

2018
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Departures & Variances

2018 Annual National Seminar

In imposing a federal sentence, the court follows a three-step process. Relevant Guidelines provisions and case law governing this process, as well as rules governing relief from statutory mandatory minimums, are included here for quick reference.

3-Step Approach to Federal Sentencing

Step 1
Guidelines Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines.

Step 2
Departures Consider the Commission's policy statements in formulating the sentence, See §1B1.1(b)
Policy Statements Regarding Departures

- 5K1.1 Substantial Assistance (requires a government motion)
- §5K2.0 Grounds for Departure
- §5K2.1 – 2.24 Various bases for departures
- §5K3.1 Early Disposition Programs (“Fast Track”) (requires a government motion)
- Chapter 2 Guidelines
- Criminal History Departure - §4A1.3
- Chapter Five, Part H - Specific Offender Characteristics

Step 3
Variances Consider § 3553(a) taken as a whole, See §1B1.1(c)
Supreme Court Case Law on Variances

- *Gall v. U.S.*, 552 U.S. 38 (2007)
- District courts may vary from the guidelines based on case-specific circumstances, including factors that are taken into consideration by the guidelines (*e.g.*, criminal history) or that are discouraged or forbidden grounds for departures (*e.g.*, a defendant's family circumstances) *Kimbrough v. U.S.*, 128 S. Ct. 558 (2007); *U.S. v. Spears*, 129 S. Ct. 840 (2009); *Pepper v. U.S.*, 131 S. Ct. 1229 (2011)



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District courts may in appropriate cases vary from the guidelines based on a policy disagreement. Such a sentence “may attract greatest respect when it is based on the particular facts of a case.”

Relief from Mandatory Minimums

Substantial Assistance (18 U.S.C. § 3553(e))

Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e) - Permits a sentence below a mandatory minimum

§5K1.1 - Permits a sentence below the minimum of the guideline range

Each requires a government motion - *Wade v. U.S.*, 504 U.S. 181 (1992); *Melendez v. U.S.*, 518 U.S. 120 (1996)

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

Safety Valve (18 U.S.C. § 3553(f))

Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the 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 of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

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Safety Valve (USSG §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:

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 or supervisor of others in the offense; was not engaged in a Continuing Criminal Enterprise (RICO)
 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.
- Court may sentence the defendant without regard to mandatory minimums for violations of select drug statutes
 - Court makes the determination; no government motion required
 - Defendant must meet 5-part test
 - Additional variances or downward departures allowed



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Related Case Law

United States v. Winebarger, 664 F.3d 388 (3d Cir. 2011) We note that every circuit court of appeals to address the issue we face today has held that a court may not use factors unrelated to a defendant's assistance to the government in reducing the defendant's sentence below the statutory minimum.

United States v. Coyle, 506 F.3d 680 (8th Cir.2007) We see nothing in Booker or the relevant statutes that prevents a district court in this situation from relying to some degree on both § 3553(a) and § 3553(e) to fashion an appropriate sentence. The text of § 3553(e) prohibits a district court from relying on factors other than assistance as a basis for sentencing below the statutory minimum. But here, the district court had some flexibility above the statutory minimum to determine Coyle's sentence in accordance with the factors in § 3553(a).

United States v. Winebarger, 664 F.3d 388, 393–94 (3d Cir. 2011) (citations omitted) Upon a finding that the “safety valve” factors are met, a district court is authorized by Congress to sentence the defendant “pursuant to [the sentencing guidelines] without regard to any statutory minimum sentence.” 18 U.S.C. § 3553(f). This sweeping “without regard” language stands in marked contrast to the “so as to reflect” language of § 3553(e), which is more circumscribed. [] While § 3553(f) instructs district courts to disregard a statutory minimum in appropriate circumstances, § 3553(e) retains the statutory minimum as a reference point and explicitly notes the factor that such a divergence from the reference point should reflect

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.