ 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

Guidelines Manual

Policy Statements

Include Departure Considerations

- Chapter One, Part A
- 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

Guidelines Manual

Policy Statements (cont.)

Include Departure Considerations

- Chapter Five, Part H - Specific Offender Characteristics
- §4A1.3 - Inadequacy of Criminal History Category
- Other specific commentary

3-Step Approach to Federal Sentencing

1. Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines (pursuant to § 3553(a)(4))
2. Consider the guidelines policy statements, including those addressing departures, that might warrant consideration in imposing sentence (pursuant to § 3553(a)(5))

3-Step Approach to Federal Sentencing (cont.)

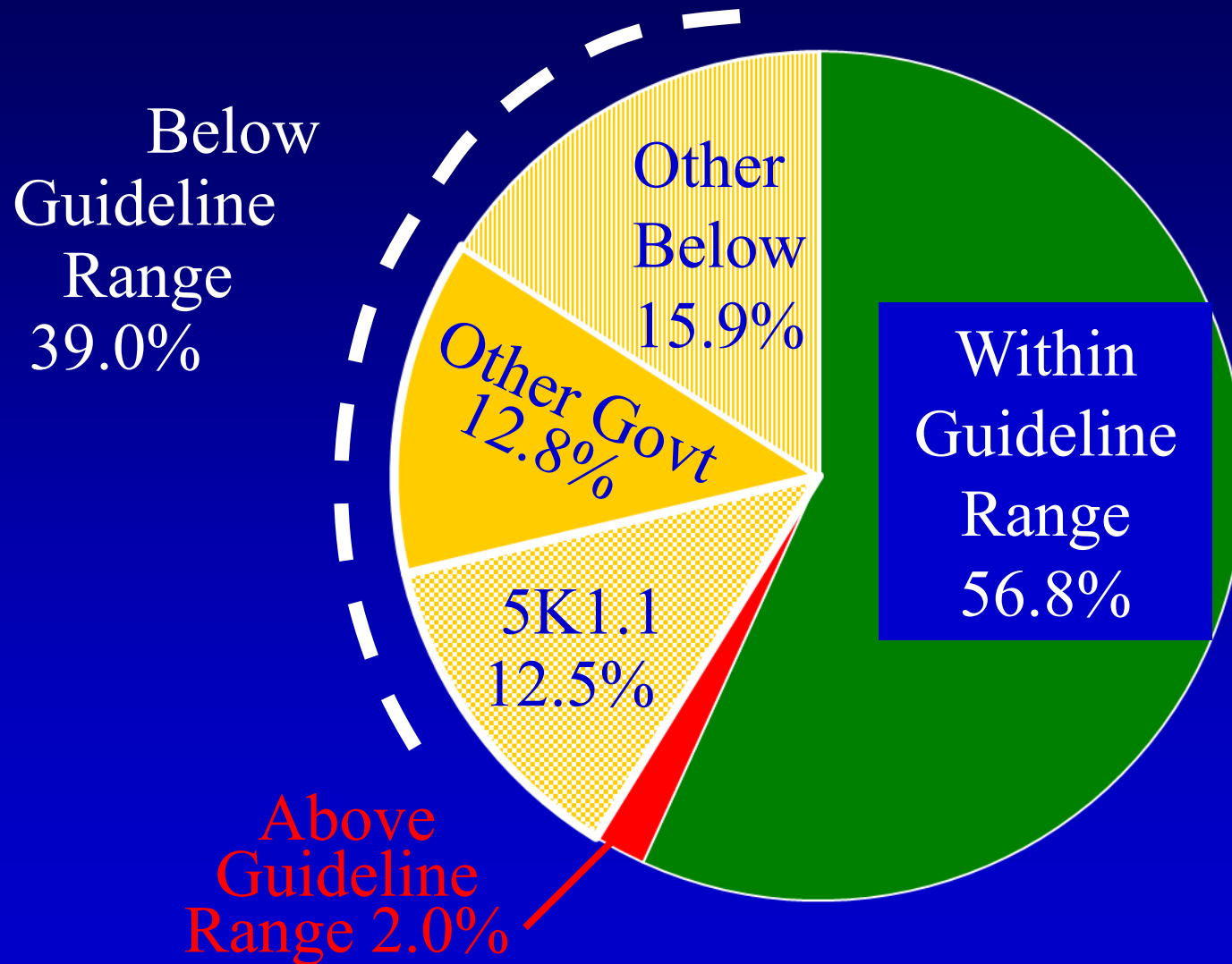
3. Consider § 3553(a) taken as a whole, and determine if the appropriate sentence is

- One within the advisory guideline system:
 - a sentence within the guideline range, or
 - a “*departure*”

OR

- One outside the advisory guideline system:
 - a “*variance*”

Position of Sentences in Relation to Guideline Range FY 2009



SOURCE: U.S. Sentencing Commission, 2009 Datafile USSCFY09

Overview of the Sentencing Process

- Plea/verdict of guilty
- U.S. probation officer (USPO) does a presentence investigation (PSI) & presentence report (PSR)
 - Gathers facts
 - Applies guidelines
 - Provides PSR to parties

Overview of the Sentencing Process (cont.)

