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# **An Introduction to Federal Guideline Sentencing**

**Eighth Edition**

**Lucien B. Campbell and Henry J. Bemporad**  
**For the Federal Public and Community Defenders**

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# An Introduction to Federal Guideline Sentencing

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For lawyers accustomed to discretionary sentencing practice, the federal sentencing guidelines present an alien and dangerous terrain. Because of their complexity, the sentencing guidelines can be a minefield for the defense, increasing exponentially the effort required to provide effective representation. To succeed in this environment, defense counsel must become fully involved in a case at the earliest possible time. In all defense efforts—from seeking pretrial release, to investigation, to discovery, to plea negotiations, to the trial itself—counsel must not only weigh traditional considerations, but also take into account the dangers and possibilities of the sentencing guidelines. The starting point is a thorough understanding of the guideline sentencing process.

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Before the advent of the sentencing guidelines, federal trial courts enjoyed broad discretion to sentence defendants within the statutory limit. Sentences were largely insulated from appellate judicial review, although the time in prison could be reduced by the Parole Commission. The guidelines radically changed this system. Under guideline sentencing, the court's discretion to fix a sentence is cabined within a guideline range that may be a small fraction of the statutory limit. The guideline range results from the combination of two numerical values, an offense level and a criminal history category. The two values form the axes of a grid, called the sentencing table; together, they specify a sentencing range for each case. The guideline range fixes the limits of the sentence, unless the court determines that an inadequately considered factor warrants imposition of a sentence outside the range. Guideline sentences are not parolable, but they are subject to limited review on appeal.

This paper examines the statutory basis of guideline sentencing and reviews the structure of the guidelines themselves. It describes the mechanics of applying the guidelines to a typical case, discusses plea bargaining, and warns of traps for the unwary. This treatment is not exhaustive; it provides an overview to facilitate gaining a working knowledge of guideline sentencing.

## The Basic Statutory System

Guideline sentencing was established by the Sentencing Reform Act. The Act created determinate sentences: by eliminating parole and greatly restricting good time, it ensured that defendants would serve nearly all the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission, an independent body within the judicial branch with a mandate of providing “certainty and fairness” in sentencing, while avoiding “unwarranted sentencing disparities.” 28 U.S.C. § 991(b)(1)(B). Delegation to the Commission did not end congressional activity, however. Over the years, Congress has mandated particular punishment for certain offenses or sentencing factors, specifically directed the Commission to promulgate particular guideline amendments, and, in the 2003 PROTECT Act,<sup>1</sup> drafted guidelines itself.

### **Imposition of Guideline Sentence; Departure.**

Under the guideline regime, the district court's sentencing authority is no longer limited only by the statutory penalty range for the substantive offense. It is also restricted by 18 U.S.C. § 3553. This section directs the court to consider a broad variety of factors before imposing sentence. § 3553(a). It does not, however,

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1. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003).

grant an equally broad range of sentencing discretion. To the contrary, the section requires the court to impose a sentence of the kind, and within the range specified, in the applicable guideline, absent a valid ground for departure. § 3553(b)(1), (b)(2). In most cases, a departure is authorized only when “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” § 3553(b)(1); *cf.* United States Sentencing Guideline (U.S.S.G.) 1B1.1, comment. (n.1(E)) (defining “departure”). Under the 2003 PROTECT Act, the authority to depart is even more limited in specified child and sex cases.<sup>2</sup> *See* § 3553(b)(2). The reasons for the particular sentence imposed must be stated in open court; for a departure sentence, they must also be stated specifically in the written judgment. § 3553(c).

**Guidelines and Policy Statements.** The Sentencing Reform Act authorized the Commission to promulgate both sentencing “guidelines,” 28 U.S.C. § 994(a)(1), and “general policy statements regarding application of the guidelines,” § 994(a)(2). Guidelines are binding: they must be used to determine the sentence, absent a ground for departure. *See* 18 U.S.C. § 3553(a)(4)(A), (b). Policy statements are intended to explain how guidelines are to be applied. Although they must be considered by the court, § 3553(a)(5), they are not usually binding. When, however, “a policy statement prohibits a district court from taking a specified action,” failure to follow it constitutes guideline misapplication. *Williams v. United States*, 503 U.S. 193, 201 (1992) (departure barred when basis is prohibited by policy statement); *cf.* 3553(b)(2)(A)(ii) (2003 PROTECT Act amendment barring downward departure in child or sex case except as specifically authorized by guideline or policy statement).<sup>3</sup>

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2. The specified offenses include kidnapping of a minor in violation of 18 U.S.C. § 1201, sex trafficking in violation of 18 U.S.C. § 1591, the obscenity offenses in Chapter 71, the sexual abuse offenses in Chapter 109A, the sexual exploitation and child pornography offenses in Chapter 110, and transportation for illegal sex offenses in Chapter 117.

3. In addition to guidelines and policy statements, the *Guidelines Manual* includes Sentencing Commission “commentary.” The Commission instructs that commentary should be treated as the legal equivalent of a policy statement, and that failure to follow it “could constitute an incorrect application of the guidelines.” U.S.S.G. § 1B1.7; *see also Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding

**Guidelines and Statutory Minimums.** While the guidelines control sentencing discretion under the Act, they do not supersede the sentencing limits prescribed by statute. If the guidelines call for a sentence above the statutory maximum, or below a statutory minimum, the statutory limit controls. U.S.S.G. § 5G1.1. A number of federal statutes include minimum prison sentences that can trump the otherwise applicable guideline range.<sup>4</sup> Some, like the federal “three strikes” law, mandate life imprisonment. 18 U.S.C. § 3559(c).

Statutory minimum sentences regularly come into play in two common types of federal prosecutions: drug cases and firearms cases.

**Drug cases.** The federal drug statutes provide two types of commonly-applied mandatory minimum sentences. One is based on the amount of drugs involved; for certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years’ imprisonment. The circuits are divided over whether drug amount must be alleged in the indictment and proved to the jury to trigger the statute’s mandatory minimum sentences.<sup>5</sup>

The other type of mandatory minimum is based on criminal history; for defendants who have previously been convicted of drug offenses, the statutes establish increasing minimum sentences, up to life imprisonment. The prior conviction need not be alleged in the indictment or proved at trial; however, the government must follow the notice and hearing procedures of 21 U.S.C. § 851 to obtain a recidivism-based enhancement.

**Firearms cases.** Title 18 U.S.C. § 924, which sets out the penalties for most common federal firearm-possession offenses, includes two subsections that require significant minimum prison sentences. One is § 924(c), which punishes firearm possession during a drug-trafficking or violent crime. It provides graduated

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Commission commentary authoritative unless it violates Constitution or federal statute, or constitutes plainly erroneous reading of guideline).

4. The 2003 PROTECT Act added, or increased, statutory minimum sentences for a variety of child and sex offenses. *See, e.g.,* Pub. L. No. 108-21, §§ 103, 104, 106, 506.

5. *Compare United States v. Leachman*, 309 F.3d 377, 381–83 (6th Cir. 2002) (drug quantity setting statutory minimum is a sentencing factor that need not be proved to jury beyond reasonable doubt) (citing *Harris v. United States*, 122 S. Ct. 2406 (2002)), with *United States v. Velasco-Heredia*, 319 F.3d 1080, 1084–86 (9th Cir. 2003) (minimum drug sentence inapplicable without proof to jury beyond reasonable doubt) (distinguishing *Harris*) and *United States v. Martinez*, 234 F. Supp. 2d 80 (D. Mass. 2002) (same).

minimum sentences, starting at 5 years and increasing to a fixed sentence of life imprisonment, depending on the type of firearm, how it was employed, and whether the defendant has a prior § 924(c) conviction. The statute requires that a sentence under § 924(c) run consecutively to any other sentence. A § 924(c) charge is often (but not always) accompanied by a charge on the underlying substantive offense; the guidelines provide special rules for determining the § 924(c) sentence, based on the number of counts, the mandatory consecutive nature of the penalty, and the defendant's criminal history. U.S.S.G. §2K2.4, §4B1.1(c), §5G1.2(e).

The other mandatory minimum is 18 U.S.C. § 924(e), the Armed Career Criminal Act. It provides the applicable penalty for certain defendants convicted of unlawful firearm possession under § 922(g). A defendant convicted under § 922(g) normally faces a maximum term of 10 years' imprisonment. Section 924(e)(1) increases this punishment range, to a minimum of 15 years and a maximum of life imprisonment, if a defendant has three prior convictions for violent felonies or serious drug offenses. "Violent felony" and "serious drug offense" are defined by statute. § 924(e)(2).

**Sentencing below a statutory minimum.** Federal law authorizes a sentence below a statutory minimum in only two circumstances: when a defendant cooperates, and when he meets the requirements of a limited "safety valve."

**Cooperation.** The court, on motion by the government, may "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." 18 U.S.C. § 3553(e); *see also* FED. R. CRIM. P. 35(b) (implementing § 3553(e)). The court is required to follow the guidelines and policy statements in imposing the reduced sentence. Policy statement §5K1.1, discussed in more detail below, sets out the factors to be considered in imposing sentence on a government substantial-assistance motion. A §5K1.1 motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

**Safety valve.** Under 18 U.S.C. § 3553(f), the statutory minimum is removed for certain drug crimes that did not result in death or serious injury, if the court finds that the defendant has minimal criminal history; was not violent, armed, or a high-level participant; and provided the government with truthful, complete information

regarding the offense of conviction and related conduct. Unlike § 3553(e), the § 3553(f) "safety valve" does not require a government motion, but the government must be allowed to make a recommendation to the court.

The Sentencing Commission has promulgated a safety-valve guideline, §5C1.2, which mirrors the requirements of § 3553(f), but may reduce the guideline sentence even when no statutory minimum is in play.

