

Sentencing Procedure at a Glance

Information at Sentencing

- No limitation shall be placed on the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. 18 USC § 3661; USSG §1B1.4.
- Burden of proof at sentencing is preponderance of evidence. *Witte v. United States*, 115 S.Ct. 2199 (1995).
- The rules of evidence do not apply at sentencing. Fed. R. Evid. 1101(d)(3).
- Information considered must have sufficient indicia of reliability to support probable accuracy. USSG §6A1.3(a).
- Uncharged conduct may be used. *Witte v. United States*, 515 U.S. 389 (1995).
- Conduct of which the defendant was acquitted may be used. *United States v. Watts*, 519 U.S. 148 (1997).
- The defendant retains a right to remain silent at sentencing. *Mitchell v. United States*, 526 U.S. 314 (1999).
- Victims have certain rights before and at sentencing. 18 USC § 3771(a)-(b).

Departure

A sentence outside the guideline range in accordance with the *Guidelines Manual*. Chapter Five, Part K lists factors that may constitute grounds for departure, and other departures are located throughout the *Guidelines Manual*. However, there may be other grounds for departure that are not mentioned in the guidelines. Departures can be above or below the guideline range. The most commonly applied departure is the downward departure based on the defendant's substantial assistance to the government in the investigation or prosecution of others. The substantial assistance departure is found at §5K1.1 of the *Guidelines Manual*.

Variance

A sentence outside the applicable guideline range (above or below) for any reason that is not in accordance with the guidelines or policy statements, after considering factors at 18 USC § 3553(a).

Procedure for Departures and Variances

- The Court 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). *Gall v. United States*, 552 U.S. 38 (2007).
- The Court 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." *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *United States v. Spears*, 129 S. Ct. 840 (2009); *Pepper v. United States*, 131 S. Ct. 1229 (2011).
- Notice is required for a **departure** (a sentence pursuant to the *Guideline Manual*). *Burns v. United States*, 501 U.S. 129 (1991); Fed. R. Crim. Pro. 32(h).
- Notice is NOT required for a **variance** (a sentence outside the *Manual*, pursuant to 18 USC § 3553(a)). *Irizarry v. United States*, 553 U.S. 708 (2008).
- Best practice? Give the parties an adequate opportunity to respond to any intended variance.

Sentencing Procedure at a Glance*

Guilty Plea/Conviction at Trial

35 days before sentencing parties receive the PSR.

(Optional) Parties & probation may meet to resolve disputes.

(Optional) Parties file sentencing memorandum.

Within 14 days of sentencing, defendant may file notice of appeal.

90 days or more after sentencing, Court may order restitution.

14 days later, parties object to the PSR.

7 days before sentencing, probation officer submits the report to the Court, including unresolved objections.

Day of Sentencing, Court rules on objections & imposes sentence, which may include imprisonment, supervised release, fines, restitution, probation, etc.

Within 30 days of entry of judgment, the Chief Judge submits documents to the Commission.

Probation Officer

- Conducts the presentence investigation
- Interviews the defendant regarding history & characteristics
- Determines advisory guideline range
- Identifies the kinds of sentences available & any basis for departing or varying from the guidelines range
- Includes a confidential sentencing recommendation for the judge
- May meet with the parties to resolve objections to the PSR
- Supervising officer determines appropriate level of supervision upon release
- Supervising officer authorizes travel outside the supervising district

Defense Attorney

- Attends the presentence interview
- Reviews the PSR with the defendant
- Bears the burden of proof on factors decreasing the guidelines range

AUSA

- Provides information about the offense to the probation officer
- Bears the burden of proof on factors increasing the guidelines range
- Makes "best efforts" to notify crime victims of their rights

Law Clerk

- Performs legal research on objections & any other issues as directed by the Court

Judge

- Applies preponderance of evidence standard at USSG § 6A1.3 to rule on factual disputes, or determines a ruling is not necessary
- Rules on issues of law
- May allow the parties to introduce evidence & call witnesses
- May disclose the probation officer's sentencing recommendation
- Must give parties advance notice of any intent to depart & may give notice of intent to vary from the guidelines range
- Allows defendant to allocute
- Determines adjustments for time served
- Explains on the record the reasons for the sentence
- May recommend BOP programs & placement
- Completes the Statement of Reasons (Form AO 245B)
- Grants or denies inmate motions for compassionate release

Bureau of Prisons

- Determines the defendant's security level
- Designates the offender to a specific correctional institution
- Determines whether the offender is eligible for programs and treatment options
- Decides furlough & halfway house eligibility
- Determines custody credit
- Grants or denies inmate requests for compassionate release

* Sources include F.R.Crim.Pro. 32, US Sentencing Guidelines, Case Law, First Step Act.