- Parties review PSR; advise USPO of any disputes
- USPO resolves disputes as possible; submits amended PSR and addendum of unresolved disputes to parties and the judge
- At the sentencing hearing the judge will resolve disputes as necessary

Pointers for the Application of Advisory Guidelines

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

Pointers for the Application of Advisory Guidelines (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))

The Nature of a Federal Sentence

The Sentencing Reform Act of 1984

- Determinate sentences; no parole
- Supervised release
 - Available for all felonies and Class A misdemeanors
 - See 18 USC § 3559(a) and § 3583(b)&(e)(3)
- Good time
 - Maximum of 54 days per year
 - Not available for sentences of one year or less, or for a life sentence
 - See 18 USC § 3624(b)(1)

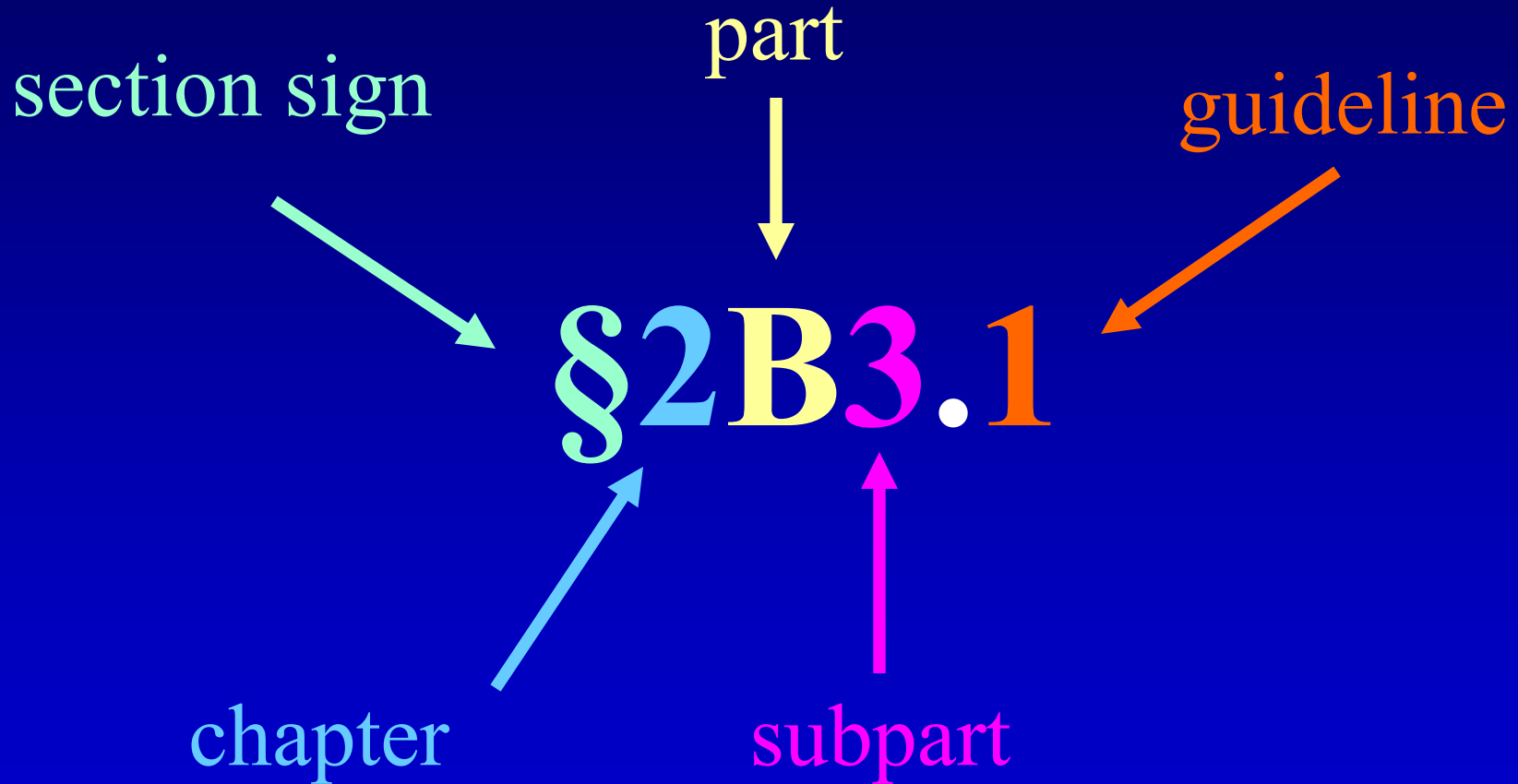
Basic Guideline Application

Guidelines Manual

- Ch. One Introduction, definitions, application principles
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- Ch. Four Criminal history