### **No Parole; Restricted Good-Time Credit.**

Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. Credit is fixed at a maximum of 54 days per year for a sentence greater than one year, but less than life. 18 U.S.C. § 3624(b). The Bureau of Prisons may reduce the time to be served by up to an additional year if a prisoner serving imprisonment for a nonviolent offense completes a substance-abuse treatment program. § 3621(e)(2).

**Probation and Supervised Release.** While the guideline regime does not allow parole, it does authorize non-incarcerative sentences of two types: probation and supervised release.

**Probation.** Probation may be imposed in lieu of imprisonment in very limited circumstances. Probation is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is statutorily permitted, the guidelines bar straight probation unless the bottom of the guideline range is zero, or the court departs downward. *See* U.S.S.G. §5B1.1(a), §5C1.1(b). (See discussion of Chapter Five below, under "The Guidelines Manual.")

**Supervised release.** Unlike probation, supervised release is imposed in addition to an imprisonment sentence. Some statutes mandate imposition of supervised release, and the pertinent guideline requires supervised release following any imprisonment sentence greater than 1 year. U.S.S.G. §5D1.1(a). Except as otherwise provided, the authorized maximum terms increase with the grade of the offense, from 1 year, to 3 years, to 5 years. 18 U.S.C. § 3583(b).<sup>6</sup> Supervised release begins on the day the defendant is released from imprisonment and runs concurrently with any other term

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6. The 2003 PROTECT Act increased the maximum release term to life for specified child and sex offenses. Pub. L. No. 108-21, § 101, *codified as* 18 U.S.C. § 3583(k).

of release, probation, or parole. § 3624(e); *United States v. Johnson*, 529 U.S. 53 (2000).

**Conditions and revocation.** The court has discretion in imposing some conditions of probation and supervised release. However, federal law makes a number of conditions mandatory, including that the defendant submit to DNA collection in some cases, and to drug testing in all cases. 18 U.S.C. §§ 3563(a)(5), (a)(9), 3583(d). The court may ameliorate or suspend the drug-testing condition if the defendant presents a low risk of future substance abuse.

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possessing a firearm or a controlled substance, refusing to comply with drug-testing conditions, or testing positive for an illegal controlled substance more than three times over the course of a year. 18 U.S.C. §§ 3565(b), 3583(g). In accordance with Sentencing Commission guidelines, the court must consider whether the availability of treatment programs, or the defendant's participation in them, warrants an exception from mandatory revocation for failing a drug test. §§ 3563(e), 3583(d).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions available in 18 U.S.C. chapter 227, subchapter A. § 3565(a)(2). Upon revocation of supervised release, the court may imprison the defendant up to the maximum terms listed in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term on revocation of supervised release, it may impose another supervised release term to begin after imprisonment. § 3583(h).

The Sentencing Commission has promulgated non-binding policy statements for determining the propriety of revocation and the sentence to be imposed. U.S.S.G. Ch.7. (See discussion of Chapter Seven below, under "The Guidelines Manual.")

**Fines and Restitution.** Federal sentencing law authorizes both fines and restitution orders. In general, the maximum fine for an individual convicted of a Title 18 offense is \$250,000 for a felony, \$100,000 for a Class A misdemeanor, and \$5,000 for any lesser offense. 18 U.S.C. § 3571(b). A higher maximum fine may be specified in the law setting forth the offense, § 3571(b)(1), and an alternative fine based on gain or loss is possible, § 3571(d). Interest accrues on any fine of more than \$2,500 that is not paid in full before the fifteenth day after judgment, and additional penalties apply to a delinquent or defaulted fine. § 3612(f)–(g). Restitution may be ordered for any Title 18 crime and

most common drug offenses. 18 U.S.C. § 3663 (a)(1)(A). It is mandatory for crimes of violence, property crimes, and product tampering, § 3663A(c), and may be required by the statute setting out the substantive offense. Restitution and fines are generally enforceable in the same manner, § 3664(m)(1)(A)(i), although interest does not automatically accrue on restitution. A defendant who knowingly fails to pay a delinquent fine or restitution is subject to resentencing, and a defendant who willfully fails to pay may be prosecuted for criminal default. §§ 3614, 3615.

While the guidelines ordinarily make both fines and restitution mandatory, a defendant's inability to pay, now and in the future, may support nominal restitution payments. U.S.S.G. §5E1.1. It may also support a lesser fine, or alternatives such as community service. §5E1.2.

**Review of a Sentence.** Under 18 U.S.C. § 3742, either the defendant or the government may appeal a sentence on the ground that it was (1) "imposed in violation of law"; (2) "imposed as a result of an incorrect application of the sentencing guidelines"; or (3) "imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." § 3742(a)–(b). Additionally, the defendant may appeal a departure above the guideline range, and the government may appeal a departure below it. § 3742(a)(3), (b)(3). These appeal rights are limited if, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties enter into a specific sentence agreement. § 3742(c). They may also be limited by an appeal waiver of the type mentioned in Rule 11(b)(1)(N). (See discussion of Rule 11(c)(1)(C) below, under "Plea Bargaining Under the Guidelines," and discussion of appeal waivers below, under "Some Traps for the Unwary.")

The 2003 PROTECT Act imposed special rules on appeal from a departure sentence, and on remand in all cases. In departure appeals, the reviewing court, while generally required to give "due deference to the district court's application of the guidelines to the facts," must determine *de novo* (1) whether the district court made written findings as required by § 3553(c), and (2) whether the departure advances the objectives of sentencing set out in § 3553(a)(2), complies with the limitations on departure in § 3553(b), and is justified by the facts of the case. 18 U.S.C. § 3742(e). On remand for resentencing, the district court may not impose a departure sentence except upon a ground that (1) "was specifically and affirmatively included in the written statement of reasons" in connection with the defendant's previous sentencing, and (2) "was held by the court of appeals, in remanding the case, to be a permissible ground of departure." § 3742(g)(2).

**Sentence Correction and Reduction.** Federal law severely limits the sentencing court's authority to correct or reduce a sentence after it is imposed. Under Federal Rule of Criminal Procedure 35(a) the court may correct "arithmetical, technical, or other clear error" in the sentence within 7 days after sentencing.

Rule 35(b) authorizes the court to reduce the sentence on motion of the government, to reflect a defendant's post-sentence assistance in the investigation or prosecution of another person who has committed an offense. With limited exceptions, the motion must be made within one year after sentencing.

In two other circumstances, reduction is authorized under 18 U.S.C. § 3582(c): (1) on motion of the Director of the Bureau of Prisons, if the court finds that "extraordinary and compelling reasons warrant such a reduction"; and (2) for a defendant whose sentencing range was later lowered by a guideline amendment designated as retroactive by the Sentencing Commission. (See discussion of guideline amendments below, under "Some Traps for the Unwary.")

**Petty Offenses; Juveniles.** The sentencing guidelines do not apply to petty offenses (offenses carrying a maximum term of six months or less) or to juvenile delinquency cases. U.S.S.G. §1B1.9, §1B1.12, p.s. But because the Juvenile Delinquency Act bars committing a juvenile to official detention for longer than a similarly-situated adult, the sentence imposed on a juvenile delinquent may not exceed that applicable to an adult under the guidelines, absent a ground for departure. See 18 U.S.C. § 5037(c)(1)(B); U.S.S.G. §1B1.12, p.s.; *United States v. R.L.C.*, 503 U.S. 291 (1992).

**Statutory Amendments.** Although the most notable revisions to the Sentencing Reform Act's provisions were made in 2003, the Act has been amended on numerous occasions in the 20 years since it became law. The Ex Post Facto Clause may bar the retrospective application of any harmful substantive amendment of statutory sentencing provisions. See *Johnson v. United States*, 529 U.S. 694, 699–701 (2000) (discussing effect of Ex Post Facto Clause on Act's amended provisions regarding supervised-release revocation); cf. *Lynce v. Mathis*, 519 U.S. 433 (1997) (retroactive amendment of state sentencing law awarding reduced jail credits violated Ex Post Facto).<sup>7</sup>

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7. While substantive amendments may not be applied retroactively, amendments that are merely "procedural" present no Ex Post Facto concern. The line distinguishing "procedural" and "substantive" amendments to the Act can be difficult to draw. Compare *United States v. Mallon*, 345 F.3d

## The Guidelines Manual

The *Guidelines Manual* contains all the guidelines, policy statements, and commentary promulgated by the Sentencing Commission to determine the sentence to be imposed in a federal case. It comprises eight chapters and three appendices. To undertake the defense of a guidelines case, counsel must have a thorough understanding of Chapters One, Three, Four, Five, and Six, as well as all sections of Chapter Two, Offense Conduct, that may arguably apply to the case. In defending a revocation of probation or supervised release, counsel must study the policy statements in Chapter Seven. If the defendant is an organization, Chapter Eight, Sentencing of Organizations, applies.

### Chapter One: Introduction and General

**Application Principles.** Chapter One provides a historical introduction to the guidelines and important definitions that apply throughout the *Manual*. It also sets the rules for determining the applicable guideline and explains the all-important concept of "relevant conduct."

**Determining the applicable guideline.** The applicable guideline section is usually determined by offense of conviction—the conduct "charged in the count of the indictment or information of which the defendant was convicted." U.S.S.G. §1B1.2(a). (See further discussion of offense guidelines below, under "Chapter Two: Offense Conduct"). If two or more guideline sections appear equally applicable, the court must use the section that results in the higher offense level. §1B1.1, comment. (n.5). Additionally, if a plea agreement "contain[s] a stipulation that specifically establishes a more serious offense," the court must use the guideline applicable to the more serious stipulated offense. U.S.S.G. §1B1.2(a). For this exception to apply, the stipulation must establish every element of the more serious offense, *Braxton v. United States*, 500 U.S. 344 (1991), and the parties must "explicitly agree that the factual statement or stipulation is a stipulation for such purposes." §1B1.2, comment. (n.1).

