

# Introduction to Guideline Application

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## USSC National Seminar

Philadelphia, PA

Wednesday, September 17, 2014

12:30 – 4:00 p.m.

Honorable Ricardo H. Hinojosa

*Vice Chair, U.S. Sentencing Commission; Chief Judge, SD/TX*

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# Outline

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- Sentencing under the federal guidelines system
- Overview of single count guideline application
- Relevant Conduct
- Criminal history
- Determining the sentence

**U.S.S.C.**

**Web Site**

***www.usssc.gov***

***HelpLine***

**202-502-4545**

# Federal Sentencing

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# The Nature of a Federal Sentence

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## 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)

## The Nature of a Federal Sentence (cont.)

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### The Sentencing Reform Act of 1984

- 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)

# Sentencing in the Advisory Guidelines System

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- Sentences are to be based on the factors at 18 USC § 3553(a)(1)-(7)
- Correct guideline application is the required starting point in sentencing
- Sentences are reviewed for “reasonableness”

# 18 USC § 3553(a)

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

Punishment, deterrence  
incapacitation & rehabilitation  
(§ 3553(a)(2))



# § 3553(a)(1) - (7) Factors

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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.)

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(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**

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# 3-Step Approach to Federal Sentencing

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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))

**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

## 3-Step Approach to Federal Sentencing (cont.)

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2. Consider the guidelines policy statements, including those addressing departures, that might warrant consideration in imposing sentence (pursuant to § 3553(a)(5))

# *Guidelines Manual*

## **Policy Statements**

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- Express the Sentencing Commission's policy judgments regarding various sentencing considerations
- Include the Commission's policy regarding "departures" from the calculated guideline range

# Policy Statements Regarding Departures

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- 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**



## Policy Statements Regarding Departures (cont.)

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- Chapter Five, Part H - Specific Offender Characteristics
- **§4A1.3 - Inadequacy of Criminal History Category**
- Other specific commentary
- **Note:** comprehensive List of Departure Provisions in back of *Guidelines Manual*