- Ch. Five Determining the guideline range
- Ch. Six Sentencing procedures & pleas
- Ch. Seven Violations of probation
& supervised release
- Ch. Eight Sentencing of organizations

Understanding a Guidelines Cite



Structure of a Guideline

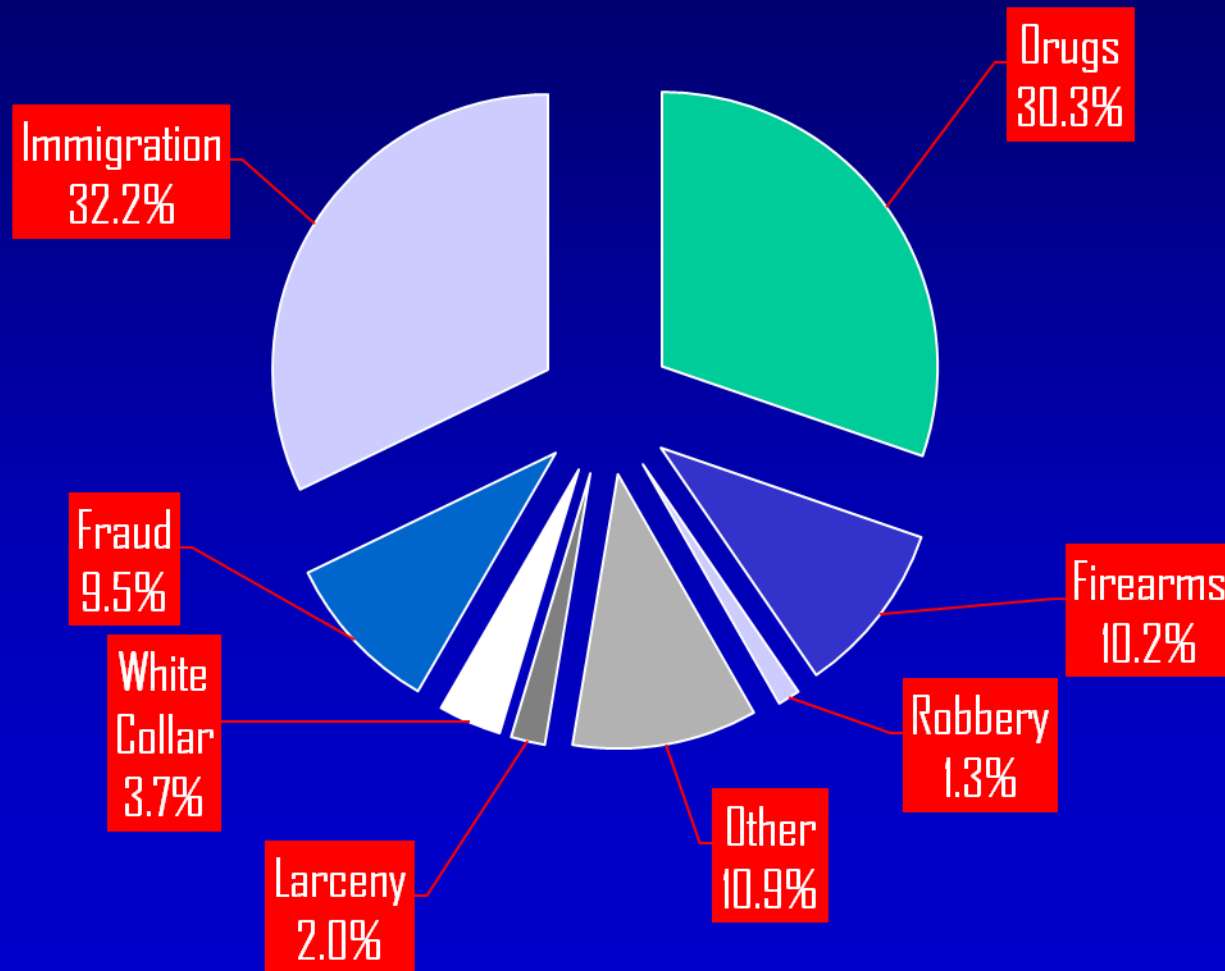
- Guideline cite (*e.g.*, §2B3.1)
 - Note some are designated “(Policy Statement)” (*e.g.*, §4A1.3)
- Introductory commentary (*e.g.*, Chapter Three, Part B)
- Guideline
 - Chapter Two guidelines have
 - Base offense levels
 - Specific offense characteristics
 - Cross references
 - Special instructions

Structure of a Guideline (cont.)

- Commentary
 - Statutory provisions
 - Application notes
 - Background
 - Historical note

Primary Offense Types

National - FY 2009



Robbery Scenario

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

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	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	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	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	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	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
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

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
- If no guideline is listed, use §2X5.1 for finding an analogous guideline for a felony (stat. max. over 1 yr.), or §2X5.2 for a Class A misd.