**Relevant conduct.** Although the initial choice of guideline section is tied to the offense of conviction, most important guideline determinations are made

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943, 946–47 (7th Cir. 2003) (new standard of review for departures in 2003 PROTECT Act qualifies as a procedural change, applicable to pending cases without offending ex post facto prohibition), with *United States v. Coates*, 295 F. Supp. 2d 11, 17 (D.D.C. 2003) (PROTECT Act's amendments to § 3742(g) limiting departure on remand "would disadvantage the defendant and therefore . . . violate the *ex post facto* clause").

according to the much broader concept of relevant conduct. The Commission developed the concept as part of its effort to create a modified “real offense” sentencing system—a system under which the court punishes the defendant based on its determination of his actual conduct, not the more limited conduct of which he may have been charged or convicted. *See* U.S.S.G. §1A1.1, editorial note, Pt.A(4)(a).

The relevant conduct guideline requires sentencing based on “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” §1B1.3(a)(1)(A). When others were involved, the defendant’s guideline range will also reflect “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,” whether or not a conspiracy was charged. §1B1.3(a)(1)(B).<sup>8</sup> For many offenses, such as drug crimes, relevant conduct extends even further, to “acts and omissions” that were not part of the offense of conviction, but “were part of the same course of conduct or common scheme or plan as the offense of conviction.” §1B1.3(a)(2). Relevant conduct need not be included in formal charges. §1B1.3, comment. (backg’d). It can include conduct underlying dismissed or even acquitted counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

While relevant conduct affects every stage of representation, it is especially important in the context of plea bargaining. (See discussion of relevant conduct below, under “Plea Bargaining Under the Guidelines.”)

**Chapter Two: Offense Conduct.** Offense conduct forms the vertical axis of the sentencing table. (The table is included as an appendix to this paper.) Offense conduct guidelines are set out in Chapter Two. The chapter has 18 parts; each part has multiple guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense, or many. When no guideline has been promulgated for an offense, §2X5.1 applies. Part X also provides the guidelines for certain conspiracies, attempts, and

solicitations, as well as aiding and abetting, accessory after the fact, and misprision of a felony.

Each guideline provides one or more base offense levels for a particular offense. A guideline may also have specific offense characteristics that adjust the base level up or down, and it may cross-reference other guidelines that invoke a higher offense level. The court will normally look to relevant conduct in choosing among multiple base offense levels, determining offense characteristics, and applying cross-references.

For some offenses, Chapter Two includes commentary encouraging departures from the prescribed offense level. *See, e.g.*, §2B1.1, comment. (n.18) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.14) (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for very large scale drug offenses).

**Drug offenses.** In drug and drug-conspiracy cases, the offense level is generally determined by drug type and quantity, as set out in the drug quantity table in guideline §2D1.1(c). The table includes a very wide range of offense levels, from a low of 6 to a high of 38; for defendants who played a mitigating role in the offense, however, the offense level is capped at 30. U.S.S.G. §2D1.1(a)(3). (See discussion of role in the offense below, under “Chapter Three: Adjustments.”)

Unless otherwise specified, the applicable offense level is determined from “the entire weight of any mixture or substance containing a detectable amount of the controlled substance.” U.S.S.G. §2D1.1(c) (drug quantity table) note \*(A). “Mixture or substance” does not include “materials that must be separated from the controlled substance” before it can be used. §2D1.1, comment. (n.1). When no drugs are seized or “the amount seized does not reflect the scale of the offense,” the court must “approximate the quantity.” *Id.* comment. (n.12). In conspiracy cases, and other cases involving agreements to sell a controlled substance, the agreed-upon quantity is used to determine the offense level, unless the completed transaction establishes a different quantity, or the defendant demonstrates that he did not intend to produce the negotiated amount, or was not reasonably capable of producing it. *Id.* With the exception of methamphetamine, amphetamine, PCP, and oxycodone, drug purity is not a factor in determining the offense level. However, “unusually high purity may warrant an upward departure.” *Id.* comment. (n.9).

The drug guidelines include provisions that raise the offense level for specific aggravating factors, such as death, serious bodily injury, or possession of a firearm. Guideline §2D1.1(b)(6) provides a 2-level reduction if the defendant meets the criteria of the safety-valve

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8. Relevant conduct, however, does not include the conduct of conspiracy members before the defendant joined the conspiracy, even if the defendant knows of that conduct. §1B1.3, comment. (n.2).



guideline, §5C1.2. If the defendant is subject to a statutory minimum of 5 years, however, the guideline establishes a minimum offense level of 17. §5C1.2(b).

**Economic offenses.** For many economic offenses (including theft, fraud, and property destruction) the offense level is determined under §2B1.1. The guideline is similar in structure to the drug-offense guideline, in that the offense level is generally driven by an amount—the amount of loss.<sup>9</sup>

The guideline broadly defines “loss” as the greater of actual loss or the loss the defendant intended, even if the intended loss was “impossible or unlikely to occur.” §2B1.1, comment. (n.3(A)(ii)). In addition to its broad definition of loss, the guideline includes many specific offense adjustments that can increase the offense level.

**Chapter Three: Adjustments.** Chapter Three sets out general offense level adjustments that apply in addition to the offense-specific adjustments of Chapter Two. Some of these adjustments relate to the offense conduct: victim-related adjustments, adjustments for hate crimes or terrorism, adjustments for the defendant’s role in the offense, and adjustments for the defendant’s use of position, of special skills, of minors, and (in certain cases) of body armor. Other Chapter Three adjustments relate to post-offense conduct, including flight from authorities and obstruction of justice, as well as acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

**Role in the offense.** In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. U.S.S.G. Ch.3, Pt.B, intro. comment. Aggravating-role adjustments range from 2 to 4 levels, depending on the defendant’s supervisory status and the number of participants in the offense. §3B1.1. Mitigating-role adjustments likewise range from 2 to 4 levels, depending on whether the defendant’s role is characterized as minor, minimal, or falling in between. §3B1.2. The determination of a defendant’s role is made on the basis of all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may face an upward adjustment (or

seek a downward adjustment) if more than one person participated. However, the fact that a defendant is not accountable for the relevant conduct of others does not disqualify him from receiving a reduced offense level. §3B1.2, comment. (n.3(A)).

**Obstruction.** A defendant who willfully obstructed the administration of justice will receive a 2-level upward adjustment. U.S.S.G. §3C1.1. Obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related offense. Conduct warranting the adjustment includes committing or suborning perjury,<sup>10</sup> destroying or concealing material evidence, or “providing materially false information to a probation officer in respect to a presentence or other investigation for the court.” §3C1.1, comment. (n.4). Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* comment. (n.5). While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, reckless endangerment of another during flight will support a separate upward adjustment under §3C1.2.

**Multiple counts.** When a defendant has been convicted of more than one count, the multiple-count guidelines of Chapter Three, Part D must be applied. These guidelines produce a single offense level by grouping counts together, assigning an offense level to the group, and, if there is more than one group, combining the group offense levels together.

The guidelines group counts together when they involve “substantially the same harm,” §3D1.2, unless a statute requires imposition of a consecutive sentence. §3D1.1(b); *see also* § 5G1.2 (providing rules for sentencing on multiple counts, and for imposing statutorily-required consecutive sentences). If the offense level is based on aggregate harm (such as the amount of theft losses or the weight of controlled substances), the level for the group is determined by the aggregate for all the counts combined. §3D1.3(b). Otherwise, the offense level for the group is the level for the most serious offense. §3D1.3(a). When there is more than one group of counts, §3D1.4 usually requires an increase in the offense level to account for them. The combined offense level can be up to 5 levels higher than the level of any one group. Even when a defendant

9. An exception to this general rule was created by a recent amendment to the guideline, which increases the base offense level by 1 regardless of the amount of loss, if the offense of conviction has a maximum imprisonment penalty of 20 or more years. *See* U.S.S.G. App. C, amend. 653 (Nov. 1, 2003) (amending §2B1.1(a)).

10. To support an obstruction adjustment based on perjury at trial, the court must “make independent findings necessary to establish a willful impediment to or obstruction of justice,” or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

pleads guilty to a single count, grouping may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4). (See discussion of grouping below, under “Plea Bargaining Under the Guidelines.”)

**Acceptance of responsibility.** Chapter Three, Part E provides a downward adjustment of 2 or, in certain cases, 3 offense levels for acceptance of responsibility by the defendant. To qualify for the 2-level reduction, a defendant must “clearly demonstrate[ ] acceptance of responsibility for his offense.” §3E1.1(a). Pleading guilty provides “significant evidence” of acceptance of responsibility, but does not win the adjustment as a matter of right. §3E1.1, comment. (n.3). On the other hand, a defendant is not “automatically preclude[d]” from receiving the adjustment by going to trial. *Id.* comment. (n.2). A defendant who received an upward adjustment for obstruction under §3C1.1, however, is not ordinarily entitled to a downward adjustment for acceptance of responsibility. *See* §3E1.1, comment. (n.4).

The 2003 PROTECT Act tightened the requirements for the 3-level reduction under §3E1.1. It also requires a government motion before the additional level can be granted by the court.<sup>11</sup> (The adjustment for acceptance is discussed more fully below, under “Plea Bargaining Under the Guidelines.”)

**Chapter Four: Criminal History and Criminal Livelihood.** The defendant’s criminal history forms the horizontal axis of the sentencing table. The table includes six criminal history categories; the guidelines in Chapter Four, Part A translate the defendant’s prior record into one of these categories by assigning points for qualifying prior convictions and juvenile adjudications. The number of points scored for a prior conviction is based primarily on length of the sentence imposed. U.S.S.G. §4A1.1. There is also a recency factor: points are added for committing the instant offense within 2 years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence. §4A1.1(d), (e).

No points are added if a prior conviction was sustained for conduct that was part of the instant offense. *See* §4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional

invalidity. §4A1.2(c)–(j).<sup>12</sup> And sentences imposed in “related” cases are treated as one sentence for the criminal history calculation. §4A1.2(a)(2) & comment. (n.3).