## 3-Step Approach to Federal Sentencing (cont.)

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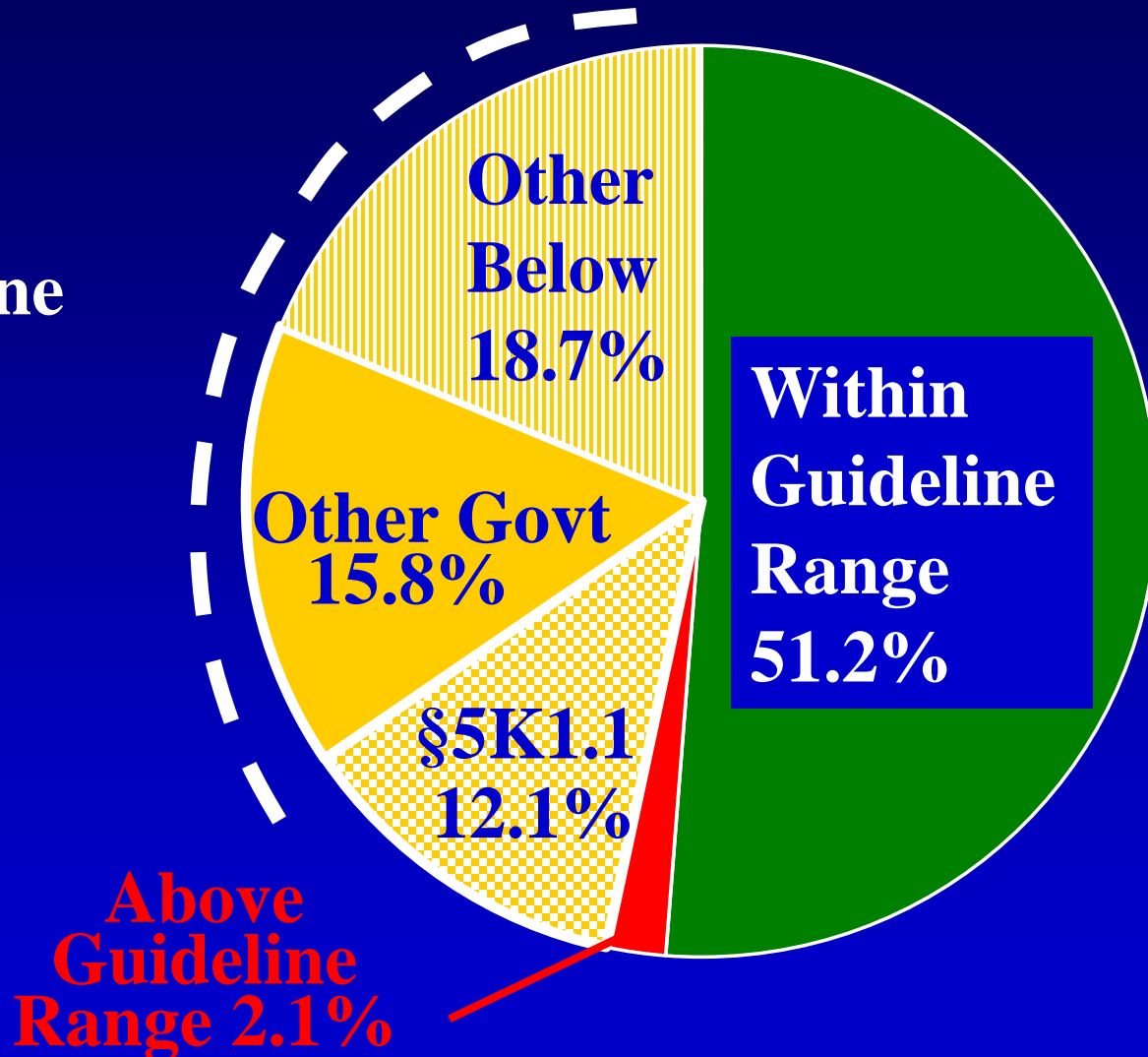
3. Consider § 3553(a) taken as a whole, and determine if the appropriate sentence is
  - One within the advisory guideline system:
    - a sentence within the guideline range, or
    - a “*departure*”

OR

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

# Position of Sentences in Relation to Guideline Range National - FY 2013

**Total  
Below  
Guideline  
Range  
46.6%**



# Overview of the Sentencing Process

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- 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.)

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- 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 the Guidelines

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- 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 the Guidelines (cont.)

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- 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))**

# Basic Guideline Application

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**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
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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
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38	235-293	262-327	292-365	324-405	360-life	360-life
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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

# The Statutes “Trump” the Guidelines

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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*

# Mandatory Minimum's Impact on Sentencing Range

Guideline Range Computed  
41 - 51

Mandatory Minimum  
5 years  
(60 months)

**Final Guideline Range: 60-60**

# Mandatory Minimum's Impact on Sentencing Range

Guideline Range Computed  
51-63

Mandatory Minimum  
5 years  
(60 months)

**Final Guideline Range: 60-63**

# *Guidelines Manual*

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- 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

# *Ex Post Facto*

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- 18 U.S.C. § 3553(a)(4)
  - Use guidelines in effect at sentencing
- *U.S. v. Peugh*, 133 S. Ct. 2072 (U.S. 2013)
  - *Ex post facto* applies to the federal sentencing guidelines
- §1B1.1
  - “One Book Rule”