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 Levels

(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)

Chapter Three Adjustments

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

Role in the Offense

Chapter Three, Part B

Levels

- §3B1.1 Aggravating Role +4,+3, or +2
- §3B1.2 Mitigating Role -4 (minimal), -3, or -2 (minor)

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:

If offense level 16 or greater, and government motion based on timely notification of guilty plea

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” are distinct from “departures” and “variances” (Chapter Three & §5K2.0 & § 3553(a))³⁹

Relevant Conduct in the Robbery Scenario

1B1.3

Analysis of Relevant Conduct Acts

§1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A))
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B))
- For certain offenses defendant accountable for certain acts beyond the offense of conviction (*e.g.*, course of conduct or common scheme or plan) ((a)(2))

Preliminary Determination

§1B1.3(a)(2): Same Course of Conduct or Common Scheme or Plan

- Is the applicable Chapter Two guideline on the “included” list or the “excluded” list at §3D1.2(d)?
 - If on the “included” list, relevant conduct will include the same course of conduct or common scheme or plan
 - If on the “excluded” list, relevant conduct will not include the same course of conduct or common scheme or plan

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

Included:
(examples)

- Drug trafficking
- Fraud, theft, embezzlement
- Firearms
- Child porn possession,
receipt & trafficking

Excluded:
(examples)

- Robbery (§2B3.1)**
- Murder
- Assault
- Kidnapping

§1B1.3(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 ⁴⁵

Chapter Four

Criminal History and “Overrides”

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	Zone A		0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B		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	8-14	Zone C		21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	Zone D		33-41 ⁴⁷

Criminal History

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

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”

Other Determinations Regarding Prior Sentences - §4A1.2

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

- 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(e))
- 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

Career Offender Criteria

4B1.1 & 4B1.2

- Defendant at least age 18
- Instant conviction a felony for a crime of violence or a controlled substance offense
- Two predicate felony convictions for crimes of violence or controlled substance offenses

Career Offender “Override”

4B1.1

- Criminal History Category is **VI**
- Offense level determined by a table based on statutory maximum, unless offense level from Chapters Two and Three is greater

Chapter Five

Sentencing Table and Zones

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	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	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	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	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	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
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

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	Zone A		0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B		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	8-14	Zone C		21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	Zone D		33-41

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	
3	0-6	0-6	0-6	0-6		
4	0-6	0-6	0-6			
5	0-6	0-6				
6	0-6					
7	0-6					
8	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	9-15
6		1-7	2-8	6-12	9-15	
7		2-8	4-10	8-14		
8		4-10	6-12			
9	4-10	6-12	8-14			
10	6-12	8-14				
11	8-14					