**Criminal history departure.** An important policy statement authorizes departures from the guideline range when a defendant’s criminal history category does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. U.S.S.G. §4A1.3, p.s. This policy statement may support either an upward or a downward departure. It does not, however, authorize a departure below criminal history category I or below the statutory minimum. §4A1.3(b)(2).

A 2003 amendment to the policy statement prohibits or limits downward departures for defendants who fall in one of the three classes of repeat offenders: career offenders, armed career criminals, and repeat child-sex offenders. For these classes, Chapter Four, Part B requires significant enhancements to both criminal history and offense level. Each is described below.

**Career offender.** The “career offender” guideline, §4B1.1, applies to a defendant convicted of a third offense defined as either a crime of violence or a controlled substance offense. In every case, guideline §4B1.1 places the defendant in the highest criminal history category, VI. The guideline simultaneously increases the offense level to produce a guideline range approximating the statutory maximum for the offense of conviction. Chapter Four’s definitions and instructions for computing criminal history apply in determining whether a defendant qualifies as a career offender, §4B1.2, comment. (n.3); therefore, questions of remoteness, invalidity, or whether prior convictions were “related” may be of utmost importance.

**Armed career criminal.** Guideline §4B1.4 applies to a person convicted under the Armed Career Criminal Act, 18 U.S.C. § 924(e); it frequently produces a guideline range above that statute’s mandatory minimum 15-year term. Like the career offender guideline, the armed career criminal guideline operates on both axes of the sentencing table. Unlike the career offender guideline, however, §4B1.4 is not limited by guideline §4A1.2’s rules for counting prior sentences. §4B1.4, comment. (n.1). And unlike a career offender, an armed career criminal is not automatically placed in criminal history category VI; nevertheless, an armed

11. The PROTECT Act was enacted on April 30, 2003. On whether its amendment to guideline §3E1.1 should apply retroactively, *see infra* note 24 and accompanying text.

12. The guidelines, however, “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” §4A1.2, comment. (n.6).

career criminal cannot receive a score below category IV. §4B1.4(c).

**Repeat child-sex offender.** For repeat child-sex offenders, guideline §4B1.5 works in concert with the career offender guideline to ensure long imprisonment terms. The guideline sets the minimum criminal history category at V, and it reaches more defendants than §4B1.2, applying career offender offense levels to a defendant even if he has only one prior child-sex offense. §4B1.5(a)(1). Even a defendant with no prior child-sex conviction may be subject to a significant offense level increase, if he “engaged in a pattern of activity involving prohibited sexual conduct.” §4B1.5(b).

While §4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking in, receipt of, or possession of child pornography. §4B1.5, comment. (n.2).

## Chapter Five: Determining the Sentence;

**Departures.** Chapter Five provides detailed rules for imposing imprisonment, probation, fines, restitution, and supervised release. It sets out the sentencing table of applicable guideline imprisonment ranges, and the policy statements controlling the propriety of a departure from the range.

**The sentencing table.** The sentencing table in Part A is a grid of sentencing ranges produced by the intersection of offense levels and criminal history categories. Most ranges are expressed in months, although some allow for, or even require, life imprisonment. The sentencing table’s grid is divided into four “zones.” These zones determine a defendant’s eligibility for “straight” probation, or for a “split” sentence (probation or supervised release conditioned upon some confinement). Straight probation is available if a defendant’s sentencing range is in Zone A (all the ranges in Zone A are 0 to 6 months). §5B1.1(a)(1), §5C1.1(b). A split sentence is available if the sentencing range is in Zone B or C. A defendant in Zone B can be sentenced to less than the bottom of the imprisonment range by substituting a term of probation or supervised release that requires intermittent confinement, community confinement, or home detention. §5B1.1(a)(2), §5C1.1(c). For sentencing ranges in Zone C, at least half the minimum guideline term must be served in prison. §5C1.1(d). If a defendant’s sentencing range is in Zone D, the minimum term must be served in prison. §5C1.1(f).

Guideline §5G1.1 explains the interplay between the guideline ranges in the sentencing table and the penalty ranges set by statute. It allows sentence to be imposed at any point within the guideline range, so long as the

sentence is not outside statutory limits. *See* §5G1.1(c). When the entire range is above the statutory maximum, the maximum becomes the guideline sentence. §5G1.1(a). Similarly, the statutory minimum is the guideline sentence if it is greater than any sentence in the guideline range. §5G1.1(b). Guidelines §5G1.2 and §5G1.3 provide rules for imposing sentence on multiple counts, and for a defendant subject to an undischarged prison term. These provisions can require partially or fully consecutive sentences in certain circumstances.

**Departures.** Together, Parts H and K set out the Commission’s policies on the factors that may be considered in departing from, or fixing a sentence within, the guideline range. These parts were substantially rewritten in response to the 2003 PROTECT Act; the new provisions should be carefully reviewed even by lawyers familiar with past guideline practice.

Part H sets out policy statements on the relevance to sentencing of certain offender characteristics, including age, education and vocational skills, employment record, family ties and responsibilities, and community ties. The Commission’s policy is that these characteristics are “not ordinarily relevant” in determining the propriety of a departure. U.S.S.G. Ch.5, Pt.H, intro. comment. The operative word is “ordinarily”—in exceptional cases, one or more of those characteristics may support a departure. Even in the ordinary case, those characteristics may be relevant to sentencing decisions other than departure, such as where to place the sentence within the guideline range.

Certain characteristics listed in Part H can never support a departure, including role in the offense (§5H1.7, p.s.), drug or alcohol dependence and gambling addiction (§5H1.4, p.s.), and lack of guidance as a youth (§5H1.12, p.s.). While family and community ties is usually a potential departure ground in extraordinary cases, it can never be a basis for downward departure in a child or sex offense. §5H1.6, p.s. Other characteristics are never relevant to the determination of any sentence: race, sex, national origin, creed, religion, and socio-economic status. §5H1.10, p.s.

Part K provides policy statements on departures. It authorizes a downward departure—on the government’s motion—if the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” §5K1.1, p.s.; *cf.* 18 U.S.C. § 3553(b)(2)(A)(iii) (2003 PROTECT Act amendment allowing substantial assistance departures in child and sex cases). (Cooperation is discussed below, under “Plea Bargaining Under the Guidelines.”)

For a departure on a ground other than cooperation, policy statement §5K2.0 states general principles, and provides special rules for downward departure in child and sex offenses. Generally, a departure may be warranted when a case presents a circumstance that the Commission has identified as a potential departure ground; it may also be warranted in an “exceptional” case, based on a circumstance the Commission has not identified, on one it considers “not ordinarily relevant” under Part H, or on one that, although taken into account in determining the guideline range, is present in an exceptionally great (or small) degree. §5K2.0(a)(2), (3), (4). A circumstance that would not alone make a case “exceptional” may do so in combination with other circumstances, and thus justify a departure, but only if each circumstance is identified in the *Guidelines Manual* as a permissible departure ground. §5K2.0(c).

Like Part H, the policy statements of Part 5K prohibit certain circumstances as departure grounds, including a defendant’s financial difficulties and post-offense rehabilitative efforts. §5K2.0(d), §5K2.12, §5K2.19. Other circumstances are identified as potential grounds for departure, usually upward. Six listed circumstances may support a downward departure, however: (1) victim’s wrongful provocation, (2) commission of a crime to avoid a perceived greater harm, (3) coercion and duress, (4) diminished capacity, (5) voluntary disclosure of the offense, and (6) aberrant behavior. For child and sex offenses, the grounds supporting downward departure are far more limited. *See* §5K2.0(b), §5K2.22, p.s.

For exceptionally busy districts, the PROTECT Act amendments also added a specific provision allowing for departures of up to 4 levels pursuant to a Government-authorized early-disposition program. §5K3.1, p.s.; *cf.* Pub. L. No. 108-21, § 401(m)(2)(B) (directing Commission to provide for early-disposition departures).

**Chapter Six: Sentencing Procedures and Plea Agreements.** Chapter Six sets forth procedures for determining facts relevant to sentencing. It provides policy statements for preparing and disclosing the presentence report, resolving disputed sentencing issues, and considering plea agreements and stipulations.

In resolving factual disputes, the court is not bound by the rules of evidence, but may consider any information that “has sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. §6A1.3(a), p.s. The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence,

*id.* comment. para. 4,<sup>13</sup> and the burden of ultimate persuasion rests on the party seeking to adjust the sentence—upward or downward. While “[w]ritten statements of counsel or affidavits of witnesses” may often provide an adequate basis for sentencing findings, “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” §6A1.3, p.s., comment. para. 2.

If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, Chapter Six requires that it must “provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure.” U.S.S.G. §6A1.2, p.s., comment. (n.1); *see also* FED. R. CRIM. P. 32(h) (same)

Chapter Six, Part B sets out the *Guideline Manual*’s procedures and standards for accepting plea agreements. The standards vary with the type of agreement. *See* FED. R. CRIM. P. 11(c)(1). While the parties may stipulate to facts as part of a plea agreement, “[t]he court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.” §6B1.4(d), p.s. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant “the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines.” §6B1.2, p.s., comment. para. 5. (Plea agreements are discussed below, under “Plea Bargaining Under the Guidelines.”)