# Single Count Scenario

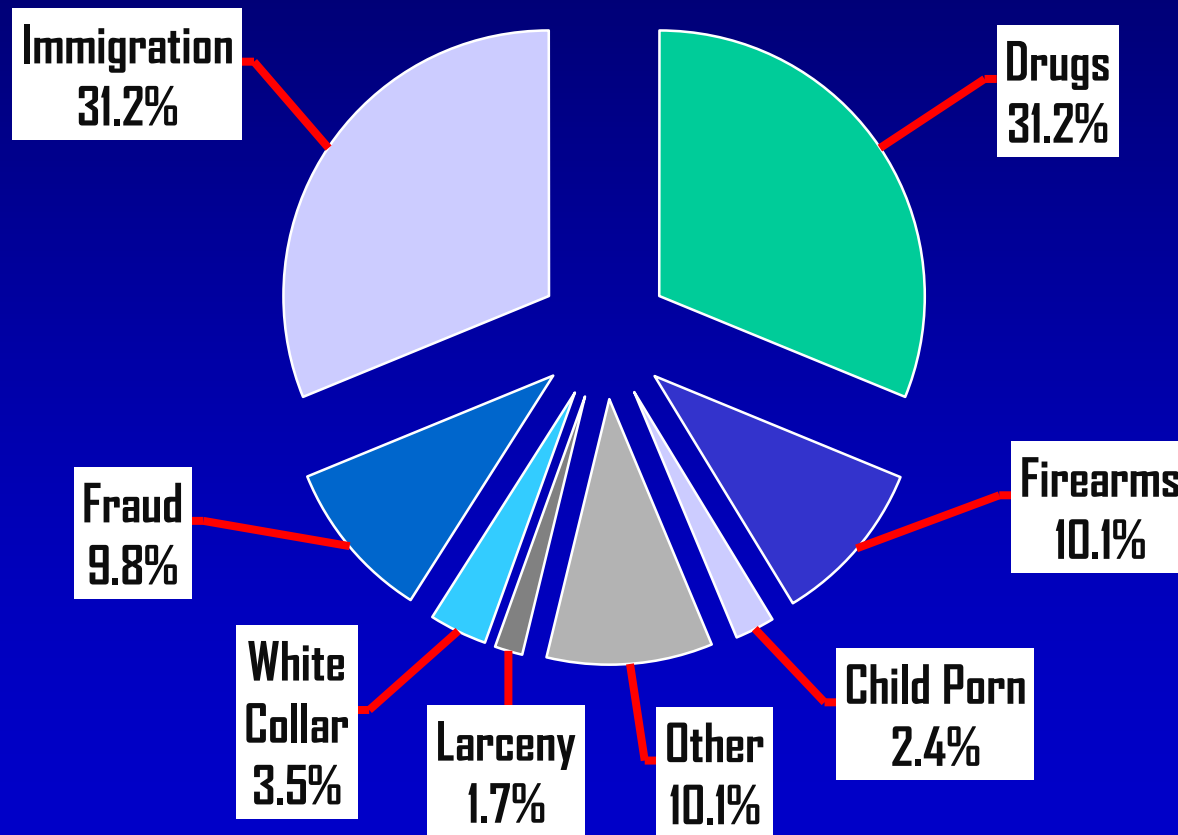
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## Robbery Scenario



# Primary Offense Types

National - FY 2013



SOURCE: U.S. Sentencing Commission, 2013 Datafile USSCFY13: 80,035 cases

# Robbery Scenario Facts

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- Defendant A convicted of 18/2113(a)&(d)
- Def. A and co-participant robbed federally insured bank
- Robbery planned by Def. A who directed co-participant
- Def. A carried pistol; co-participant carried knife
- Def. A pushed teller, resulting in cut, bruises & contusions

## Robbery Scenario Facts (cont.)

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- While not part of plan, nor directed by Def. A, the co-participant restrained a customer by binding him with tape and forcing him into a closet
- \$15K in bank loot taken; divided \$9K for Def. A and \$6K for co-participant; \$5K recovered from Def. A, but nothing recovered from co-participant

## Robbery Scenario Facts (cont.)

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- Within days of apprehension, Def. A provided full information to the govt., and announced intentions to plead guilty; the govt. will make a motion for “full” acceptance of responsibility