- 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

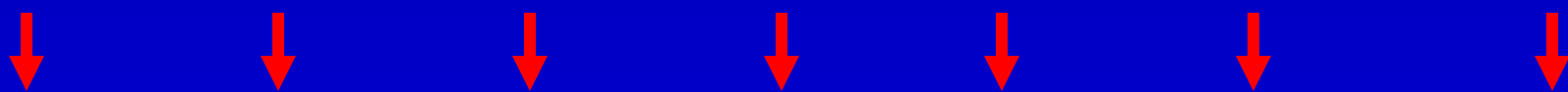
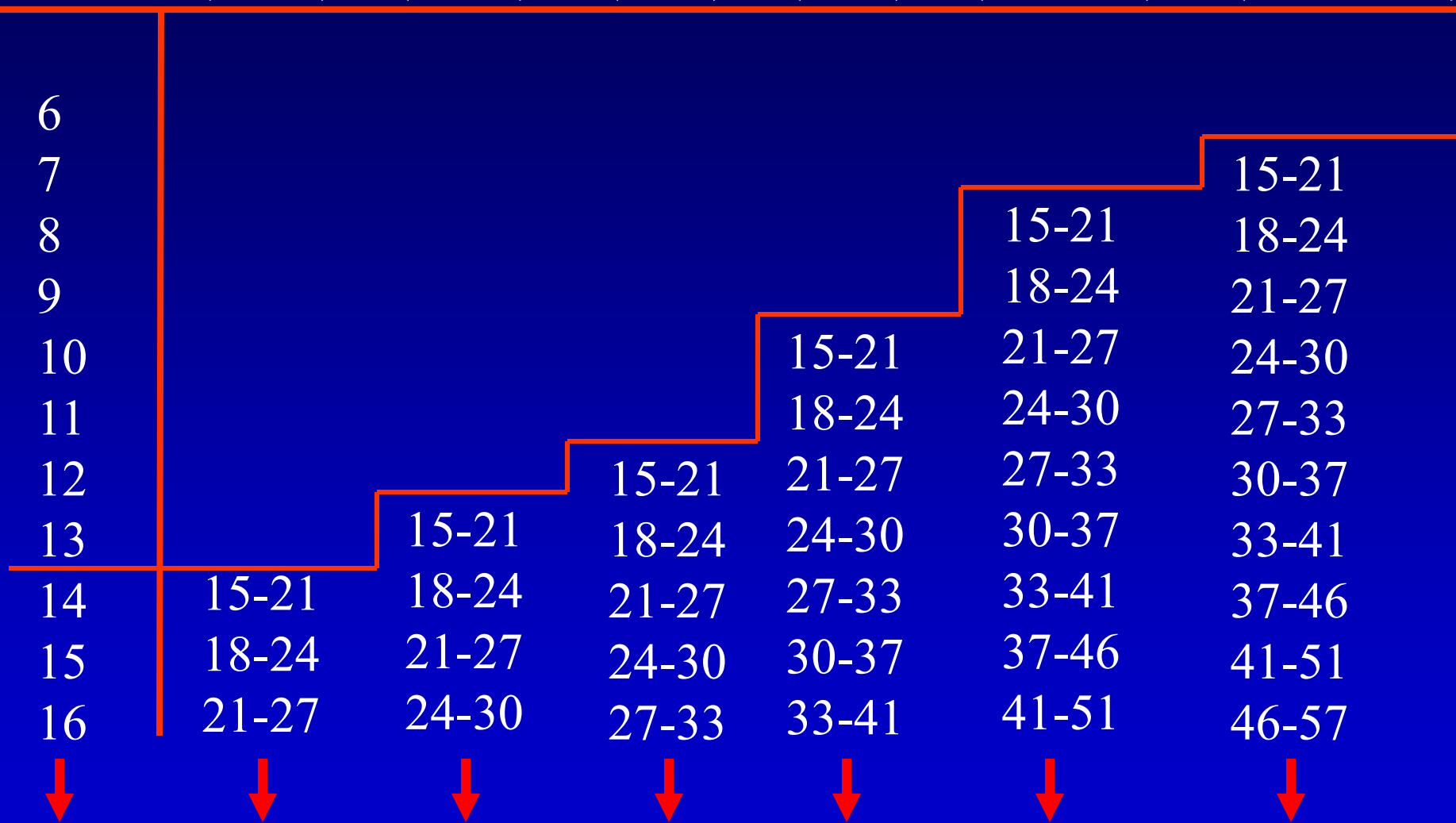
Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						
3						
4						
5						
6						12-18
7					12-18	
8				10-16		
9				12-18		
10			10-16			
11		10-16	12-18			
12	10-16	12-18				
13	12-18					

- 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)
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• Imprisonment

Other Aspects of Sentence

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

Drug Scenario

Appendix A

<u>Statute</u>	<u>Guideline</u>
21 U.S.C. § 841(a)	2D1.1
21 U.S.C. § 841(b)(1)-(3)	2D1.1
21 U.S.C. § 841(b)(4)	2D2.1
21 U.S.C. § 841(b)(7)	2D1.1
21 U.S.C. § 841(c)(1),(2)	2D1.11
21 U.S.C. § 841(c)(3)	2D1.13
21 U.S.C. § 841(d)	2D1.9

21 U.S.C. § 846	2D1.1 , 2D1.2, 2D1.5 2D1.6, 2D1.7, 2D1.8 2D1.9, 2D1.10 2D1.11, 2D1.12 2D1.13, 2D2.1 2D2.2, 2D3.1, 2D3.2

The Drug Guideline

2D1.1

Emergency Guideline Amendments Pursuant to the Fair Sentencing Act of August 3, 2010

- Affects drug guidelines, *including* §2D1.1
- The November 1, 2010 *Supplement* contains these amended guidelines and must be used in conjunction with the November 1, 2010 *Guidelines Manual*

§2D1.1 Drug Trafficking, Etc.

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

(5) 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

If resulting BOL is greater than 32, and *minimal* role (3B1.2(a)) applies, decrease to BOL 32

Drug Quantity Table

Base Offense Levels for Marijuana

30,000	KG	↑	Level 38
10,000	KG	↑	Level 36
3,000	KG	↑	Level 34
1,000	KG	↑	Level 32
700	KG	↑	Level 30
400	KG	↑	Level 28
100	KG	↑	Level 26

80	KG	↑	Level 24
60	KG	↑	Level 22
40	KG	↑	Level 20
20	KG	↑	Level 18
10	KG	↑	Level 16
5	KG	↑	Level 14
2.5	KG	↑	Level 12
1	KG	↑	Level 10
250	G	↑	Level 8
Less than 250	G	↑	Level 6

(b) Specific Offense Characteristics

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

(16) if defendant meets the <u>subdivision criteria</u> (1)-(5) of §5C1.2(a) (“the safety valve”)	-2
--	----

Relevant Conduct in the Drug Scenario

1B1.3

Analysis of Relevant Conduct Acts

§1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A))
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B))
- For certain offenses defendant accountable for certain acts beyond the offense of conviction (*e.g.*, course of conduct or common scheme or plan) ((a)(2))