**Chapter Seven: Violations of Probation and Supervised Release.** Chapter Seven sets out policy statements applicable to revocation of probation and supervised release. The policy statements classify

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13. Certain guidelines may require a higher standard of proof in specific contexts. *See, e.g.,* U.S.S.G. §3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt). Due process may likewise require a higher standard for certain guideline applications, and departures. *See, e.g., United States v. Kikumura*, 918 F.2d 1084, 1103 (3d Cir. 1990) (when the court “departs upwards dramatically,” due process requires that “factual findings must be supported by clear and convincing evidence, and hearsay statements cannot be considered unless other evidence indicates that they are reasonably trustworthy”) (footnote omitted); *United States v. Jordan*, 256 F.3d 922, 927–30 (9th Cir. 2001) (applying six-factor test to determine whether guideline application has “disproportionate effect” that requires application of clear and convincing evidence standard); *cf. United States v. Watts*, 519 U.S. 148, 156–57 & n.2 (1997) (noting possible constitutional challenge to preponderance standard for relevant conduct).

violations of conditions, guide probation officers in reporting those violations to the court, and propose dispositions for them. For violations leading to revocation, policy statement §7B1.4 provides an imprisonment table similar in format to the sentencing table. Unlike the ranges in the sentencing table, the ranges in the revocation table are not binding, but the court is required by statute to consider them. *See* 18 U.S.C. § 3553(a)(4)(B).

### Chapter Eight: Sentencing of Organizations.

When a convicted defendant is an organization rather than an individual, sentencing is governed by Chapter Eight.

**Appendices.** The official *Guidelines Manual* includes three appendices. Appendix A is an index specifying the offense conduct guideline or guidelines that apply to a conviction under a particular statute. Appendix B sets forth selected sentencing statutes. The two-volume Appendix C comprises the amendments to the *Guidelines Manual* since its initial publication in 1987.

## Applying the Guidelines

**Step-by-Step Application.** Step-by-step instructions for using the guidelines are prescribed in guideline §1B1.1. Worksheets implementing these steps have been published by the Commission; the worksheets for individuals are appended to this paper. The following description follows the worksheets, which may assist newcomers to the guidelines.

- Prepare a separate Worksheet A (Offense Level) for each count of conviction. Determine the applicable guideline by reference to guideline §1B1.2 and Appendix A—Statutory Index. A conviction for conspiracy to commit more than one offense is treated as if the defendant were convicted on a separate conspiracy count for each offense. §1B1.2(d). If the defendant has entered into a plea agreement stipulating to having committed an additional offense, the stipulated offense must be treated as an additional count of conviction. §1B1.2(c).
- From the offense conduct guideline in Chapter Two, determine the base offense level and any applicable specific offense characteristics. Offense conduct is usually determined by reference to the relevant-conduct guideline, which frequently includes conduct from dismissed or acquitted counts, or even uncharged offenses. *See* §1B1.3, comment. (backg'd). Do not overlook any cross-reference to another offense guideline.

- Make all applicable adjustments from Chapter Three, Parts A, B, and C: victim-related adjustments, role in the offense, and obstruction. Unless otherwise specified, these adjustments are based upon all relevant conduct as defined in guideline §1B1.3(a).
- If more than one count is being scored, use Worksheet B to apply Chapter Three, Part D (Multiple Counts), to group the counts and adjust the offense level if required.
- Consider the anticipated adjustment, if any, for acceptance of responsibility under Chapter Three, Part E.
- Referring to Chapter Four, Part A, use Worksheet C to determine the criminal history category. Take care to examine any issues of exclusion, staleness, relatedness, or invalidity of prior convictions.
- Proceeding to Worksheet D, check carefully whether the terrorism guideline §3A1.4, the career offender guideline, §4B1.1, or the criminal livelihood guideline, §4B1.3, applies. In an armed career criminal case, apply guideline §4B1.4. In a case of sex offense against a minor, check whether guideline §4B1.5 applies. Remember that these guidelines can dramatically increase the applicable range.
- Using the total offense level and the criminal history category, determine the applicable guideline range from the sentencing table, Chapter Five, Part A. From this range, determine all applicable sentencing requirements and options from Chapter Five, Parts B through G. For each count of conviction, consider whether the statutory maximum or minimum sentence affects the guideline range. §5G1.1. In a drug case, consider whether the defendant qualifies for relief from a statutory minimum under the “safety valve” guideline, §5C1.2. If the defendant faces multiple counts, or is subject to an undischarged term of imprisonment, consider the effect of §5G1.2 and §5G1.3.
- Consider any possible grounds for departure, upward or downward. Take note of any specific suggestions for departure contained in commentary to the offense conduct guidelines in Chapter Two. Review the total criminal history—not just countable convictions—for possible departure in light of policy statement §4A1.3, Adequacy of Criminal History Category. Study the policy statements in Chapter Five, Part H (Specific Offender Characteristics); and in Chapter Five, Part K (Departures). Keep in mind that, except in child and sex offenses, departure grounds are not limited to those discussed by the Commission, and identified grounds not justifying departure individually may combine to support a departure in a particular case. *See* §5K2.0(a)(2)(B), p.s.; §5K2.0(c), p.s. A major part of sentencing advocacy on behalf of the defendant is

resisting an upward departure and seeking a downward departure.

**Sentencing Hearing.** Preparing for the sentencing hearing requires familiarity with the procedures for disclosing the presentence report and objecting to it, and for resolving disputes both before and during the hearing. These procedures are set out in Federal Rule of Criminal Procedure 32 and Chapter Six, Part A of the *Guidelines Manual*, and they may also be governed by local court rules or practices. At the sentencing hearing, counsel must scrupulously observe traditional rules on preservation of error to protect issues for possible appeal under 18 U.S.C. § 3742.

## Plea Bargaining Under the Guidelines

Federal Rule of Criminal Procedure 11(c)(1) and policy statement §6B1.2 describe three forms of plea agreement: charge bargain, sentence recommendation, and specific, agreed sentence.<sup>14</sup> While other forms of plea agreement are possible, these are the most common, and each has important consequences under guideline sentencing. A charge bargain must be carefully analyzed to determine whether its supposed benefit is real or illusory, once the effect of relevant conduct and multiple-count grouping have been considered. Other, equally important considerations affect the possible benefits of sentence-recommendation and sentence-agreement bargains. In all cases, the potential value of an acceptance-of-responsibility adjustment must be carefully considered. And because cooperation by the defendant is a common element of a plea bargain, the statutory and guideline provisions that affect cooperating defendants can be of paramount importance. Each of these subjects is discussed below. (They are also discussed in connection with prosecution policies announced in 2003. See below, under “Some Traps for the Unwary.”)

**Charge Bargaining.** Policy statement §6B1.2(a) authorizes the court to accept a defendant’s plea to one or more charges under Rule 11(c)(1)(A), in exchange for the dismissal of others, if “the remaining charges adequately reflect the seriousness of the actual offense behavior” and “accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Federal plea bargaining has

typically involved this form of agreement, under which a defendant has the right to withdraw his plea to the bargained charges if the other charges are not dismissed. Charge bargains, however, will often have little effect on the guideline range. This is because of the dramatic impact of two related guideline concepts: relevant conduct and multiple-count grouping.

**Relevant conduct.** The common plea agreement calling for dismissal of counts will not reduce the offense level if the subject matter of the dismissed counts is “relevant conduct” for purposes of determining the guideline range. See U.S.S.G. §1B1.3. For example, a defendant charged with multiple counts of distributing controlled substances who pleads guilty to only one count will usually have a base offense level determined from the total amount of drugs involved in all counts.

Despite the effect of the relevant conduct, charge bargaining can confer important benefits at sentencing. When one of the counts is governed by a Chapter Two guideline with a lower offense level, a plea to that count may produce a lower guideline range.<sup>15</sup> Even if a count does not have a lower guideline range, it may carry a lower statutory maximum. Because statutes “trump” guidelines, a given count may cap the maximum sentence below the probable guideline range for the case, *see* §5G1.1(a), or avoid a statutory minimum that would raise a sentence above the otherwise-applicable guideline range, *see* §5G1.1(b). Even when the estimated guideline range falls within the statutory sentencing range, a charge bargain to a count with a lower statutory maximum can limit the extent of an upward departure.

**Multiple-count grouping.** A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which separate charges involve substantially the same harm. When counts are grouped, a single offense level—the highest of the counts in the group—applies to those counts of conviction. §3D1.3(a). In such cases, the offense level will not be adjusted upward even if a defendant is convicted of multiple counts. However, in the case of offenses that the guidelines do not group—such as robberies—Chapter Three, Part D may require an upward adjustment for multiple convictions. Dismissing counts will avoid this adjustment, provided the defendant does not stipulate to all the elements of the dismissed offenses as part of a plea bargain.

14. Policy statement §6B1.2 and other provisions of the 2003 *Guidelines Manual* refer to the Federal Rules of Criminal Procedure as they were numbered before their amendment effective December 1, 2002. Before that date, the provisions of Rule 11(c) were found in subdivision (e).

15. However, dismissed charges not considered in determining the guideline range can provide grounds for upward departure. §5K2.21, p.s.

Regardless of the grouping rules, some statutes—most notably 18 U.S.C. § 924(c)—require a consecutive sentence.

### **Sentencing Recommendation; Specific**

**Sentencing Agreement.** In addition to charge bargains, Federal Rule of Criminal Procedure 11 authorizes the prosecutor to make nonbinding recommendations, and binding agreements, with regard to the sentence to be imposed. Rule 11(c)(1)(B) authorizes the prosecutor to recommend, or agree not to oppose, a particular sentence or sentencing range, or the application of a particular guideline or policy statement. A court may accept such a recommendation only if the proposed sentence is within the applicable guideline range or departs from the range for justifiable reasons. U.S.S.G. §6B1.2(b), p.s. Sentence recommendations under Rule 11(c)(1)(B) are non-binding: A defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw his plea. FED. R. CRIM. P. 11(c)(3)(B).

Rule 11(c)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence, a sentence within an agreed guideline range, or the application of a particular guideline or policy statement. As with sentence recommendations, these agreements may be approved if the agreed sentence is within the calculated guideline range or is a justified departure. U.S.S.G. §6B1.2(c), p.s. But unlike sentence-recommendation agreements, Rule 11(c)(1)(C) agreements are binding: If the court rejects the proposed sentence, the defendant is entitled to withdraw the plea.