## Robbery Scenario Facts (cont.)

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- Def. A's prior record, all since age 18:
  - 6 yrs. prior to instant robbery; auto theft:  
2 yrs. probation
  - 3 yrs. prior to instant robbery; grand larceny:  
6 mos. jail & 3 yrs. probation
  - On this probation at the time of the instant  
federal offense

# General Approach of the Federal Sentencing Guidelines

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

**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)
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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
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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
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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
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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

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## Chapter Two

- Base Offense Level
- Specific Offense Characteristics
- Cross References

## Chapter Three

- Victim
- Role
- Obstruction
- Multiple Counts
- Acceptance



# Determining the Applicable Chapter Two Guideline

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## §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

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## 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**<sub>42</sub>

- §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

# Most Commonly Applied Guidelines

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- §2B1.1 (Fraud, Theft, Embezzlement)
- §2D1.1 (Drug Trafficking)
- §2K2.1 (Firearms Offenses)
- §2L1.2 (Unlawfully Entering/Remaining in U.S.)

# §2B3.1 Robbery

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**(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>(b) SOC's (cont.)</b>	<u>Levels</u>
(4) abduction	+4
<b>restraint</b>	<b>+2</b>
(5) carjacking	+2
(6) taking of a firearm, destructive device, or controlled substance	+1
<b>(7) loss of \$10,000+ to \$5 million+</b>	<b>+1 to +7</b>

**(c) Cross Reference**

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

# §2D1.1 - Drugs

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Unlawful Manufacturing, Importing,  
Exporting, or Trafficking  
(Including Possession with Intent  
to Commit These Offenses);  
Attempt or Conspiracy

## §2D1.1 Drug Trafficking, Etc.

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(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 Cocaine

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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

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

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## §2D1.1(b)(1) & App. Note 11

“...should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”

# SOC (b)(16) at §2D1.1

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## 2-Level Decrease

- The defendant must only meet the criteria set forth in **subdivisions (1)–(5)** of subsection (a) of §5C1.2 (“The Safety Valve”)

# Chapter Three Adjustments

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- Victim-Related Adjustments (Chapter 3, Part A
  - Role in the Offense
  - Obstruction
  - Multiple Counts
  - Acceptance of Responsibility

# Role in the Offense

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## Chapter Three, Part B

- |  | <u>Levels</u> |
|--|---------------|
| • <b>§3B1.1 Aggravating Role</b>                                   | +4,+3, or +2  |
| • §3B1.2 Mitigating Role   | -4, -3, or -2 |
| • §3B1.3 Abuse of a Position of Trust<br>or Use of a Special Skill | +2            |

# Acceptance of Responsibility

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## 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

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## §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

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- 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))

# Relevant Conduct

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§1B1.3

# Relevant Conduct Synopsis

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- The defendant is held accountable for anything he/she does during the offense of conviction
- The defendant is held accountable for some conduct of co-conspirators
- For certain offenses, the defendant is also held accountable for conduct outside the offense of conviction

# Subsections (a)(1) and (a)(2)

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## §1B1.3(a)

- Responsible for most application issues
- Requires an analysis
  - Keyed to the offense of conviction
  - Requires determinations of “WHO” & “WHEN”

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

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## 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

# **Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct**

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**§ 1B1.3(a)(1)(B)**

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

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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 <sup>64</sup>



# Determination of Scope of Undertaking

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## §1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others

# Determining Scope in a Conspiracy

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## §1B1.3, App. Note 2

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 (cont.)

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### “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.

# Standard for “Reasonable Foreseeability”

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## §1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
  - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?

# “Reasonably Foreseeable”

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## §1B1.3, App. Note 2

- 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))

# Example 1:

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- Defendant convicted of robbery: §2B3.1
- Co-participant carried gun
- Should the defendant be held accountable for the gun the co-participant carried?