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

Included: (examples)

- Drug trafficking (§2D1.1)
- Fraud, theft, embezzlement
- Firearms
- Child porn possession,
receipt & trafficking

Excluded: (examples)

- Robbery
- Murder
- Assault
- Kidnapping

§1B1.3(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 ⁷⁷

Determining Scope in a Conspiracy

§1B1.3(a)(1)(B), App. Note 2

- Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy
- “Bright Line Rule”
 - 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

“Reasonably Foreseeable”

§1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant not accountable for acts of others that were reasonably foreseeable (or known) if those acts were not within the scope of defendant’s undertaking

2D1.1(b)(16) SOC Criteria

Subdivisions (1) – (5) of §5C1.2(a)

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

2D1.1(b)(16) SOC Criteria (cont.)

Subdivisions (1) – (5) of §5C1.2(a)

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

Sentencing Below a Mandatory Minimum

“The Safety Valve”

&

Substantial Assistance

“Safety Valve”

18 U.S.C. § 3553(f) & §5C1.2

- Court makes determination;
no government motion required
- Sentence without regard to mandatory minimums for violations of select drug statutes
 - 21 U.S.C. 841, 844, 846, 960, and 963
- Downward departures or variances for mitigating factors possible

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

“Fast Track” Departures

5K3.1

Early Disposition Programs

“Fast Track” Departures

§5K3.1 - Early Disposition Programs

- 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

Ex Post Facto

1B1.11

“One Book Rule”

Ex Post Facto and the “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

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 ₉₄ (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 +2
or Use of a Special Skill

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”
- “Circuit split” as to whether *ex post facto* is implicated under advisory guidelines

“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 – 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

Charts & Tables Handout Slides

Revised 3/1/2011

Slides address the following:

- *HelpLine* & website
- Sentencing data
- Sentencing table
- Relevant conduct analysis
- Criminal history tables; “single sentence” analysis
- Zones A, B, C and D
- Cooperation issues slides, including 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

Sample of Resources Available on

www.ussc.gov

- *Guidelines Manuals*, 1994-present
- “Reader-friendly” versions of amendments, 1998-present
- *USSC Guide to Publications & Resources*
- USSC reports to Congress
 - *E.g.*, the “crack” reports of 1995, 1997, 2002, 2007
- Research products and special projects
 - *E.g.*, the Commission’s “15-year report”

Sample of Resources Available on www.ussc.gov (cont.)

- Public meeting minutes
- Public hearing testimony
- Federal Register notices
- Case law
 - *E.g.*, Supreme Court sentencing decisions and selected sentencing decisions by circuit
- Charts, slides, worksheets from training manual
- Statistics

Commission Sentencing Data

- www.ussc.gov
 - *E.g., Statistical Sourcebooks*, district statistical packets, and guideline frequency tables
- www.icpsr.umich.edu/access/index.html
 - Inter-University Consortium for Political and Social Research at the University of Michigan (ICPSR)
- <http://fjsrc.urban.org>
 - Federal Justice Statistics Resource Center at the Urban Institute (FJSRC)
 - Also contains data from the Administrative Office

Statistics on Federal Sentencing

Available on www.ussc.gov

- USSC Annual Reports & Statistical Sourcebooks, 1996-present
- Federal sentencing statistical information packets by district, state, and circuit, 1995-present
- Guideline application frequencies, 2002-present

Statistics on Federal Sentencing (cont.)

Available on <http://fjsrc.urban.org>

- Federal Justice Statistics Resource Center (FJSRC) at the Urban Institute
 - A compilation of federal criminal justice data, including data from USSC and the Administrative Office of the US Courts
 - Requires little expertise; provides prompts for finding information
 - Gives a number of options
 - *E.g.*, for a criminal code section it can be determined how many defendants were sentenced in a fiscal year and the types of sentences imposed¹³⁶

Statistics on Federal Sentencing (cont.)

Available on www.icpsr.umich.edu/access/index.html

- Inter-University Consortium for Political and Social Research (ICPSR) at the University of Michigan
 - This is the repository of all publically released USSC datafiles
 - Requires creating an account and a degree of research expertise

Special Requests for Data Research

Analysis Beyond that in Commission Publications

- Available from Commission's Office of Research & Data (ORD)
 - Contact: Christine Kitchens 202-502-4505
- Requires a judge's request
 - Advocates wanting data research must do so through judge handling the particular case
- Typically a 48 hour turnaround, subject to staff resources

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	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	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	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	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	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
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