Because a Rule 11(c)(1)(C) sentence bargain severely limits sentencing discretion, counsel seeking one may encounter resistance or categorical rejection from the prosecutor or the judge. If an agreement to a specific sentence cannot be obtained, or if court rejection is feared, counsel should consider the less-restrictive forms authorized by the rule, which can still afford the defendant a measure of protection. For example, the parties might agree under Rule 11(c)(1)(C) that a sentence not exceed a certain guideline range, that a particular adjustment apply, or that the court not depart. If the court does not follow the parties' agreement on a particular sentence component, the defendant can withdraw the plea.

**Acceptance of Responsibility.** Sometimes, the only perceived guideline-range benefit for a plea of guilty will be the adjustment for acceptance of responsibility. Pleading guilty does not ensure the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. The court's

determination of acceptance of responsibility "is entitled to great deference on review." U.S.S.G. §3E1.1, comment. (n.5). Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.<sup>16</sup> Nevertheless, while "[a] defendant may remain silent" about relevant conduct, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *Id.* (n.1(a)).

In evaluating the prospects for an acceptance-of-responsibility adjustment, counsel must guard against giving up a valuable right to trial, solely in pursuit of an adjustment that may already be lost. Scrutinize all pertinent facts that may bear upon this determination, paying special attention to the possibility of an adjustment for obstruction of justice under guideline §3C1.1. *See* U.S.S.G. §3E1.1, comment. (n.4). When it is certain that a defendant will not receive the adjustment for acceptance of responsibility even upon a plea of guilty, and the plea confers no other benefit, then the plea will not improve the guideline range. Even so, a guilty plea may benefit the defendant—by diminishing the risk of an upward departure, improving the possibility or extent of a downward departure, or inducing the court to impose a lower sentence within the range.

Even when the acceptance adjustment is not in doubt, counsel should consider whether plea bargaining could help obtain a Government motion for a third level of reduction under §3E1.1(b), as required by the 2003 PROTECT Act. Note, however, that the plain language of the amended guideline does not require entry into a plea agreement, but only "timely notifi[cation]" of an "intention to enter a plea of guilty." *Id.*

**Cooperation.** Congress directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a lower sentence "to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has

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16. In contrast, the "safety valve" specifically requires that, before a defendant can be sentenced below a statutory minimum, he must provide the government with all information and evidence concerning not only the offense, but also "offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(5); *see also* U.S.S.G. §5C1.2(a)(5) (same).

committed an offense.” 28 U.S.C. § 994(n).<sup>17</sup> The Commission responded to this directive by promulgating policy statement §5K1.1. The policy statement requires a motion by the government before the court can depart for substantial assistance. While §5K1.1 is a policy statement, not a guideline, the government’s motion is “the condition limiting the court’s authority” to reduce sentence. *Wade v. United States*, 504 U.S. 181, 185 (1992) (dictum). A departure below a statutory minimum on the basis of substantial assistance similarly requires a motion by the government. 18 U.S.C. § 3553(e). When the court considers a cooperation motion, it should give “[s]ubstantial weight” to “the government’s evaluation of the extent of the defendant’s assistance”; however, the ultimate determination of the value of the defendant’s assistance is for the court to make. §5K1.1(a)(1), p.s. & comment. (n.3). Even without a government departure motion, cooperation can benefit the defendant at sentencing, as the court can consider it in placing the sentence within the guideline range, or in determining the extent of a departure based on other grounds. By contrast, “[a] defendant’s refusal to assist authorities . . . may not be considered as an aggravating sentencing factor.” §5K1.2, p.s.

A defendant contemplating cooperation should always seek the protection of Federal Rule of Evidence 410 and guideline §1B1.8. With limited exceptions, Rule 410 renders inadmissible, in any civil or criminal proceeding, any statement made in the course of plea discussions with an attorney for the government, even if the discussions do not ultimately result in a guilty plea.<sup>18</sup> See also FED. R. CRIM. P. 11(f). Guideline §1B1.8 permits the parties to agree that information provided by a cooperating defendant will not be used to increase the applicable guideline range.

Guideline §1B1.8 has limited effect. The information can still be used if it was previously known to the government; if it relates to criminal history; if the defendant is prosecuted for perjury or false statement; or if the defendant breaches the cooperation agreement. Moreover, §1B1.8 protects the defendant only in determining the guideline range, not from fixing the sentence higher within the range or departing upward. While it is the “policy of the Commission” that information “shall not be used” for an upward

departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

## Some Traps for the Unwary

**Pretrial Services Interview.** In most courts, a pretrial services officer (or a probation officer designated to perform pretrial services) will seek to interview arrested persons before their initial appearance, to gather information pertinent to the release decision. The information will be made available to the court, the prosecutor, and defense counsel, and later to the probation officer preparing any presentence report. 18 U.S.C. § 3153(c)(1), (c)(2)(C). Absent specified exceptions, however, information obtained during pretrial services functions “is not admissible on the issue of guilt in a criminal judicial proceeding.” § 3153(c)(3). Certain information pertinent to the release decision—including criminal history (especially juvenile adjudications and tribal court convictions that might otherwise be unavailable), earnings history, and possession of a special skill—can raise the guideline range, provide a basis for upward departure, or affect the decision to impose a fine or restitution. Whenever possible, counsel should advise the defendant of these considerations before the interview, with scrupulous care that any information provided be truthful. A finding that the defendant provided false information can lead to denial of acceptance of responsibility, an upward adjustment for obstruction, or the filing of additional charges. Because of these dangers, counsel who enters a case after the report is prepared must learn what information was acquired by the officer to be aware of its possible effect.

**New Prosecution Policies.** In response to the 2003 PROTECT Act, the Department of Justice has announced important new policies on filing charges, plea bargaining, sentencing litigation, and appeal. The policies are set out in memoranda from Attorney General John Ashcroft and amendments to the U.S. Attorney’s Manual. Copies of the memoranda are available from the Defender Services Division Training Branch Website, at <http://www.fd.org>. Because they place significant limits on prosecutorial discretion, the new policies should be carefully reviewed by any lawyer defending a federal criminal case. In certain districts, a new policy on “fast-track” early disposition programs may be of prime importance.

**Filing charges and plea bargaining.** The new charging policy builds upon long-standing Department guidelines. It requires that the prosecutor charge the “most serious, readily provable offense or offenses that are supported by the facts of the case.” Attorney

17. For cooperation departures in child and sex offenses, see also 18 U.S.C. § 3553(b)(2)(A)(iii).

18. A defendant may waive the protections of Rule 410 as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).



General Memorandum Entitled “Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing” (Charging Memorandum) at 2 (Sept. 22, 2003). The “most serious” offense or offenses are those that trigger the longest required sentence, under either the guidelines or an applicable statutory minimum. *Id.* “Readily provable” is defined negatively: “A charge is not ‘readily provable’ if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government’s ability readily to prove a charge at trial.” *Id.* Once charges are filed, they may not be dismissed by plea agreement except under limited circumstances. If the dismissal would affect the guideline range, or remove a controlling statutory minimum or consecutive term, then documented supervisory approval of the agreement is required. *Id.* at 3–5. (The only exception to the documented-approval requirement is for “fast-track” dispositions, described below.)<sup>19</sup>

Defense counsel must be prepared to negotiate in light of these new policies. If possible, counsel should attempt to avoid charges before they are brought. The key is challenging what the prosecutor perceives as “readily provable”; counsel should attempt to demonstrate that legal or evidentiary hurdles make a charge or charges difficult to prove at trial. If charges have already been brought, counsel may have to litigate to raise good faith doubts that may allow charges to be dismissed. Vigorous defense is often the most effective tool of negotiation.

**Sentencing litigation and appeals.** The concept of ready provability also plays a key role in the Department of Justice’s new policies on sentencing litigation and appeal. Under the new policies, prosecutors must bring all readily provable facts before the sentencing court; they cannot stand silent, but must actively oppose any adjustment or departure not supported by the facts and the law. *See* Charging Memorandum at 5–6; Attorney General Memorandum Entitled Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (Sentencing Memorandum), at 2–3 (July 28, 2003). And in the case of any “adverse” sentencing decision, the prosecutor must file notice of appeal and notify the appropriate division of the Department of Justice in Washington. Sentencing Memorandum at 4.

“Adverse sentencing decision” is defined in an amendment to the U.S. Attorneys’ Manual § 9-2.170(B). *See* Sentencing Memorandum, App. The amended section sets out categories of sentencing determinations that the government must oppose and appeal. Any sentence illegally below a statutory minimum is included, as is the award of a third level off for acceptance of responsibility without a government motion. The rest of the specified adverse decisions are downward departures. Not all departures are automatically considered “adverse,” however; some need not be challenged, depending on the grounds for departure, the size and effect of the sentence reduction, and whether the departure was made over government objection.

Counsel should carefully review the amended section, particularly its requirements for litigating and appealing downward departures. In light of those requirements, counsel may consider tailoring departure requests to obtain government agreement or non-opposition, thereby avoiding sentencing-court litigation or possible reversal on appeal.

**“Fast-track” disposition.** Although the 2003 PROTECT Act was intended to reduce the number of downward departures, Congress made special provision for “fast-track” programs—programs that allow downward departures of up to 4 levels in exchange for early disposition of some cases. *See* Pub. L. No. 108-21, § 401(m)(2)(B); *see also* U.S.S.G. §5K3.1, p.s. A Department of Justice memorandum sets out the required criteria for such programs, which must be approved by both the Attorney General and the local U.S. Attorney. *See* Attorney General Memorandum Entitled “Department Principles for Implementing an Expedited Disposition or ‘Fast-Track’ Prosecution Program in a District” (July 28, 2003). At a minimum, a fast-track program must require that the defendant agree to the factual basis and waive the rights to file pretrial motions, to appeal, and to seek collateral relief (except for ineffective assistance). *Id.* at 2–3. (Waivers are further discussed below, under “Waiver of Sentencing Appeal.”)