## Example 1: (cont.)

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- To hold the defendant accountable for the co-participant's gun, the court will need to determine:
  1. The scope of the defendant's undertaking,
  2. If the act of the co-participant carrying the gun was in furtherance of the undertaking, and
  3. If a reasonable person would have foreseen that act of carrying the gun

## Example 2:

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- Defendant convicted of drug conspiracy: §2D1.1
- Conspiracy involved 20 importations;
- Defendant was involved in two importations
- For how many importations should the defendant be held accountable?



## Example 2: (cont.)

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- If the defendant's undertaking was two importations, defendant will only be accountable for acts of others within those two importations, if reasonably foreseeable

## Example 3:

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- Defendants A, B, and C are convicted of healthcare fraud conspiracy (§2B1.1)
- Defendants A and B began the fraud 5 years ago
- Defendant C participated in the fraud for the last 2 years
- Each year, the fraud generates \$100,000 of loss
- For what amount of loss will Defendant C be held accountable?

# **Holding a Defendant Accountable for Acts Outside the Offense of Conviction**

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**§1B1.3(a)(2):**

**“Expanded” Relevant Conduct**

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

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## 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

# Offenses for Which “Expanded” Relevant Conduct Applies

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## §1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included in a list at §3D1.2(d) (or be of that type), which is the list used for “grouping” multiple counts of conviction of a certain type
- NOTE: Multiple counts of conviction are not necessary to have “expanded” relevant conduct

# Offenses Included at §3D1.2(d):

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Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

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

§§2C1.1, 2C1.2, 2C1.8;

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

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

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

# Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

# “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”

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

- Similarity
- Regularity (repetitions)
- Temporal proximity

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

## Example 4:

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- Def. convicted of one count of embezzlement of \$5,000; applicable guideline §2B1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. took \$5,000 on each of four other occasions, and that those acts were in the same course of conduct/common scheme or plan, those losses will be relevant conduct
- What is the loss amount?

## Example 5:

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- Def. convicted of drug sale of 1 kg on a single occasion; applicable guideline §2D1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. also sold 1 kg per week for 99 weeks, and those acts were in same course of conduct as offense of conviction, that will be relevant conduct
- What is the drug quantity?

# Offenses for Which “Expanded” Relevant Conduct Does Not Apply

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§1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct does not apply if the applicable Chapter Two guideline is on the “excluded list” at §3D1.2(d)

# Offenses Excluded at §3D1.2(d):

---

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

# Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2)  
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

# Example 6:

---

- Defendant commits bank robbery on 1/7/14
  - Did not possess a weapon
  - Stole \$5,000
- Defendant commits bank robbery on 2/13/14
  - Possessed a firearm
  - Stole \$6,000
- Defendant pled guilty to the bank robbery committed on 1/7/14

## Example 6: (cont.)

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- At §2B3.1 (Robbery), will the defendant receive an increase for firearm possession?
- What is the amount of loss for this defendant?



## Example 6 (cont.):

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- Because §2B3.1 is on the “excluded” list, relevant conduct does not include the same course of conduct or common scheme or plan
- Conduct in the other robberies will not be relevant for application of robbery guideline
  - Losses from the other robberies will not be included
  - The firearm from the other robbery will not be included

# Points to Remember Regarding Relevant Conduct Analysis

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## §1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A) & (a)(1))
- Defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B) & (a)(1))

## Points to Remember Regarding Relevant Conduct Analysis (cont.)

---

### §1B1.3

- *For certain offenses* (those “included” at §3D1.2(d)), defendant also accountable for acts he/she did, and certain acts others did in the same course of conduct or common scheme or plan as the offense of conviction ((a)(1)(A) and (a)(1)(B) & (a)(2))

# Chapter Four

---

## Criminal History and “Overrides”

**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

# Numerous “Rules” in Chapter Four

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- Typically clear regarding previous federal record
- Issues more likely to arise regarding previous state/local record
  - Look to case law
  - Established methods used in your court for recurring issues

# Criminal History

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§4A1.1(a) – (d)

- ✓ “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”