(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 undertaking¹⁴¹

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

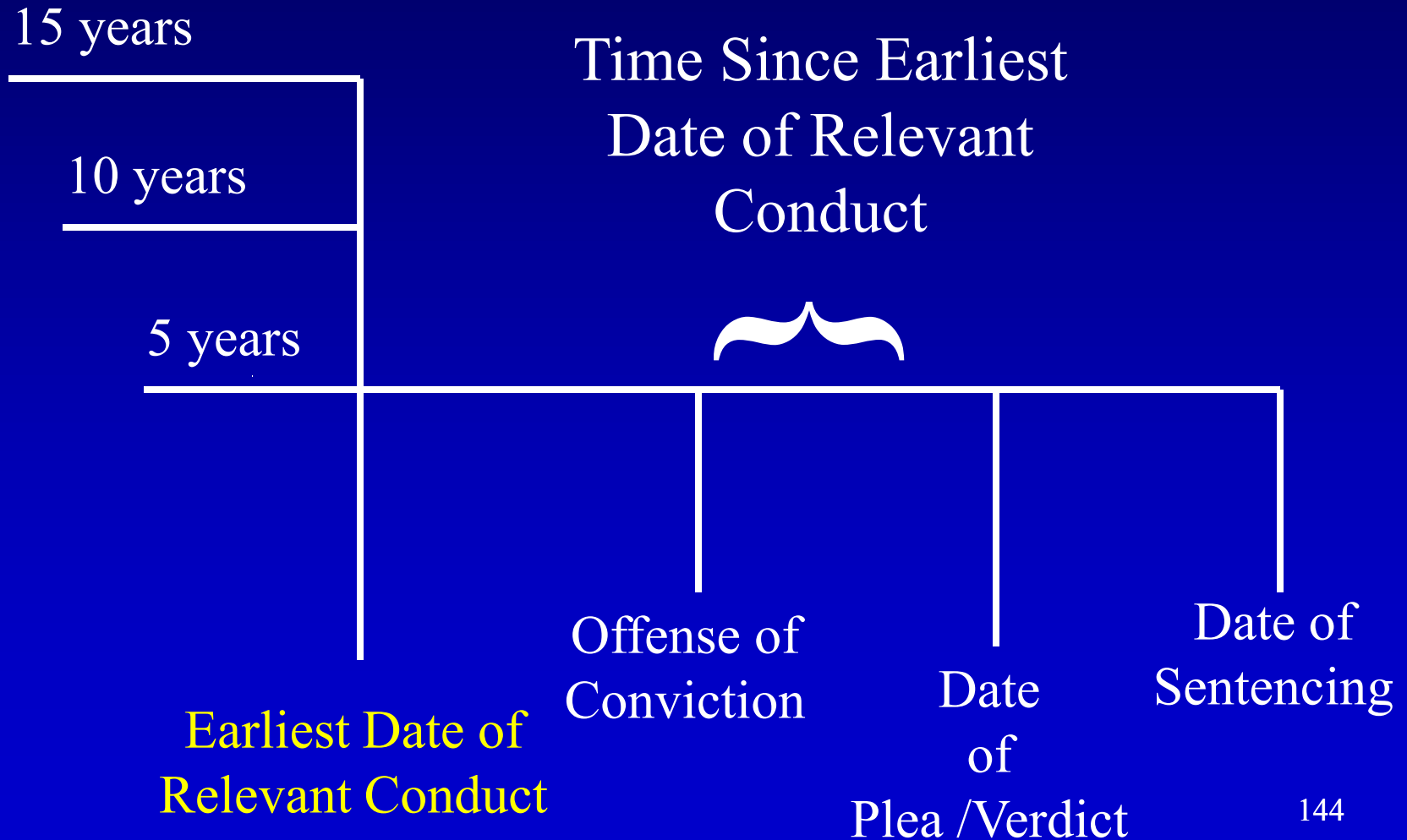
Prior Offense Committed Before 18

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



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** 146

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

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. consec.	}	2 pts.
<u>9 mos. consec.</u>		<u>2 pts.</u>
14 mos.		3 pts.

Example:

Point Assignments and “Single” Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
1 mo.		1 pt.
4 mos. concur.		2 pts.
<u>9 mos. concur.</u>		<u>2 pts.</u>
9 mos.	2 pts.	5 pts.

A “Single Sentence” That Includes Crimes of Violence

§4A1.1(e)

- When multiple prior sentences are treated as a “single sentence,” §4A1.1(e) 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(e)

- Example:
 - Defendant pleads to 3 bank robberies
 - Defendant was sentenced on the same day to 5 years for each robbery to run concurrently
 - Single sentence: 3 points (§4A1.1(a))
 - 1 point added for crime of violence that did not receive points: 2 additional points (§4A1.1(e))

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	Zone A	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B	8-14	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	8-14	Zone C	12-18	21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	Zone D	30-37	33-41 ¹⁵²

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	
3	0-6	0-6	0-6	0-6		
4	0-6	0-6	0-6			
5	0-6	0-6				
6	0-6					
7	0-6					
8	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	9-15
6		1-7	2-8	6-12	9-15	
7		2-8	4-10	8-14		
8		4-10	6-12			
9	4-10	6-12	8-14			
10	6-12	8-14				
11	8-14					