In districts with a large volume of a particular category of cases, defense counsel should determine whether a fast-track program is in place; if so, counsel must consider whether it would benefit the defendant to participate, in light of the important rights that the program may require the defendant to relinquish.

**Waiver of Sentencing Appeal.** One of the most important safeguards put in place by the Sentencing Reform Act was the right of appellate review of guideline sentences and departures. *See* 18 U.S.C.

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19. Similar constraints apply to the decision to seek or forego a statutory sentence enhancement, such as those that may be sought under 21 U.S.C. § 851 for defendants with prior drug convictions. *Id.* at 4.

§ 3742. Sentencing Commission statistics for 2001 indicate that more than 1 out of 7 sentencing appeals resulted in complete or partial reversal.

In many districts, prosecutors attempt to insulate sentences from review under § 3742 by requiring the defendant to waive the right to appeal the sentence as part of a plea agreement. The Supreme Court has never sanctioned these appeal waivers, and a number of district judges have refused to accept them as part of a plea bargain.<sup>20</sup> However, they have been approved by every court of appeals that has considered them (with some limitations).<sup>21</sup> Federal Rule of Criminal Procedure 11(b)(1)(N) requires the district court to advise the defendant of the terms of any bargained sentencing-appeal waiver as part of the plea colloquy.

Unthinking acceptance of an appeal waiver can have disastrous results for the client. The waiver is usually accepted before the presentence report is prepared; at that time, the defendant cannot know what possible errors the probation officer, or the court, will make in determining the guideline range or the propriety of a departure. Counsel can defend against this danger by refusing to agree to a waiver, or by demanding concessions in exchange for it (e.g., that the prosecutor agree to a binding sentence or guideline range, or a provision that the court not depart). If the prosecutor insists on the waiver, and refuses to give valuable

concessions in exchange for it, defense counsel should carefully consider with the defendant whether to plead without an agreement, or go to trial. Counsel should also resist any proposed waiver that does not except appeals or collateral attacks based on ineffective assistance or prosecutorial misconduct; without these exceptions, the waiver presents the serious ethical problem of lawyers bargaining to protect themselves from possible future liability.<sup>22</sup>

**Presentence Investigation Report and Probation Officer's Interview.** In most cases, a probation officer will provide a presentence investigation report to the court before imposition of sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c). The importance of the report cannot be overstated. In it, the probation officer will recommend fact findings, guideline calculations, and potential grounds for departure, recommendations that often have a determinative effect on the sentence ultimately imposed. After sentencing, the report may affect the Bureau of Prisons' placement decision, conditions of confinement, and eligibility for prison programs; it can also affect the conditions of probation or supervised release. And under the 2003 PROTECT Act, the report must be disclosed not only to the Sentencing Commission, but also to Congress when requested. Pub. L. No. 108-21, § 401(h) (amending 28 U.S.C. § 994(w)).

Many presentence report recommendations, while nominally objective, have significant subjective components. The probation officer's attitude toward the case or the client may substantially influence the sentence recommendations, which enjoy considerable deference from both the judge at sentencing and the reviewing court on appeal. For these reasons, the effective advocate will independently review all elements of the probation officer's report to make any necessary objections and affirmatively present the defense case for a favorable sentence. Counsel should never assume that the probation officer has arrived at a favorable recommendation, or even a correct one.

The probation officer's presentence investigation will usually include an interview of the defendant. Broader than the interview conducted by pretrial services, this

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20. See, e.g., *United States v. Johnson*, 992 F. Supp. 437 (D.D.C. 1997) (refusing to accept plea bargain containing appeal waiver provision); *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997) (same); see also *United States v. Melancon*, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring) (expressing serious misgivings about legality and wisdom of appeal waivers).

21. See, e.g., *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (appeal waiver not binding when sentencing error would work a miscarriage of justice); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001) (same); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (appeal waiver does not bar appeal if sentence exceeded maximum authorized penalty or was based on constitutionally impermissible factor); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000) (appeal waivers, like other contracts, subject to public policy constraints); *United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (refusing to enforce a broad waiver that would expose the defendant to “a virtually unbounded risk of error or abuse by the sentencing court”); *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (waiver not binding if sentence imposed on basis of ethnic bias); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (waiver cannot subject defendant to sentencing at whim of district court); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (waiver does not prevent appeal if sentence imposed is not in accordance with negotiated agreement).

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22. See Ohio Advisory Ethics Op. 2001-6 (2001); Tennessee Advisory Ethics Op. 94-A-549 (1994); North Carolina Ethics Op. 129 (1993). In his memorandum on “fast-track” programs, Attorney General Ashcroft discusses appeal waivers that except ineffective assistance claims; however, he makes no mention of prosecutorial misconduct. See Attorney General Memorandum Entitled “Department Principles for Implementing an Expedited Disposition or ‘Fast-Track’ Prosecution Program in a District,” at 3 (July 28, 2003).

interview has even greater potential to increase a sentence in specific, foreseeable ways. Disclosing undetected relevant conduct may, by operation of guideline §1B1.3, increase the offense level. Information first revealed during the presentence interview may affect Chapter Three adjustments, such as obstruction of justice and acceptance of responsibility. Revelations of undiscovered criminal history may increase the criminal history score or provide a ground for departure. Other revelations, such as drug use and criminal associations, may result in an unfavorable adjustment or upward departure, or support a higher sentence within the guideline range.

Because the presentence interview holds many perils, the defendant must fully understand its function and importance, and defense counsel should attend the interview. *See* FED. R. CRIM. P. 32(c)(2) (requiring that probation officer give counsel notice and reasonable opportunity to attend interview). In some cases, counsel may decide to limit the scope of the presentence interview. While the privilege against self-incrimination applies to sentencing issues, *Mitchell v. United States*, 526 U.S. 314 (1999), refusal to submit to an unrestricted presentence interview is often hazardous. It can jeopardize the adjustment for acceptance of responsibility or adversely affect other incidents of the sentence, including the placement of the sentence within the guideline range. There is no fixed solution to this dilemma; counsel must make an informed decision as to the best course in the context of the particular case.

**Guideline Amendments.** Title 28 U.S.C. § 994(p) authorizes the Commission to submit guideline amendments to Congress by May 1 of each year. Absent congressional modification or disapproval, the amendments ordinarily take effect November 1. Congress can also amend guidelines itself or direct the Commission to promulgate amendments outside the regular amendment cycle. *See, e.g.*, Pub. L. No. 108-21, §§ 401(b), 401(g), 401(j) (PROTECT Act amendments to *Guidelines Manual*); *id.*, §401(m) (directing Commission to amend departure guidelines and policy statements). Since the guidelines were first promulgated in 1987, they have been amended 662 times; many of these amendments changed multiple guideline provisions. All the amendments, along with explanatory notes, are contained in Appendix C to the *Guidelines Manual*.

Normally, the guidelines in effect on the date of sentencing apply. U.S.S.G. §1B1.11(a).<sup>23</sup> But if a

detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing, the Ex Post Facto Clause bars its application. *See United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir. 1994) (noting circuits' agreement on issue); *cf. Miller v. Florida*, 482 U.S. 423 (1987) (Clause bars retrospective application of harmful amendment to state sentencing guideline). Each guideline includes a historical note, which facilitates determining whether the guideline has been amended since the offense was committed. If ex post facto principles require use of an earlier guideline, the Commission requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety." U.S.S.G. §1B1.11(b)(2).<sup>24</sup>

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission, paying particular attention to amendments that the Commission denominates "clarifying." Clarifying amendments are intended to explain the meaning of previously-promulgated guidelines, and the Ex Post Facto Clause may not bar their application to offenses committed before their effective date. If a proposed clarifying guideline amendment benefits the client, counsel should seek its application even before the effective date, arguing that it provides authoritative guidance as to the meaning of the current guideline.<sup>25</sup> On the other hand, if a proposed amendment is harmful, counsel should not automatically accede to its retroactive application, simply because the Commission characterized it as "clarifying." A number of courts have held that when a harmful "clarifying" amendment changes circuit precedent, it may not be

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of the guidelines in effect on the date of the previous sentencing. 18 U.S.C. § 3742(g)(1).

24. The 2003 PROTECT Act requires that any congressional guideline amendments in place at the time of sentencing be applied "regardless of whether such amendments have yet to be incorporated" into the *Guidelines Manual*. 18 U.S.C. § 3553(a)(4)(A)(i); *see also* § 3553(a)(5)(A) (same, policy statements). But congressional guideline amendments, like any others, are subject to ex post facto prohibitions. *See, e.g., United States v. Briceno*, No. 01 CR.943 LTS, 2003 WL 22025870, at \*6 n.6 (S.D.N.Y. Aug. 23, 2003) (declining to apply PROTECT Act amendment to §3E1.1 in sentencing for 2001 offense); *United States v. Lester*, 268 F. Supp. 2d 514, 515 n.2. (E.D. Penn. 2003) (government agrees that PROTECT statutory and guideline amendments are inapplicable to sex offense that occurred before statute was enacted).

25. Even if a beneficial amendment is not deemed "clarifying," it may support a request for downward departure before its effective date.

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23. The 2003 PROTECT Act provides an exception to this rule in the case of a resentencing on remand after appeal. In such a case, the sentencing range is determined by application

retroactively applied. *See, e.g., United States v. Capers*, 61 F.3d 1100, 1110–12 (4th Cir. 1995).

Some amendments may benefit a defendant who is already serving an imprisonment term. If the Commission expressly provides that a beneficial amendment has retroactive effect, and the amendment would reduce the defendant's guideline range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); U.S.S.G. §1B1.10, p.s.