# Relevant Conduct and “Status”

---

## §4A1.1(d) & App. Note 4

- “Status” if under criminal justice sentence during any relevant conduct

Note: “status” can only count if the sentence from which it resulted has been counted

# Other Determinations Regarding Prior Sentences - §4A1.2

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- Relationship of prior sentences and relevant conduct (§4A1.2(a)(1) & App. Note 1)
- Types of sentences never counted, *e.g.*,
  - Foreign sentences (§4A1.2(h))
  - Tribal sentences (§4A1.2(i))
  - Certain misdemeanors (§4A1.2(c) & App. Note 12)

- Treatment of multiple prior sentences (§4A1.2(a)(2))
  - 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 (§4A1.2(k) & App. Note 11)
- Pardons, set asides, expunged convictions, and diversionary dispositions (§4A1.2(f)&(j) & App. Notes 9 & 10)

# Robbery Scenario Facts

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- Def. A's prior record, all since age 18:
  - 6 yrs. prior to instant robbery; auto theft:  
2 yrs. probation
  - 3 yrs. prior to instant robbery; grand larceny:  
6 mos. jail & 3 yrs. probation
  - On this probation at the time of the instant federal offense
- How many criminal history points?

# Chapter Three and Chapter Four “Overrides”

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§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

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## §§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”

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## §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

<u>Statutory Maximum</u>	<u>Offense Level</u> *
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

\* Decrease by number of levels (0 or -2 or -3)  
at §3E1.1 (Acceptance of Responsibility)

# Mandatory Minimums and Sentencing

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# Substantial Assistance Departures

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§5K1.1  
& 18 USC § 3553(e)

# Substantial Assistance

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## §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.)

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### §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.)

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### 18 U.S.C. § 3553(e)

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

# “Safety Valve”

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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 under 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. Not later than the time of the sentencing hearing, 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)

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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**

Note: The guideline range for OL 17 at CHC I is 24-30 mos.; a departure or variance below this range is still possible<sup>17</sup>

**Sentencing Table & Zones**

**&**

**Departures & Variances**

---

**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

# Zones

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**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	Zone D		30-37
13	12-18	15-21	18-24	21-27	30-37	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					

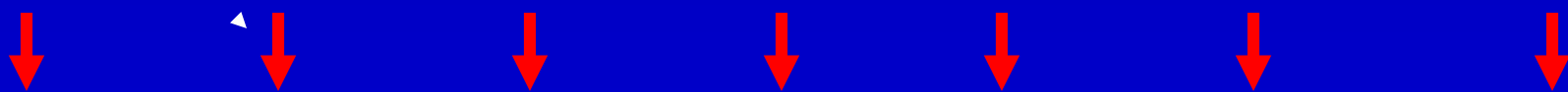
- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.

- 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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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

# Other Aspects of Sentence

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## Chapter Five

- Probation (§5B)
- Supervised release (§5D)
- Restitution, fines, assessments, forfeitures (§5E)
- Sentencing options (§5F)
- Undischarged terms (consecutive/concurrent) (§5G1.3)

# Departures

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# Departures

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- List of Departure Provisions
  - Located at end of *Guidelines Manual*
  - Lists all provisions in *Manual* indicating specific departure grounds
- Examples of departure provisions
  - §5K2.0 – Grounds for Departure
  - §5K3.1 – Early Disposition Programs (“Fast Track”)
  - §4A1.3 – Inadequacy of Criminal History Category
  - §2B1.1, App. Note 20 – Offense level overstates/understates seriousness of offense

# Notice for Sentences Outside the Applicable Guideline Range

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- Notice is required for a departure
  - *Burns v. U.S.*, 501 U.S. 129 (1991)
  - Rule 32(h)
  - Can be satisfied if the ground is identified in the presentence report or in prehearing submissions
- Notice is NOT required for a variance
  - *Irizarry v. U.S.*, 553 U.S. 708 (2008)

END