- 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						
6						12-18
7					12-18	
8				10-16		
9				12-18		
10			10-16			
11		10-16	12-18			
12	10-16	12-18				
13	12-18					

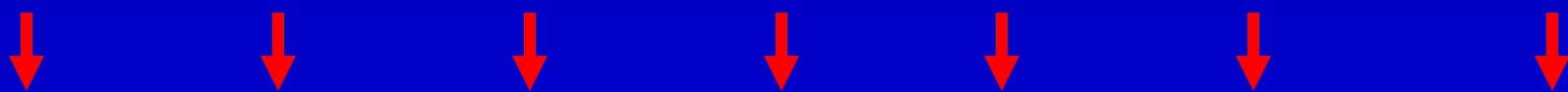
- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.

- 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)
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6						
7						15-21
8					15-21	18-24
9					18-24	21-27
10				15-21	21-27	24-30
11				18-24	24-30	27-33
12			15-21	21-27	27-33	30-37
13		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

Cooperation Issues

Cooperation Issues

- Acceptance of Responsibility
 - 2-level reduction
 - 1-level additional reduction
- “Safety Valve”
- Substantial Assistance
 - Below guideline range
 - Below mandatory minimum

Acceptance of Responsibility

Chapter Three, Part E

§3E1.1(a)

2-Level Reduction

- Defendant must clearly demonstrate affirmative acceptance of responsibility for the offense
 - Must only admit to the offense of conviction and not falsely deny additional relevant conduct
- Court has broad discretion

§3E1.1(b)

1-Level Additional Reduction

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

“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 or variances for mitigating factors 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**

Understanding the “Safety Valve”

- Not discretionary: is either applicable or not
- “Defendant” means just that: not all §1B1.3
- Relevant time frame: sentencing hearing
- Subsection (5) “cooperation” is different than §3E1.1 or §5K1.1
 - Court’s decision; government can contest

Substantial Assistance

§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

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

“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

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. & Infractions¹⁷⁸

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	

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 (§7B1.4(a))
- Three grades of violations based on *actual* conduct (§7B1.1)
 - Grades A & B are felonious conduct
 - Grade C is misdemeanor conduct or a technical violation
- Revocation sentence to be consecutive (§7B1.3(f))

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)

Revised 2/25/2010

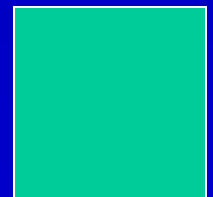
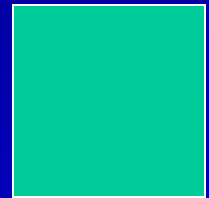
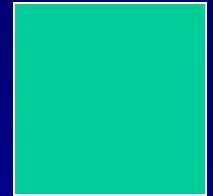
Decision to Order Supervised Release to Follow Revocation Imprisonment

- “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 for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release*)
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 on/after 4/30/03

*As to Step 2, the only two circuits to address this issue have determined that the aggregate of the imprisonment terms imposed for the current revocation and for any prior revocations must be subtracted from the maximum supervised release term statutorily authorized for the original offense.

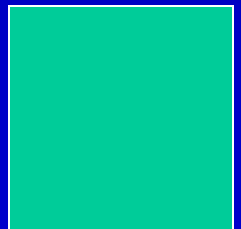
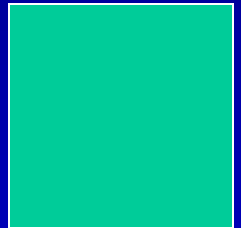
-*U.S. v. Vera*, 542 F3d 457 (5th Cir. 2008)

-*U.S. v. Knight*, 580 F3d 933 (9th Cir. 2009)

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

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

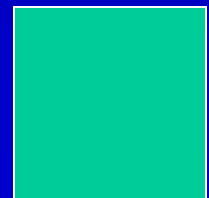
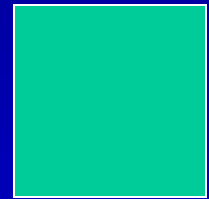
1. Determine the statutorily authorized maximum imprisonment available upon revocation (3583(e)(3))
2. Subtract the amount of imprisonment to be imposed (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release) upon revocation
3. If the difference is greater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

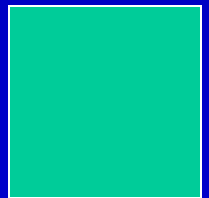
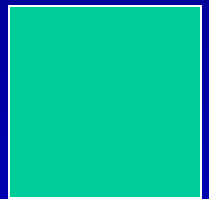
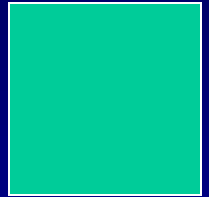
1. Determine the statutorily authorized maximum term of supervised release for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release)
3. The difference is the maximum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



END