**Validity of Guidelines.** In keeping with express statutory language and with general principles of delegation, the Sentencing Commission's guidelines, policy statements, and commentary must be consistent with all pertinent statutory provisions. 28 U.S.C. § 994(a). They must also, of course, conform to the requirements of the Constitution. *See Mistretta v. United States*, 488 U.S. 361 (1989) (considering constitutional challenges to guideline sentencing); *cf. Apprendi v. New Jersey*, 530 U.S. 466, 543–45 (2000) (O'Connor, J., dissenting) (questioning the continuing validity of guideline enhancements in light of principle announced by majority); *Blakely v. Washington*, 124 S. Ct. 429 (2003) (granting certiorari to consider the constitutionality of state guideline system in light of *Apprendi*). Counsel must scrutinize all pertinent provisions for both statutory and constitutional validity, with special attention to recent amendments. *See, e.g., United States v. LaBonte*, 520 U.S. 751 (1997) (invalidating guideline amendment as contrary to congressional directive in 28 U.S.C. § 994).

## Telephone Support and Online Information

The Defender Services Division Training Branch, Administrative Office of the U.S. Courts, provides a toll-free hotline for federal defender organizations and private attorneys providing defense services under the Criminal Justice Act. The number is 800-788-9908. The Sentencing Commission also offers telephone support on the guidelines, at 202-502-4545.

Information on guideline sentencing is also available on the Internet. Some of the most useful sites follow.

- The U.S. Sentencing Commission Website, which contains a wealth of well-organized material, <http://www.ussc.gov>.
- Defender Services Division Training Branch Website, which includes numerous federal sentencing documents and commentary, <http://www.fd.org>.
- The Federal Judicial Center Website, which includes a variety of sentencing information, including *Guideline*

*Sentencing: An Outline of Appellate Case Law on Selected Issues* (2002), <http://www.fjc.gov>.

- The Department of Justice Website, which includes numerous publications and documents, including the *U.S. Attorney's Manual*, <http://www.usdoj.gov>.

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An explication of the guidelines and strategies from both the prosecution and the defense perspective; includes historical and background material.

FEDERAL DEFENDERS OF SAN DIEGO, INC., *Defending a Federal Criminal Case* (2001). A comprehensive manual on all aspects of federal criminal practice, with an extensive chapter on guideline sentencing. For ordering information, see <http://www.fdsdi.com>.

ROGER W. HAINES JR. ET AL., *Federal Sentencing Guidelines Handbook* (West Group 2003). An annotated version of the *Guidelines Manual*, with authors' notes and extensive case citations.

THOMAS W. HUTCHISON ET AL., *Federal Sentencing Law and Practice* (West Group 2003). A guidelines manual with extensive annotations and additional materials.

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**Authors**

Lucien B. Campbell and Henry J. Bemporad  
Office of the Federal Public Defender  
Western District of Texas  
727 E. Durango Boulevard, B-207  
San Antonio, Texas 78206-1278  
Telephone: 210-472-6700  
E-Mail: [IntroFGS@fd.org](mailto:IntroFGS@fd.org)

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# Worksheet A (Offense Level)

Defendant \_\_\_\_\_ District/Office \_\_\_\_\_

Docket Number (Year-Sequence-Defendant No.) \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Count Number(s) \_\_\_\_\_ U.S. Code Title & Section \_\_\_\_\_ : \_\_\_\_\_  
\_\_\_\_\_ : \_\_\_\_\_

Guidelines Manual Edition Used: 20\_\_\_\_ (NOTE: worksheets keyed to the Manual effective November 1, 2001)

## Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

### 1. Offense Level (See Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

<u>Guideline</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Sum

### 2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ \_\_\_\_\_

### 3. Role in the Offense Adjustments (See Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

§ \_\_\_\_\_

### 4. Obstruction Adjustments (See Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ \_\_\_\_\_

### 5. Adjusted Offense Level

Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

☐

If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

# Worksheet B

## (Multiple Counts or Stipulation to Additional Offenses)

Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

### Instructions

**Step 1:** Determine if any of the counts group. (Note: All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of confiction (see §3D1.2(a)). Explain the reasons for grouping:

\_\_\_\_\_

\_\_\_\_\_

**Step 2:** Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various "A" Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: A "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

**Step 3:** Enter the number of units to be assigned to each group (see §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. **Adjusted Offense Level for the First Group of Closely Related Counts**

Count number(s): \_\_\_\_\_

\_\_\_\_\_ (unit)

2. **Adjusted Offense Level for the Second Group of Closely Related Counts**

Count number(s): \_\_\_\_\_

\_\_\_\_\_ (unit)

3. **Adjusted Offense Level for the Third Group of Closely Related Counts**

Count number(s): \_\_\_\_\_

\_\_\_\_\_ (unit)

4. **Adjusted Offense Level for the Fourth Group of Closely Related Counts**

Count number(s): \_\_\_\_\_

\_\_\_\_\_ (unit)

5. **Adjusted Offense Level for the Fifth Group of Closely Related Counts**

Count number(s): \_\_\_\_\_

\_\_\_\_\_ (unit)

6. **Total Units**

\_\_\_\_\_ (total units)

7. **Increase in Offense Level Based on Total Units (See §3D1.4)**

1 unit:	no increase	2 1/2 - 3 units:	add 3 levels
1 1/2 units:	add 1 level	3 1/2 - 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. **Highest of the Adjusted Offense Levels from Items 1-5 Above**

9. **Combined Adjusted Offense Level (See §3D1.4)**

Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.

# Worksheet C (Criminal History)

Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) \_\_\_\_\_

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)
2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and  
  
2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)
3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and  
  
1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

\* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

\*\* A release date is required in only three instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
  - b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
  - c. When §4A1.1(e) applies because the defendant was released from custody on a sentence counted under 4A1.1(a) or 4A1.1 (b) within 2 years of the instant offense or was still in custody on such a sentence at the time of the instant offense (see Item 6).
4. Sum of Criminal History Points for prior sentences under §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3).



# Worksheet C

Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

6. 2 Points if the defendant committed the instant offense LESS THAN 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b), or while in imprisonment or escape status on such a sentence. However, enter only 1 Point for this item if 2 points were added at Item 5 under §4A1.1(d). (See §§4A1.1(e) and 4A1.2.) List the date of release and identify the sentence from which release resulted. Otherwise, enter 0 Points.

7. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was considered related to another sentence resulting from a conviction of a crime of violence. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion. (See §§4A1.1(f) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered related. Otherwise, enter 0 Points.

Note: A maximum sum of 3 Points may be given for Item 7.

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8. **Total Criminal History Points** (Sum of Items 4-7)

9. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

<u>Total Points</u>	<u>Criminal History Category</u>
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

# Worksheet D (Guideline Worksheet)

Defendant \_\_\_\_\_

District \_\_\_\_\_

Docket Number \_\_\_\_\_

1. **Adjusted Offense Level** (From Worksheet A or B)

If Worksheet B is required, enter the result from Worksheet B, Item 9.

Otherwise, enter the result from Worksheet A, Item 5.

2. **Acceptance of Responsibility** (See Chapter Three, Part E)

Enter the applicable reduction of 2 or 3 levels. If no adjustment is applicable, enter "0".

3. **Offense Level Total** (Item 1 less Item 2)

4. **Criminal History Category** (From Worksheet C)

Enter the result from Worksheet C, Item 9.

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal/Repeat and Dangerous Sex Offender** (see Chapter Three, Part A, and Chapter Four, Part B)

a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A."

b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**

Enter the applicable guideline range from Chapter Five, Part A.

Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)

If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A."

Months

☐

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

☐

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

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Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6.)  
(See Chapter Five, Sentencing Table)

☐ Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐ Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐ Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- 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 (see §5C1.1(d)(2))

☐ Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of a Term of Probation** (See §5B1.2)

If probation is authorized, the guideline for the length of such term of probation is: (Check applicable box)

- ☐ At least one year, but not more than five years if the offense level total is 6 or more
- ☐ No more than three years if the offense level total is 5 or less

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(9)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

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Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

**12. Supervised Release** (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

- ☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- ☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release) (Check applicable box)

- ☐ Class A or B Felony: Three to Five Year Term
- ☐ Class C or D Felony: Two to Three Year Term
- ☐ Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- ☐ If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. \_\_\_\_\_

**13. Conditions of Supervised Release** (See §5D1.3)

List any mandatory conditions ((a)(1)-(7)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable:

**14. Restitution** (See §5E1.1)

- a. If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason: \_\_\_\_\_
- b. Enter whether restitution is statutorily mandatory or discretionary: \_\_\_\_\_
- c. Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute: \_\_\_\_\_

**15. Fines** (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

- a. Special fine provisions
- |   | <u>Minimum</u> | <u>Maximum</u> |
|---|----------------|----------------|
| <input type="checkbox"/> Check box if any of the counts of conviction is for a statute with a special fine provision. (This does not include the general fine provisions of 18 USC § 3571(b)(2), (d)) |                |                |
| Enter the sum of statutory maximum fines for all such counts  |                | \$ _____       |
- b. Fine Table (§5E1.2(c)(3))
- |                                     |          |          |
|-------------------------------------|----------|----------|
| Enter the minimum and maximum fines | \$ _____ | \$ _____ |
|-------------------------------------|----------|----------|
- c. Guideline Range of Fines:  
(determined by the minimum of the fine table (Item 15(b)) and the greater maximum above (Item 15(a) or 15(b)))
- |  |          |          |
|--|----------|----------|
|  | \$ _____ | \$ _____ |
|--|----------|----------|
- d. Ability to Pay
- ☐ Check this box if the defendant does not have an ability to pay.

# Worksheet D

Defendant \_\_\_\_\_

Docket Number \_\_\_\_\_

## 16. Special Assessments (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction:

- \$25 for each misdemeanor count of conviction
- Not less than \$100 for each felony count of conviction

\$\_\_\_\_\_

## 17. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as required.

[illegible]

Completed by \_\_\_\_\_

Date \_\_\_\_\_

# 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)
Zone A	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
Zone B	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
Zone C	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
Zone D	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