

JOIN THE SAN DIEGO FBA FOR:

# NAVIGATING SENTENCING: KEY FACTORS AND CONSIDERATIONS



Join us for a webinar covering best practices in sentencing, such as judges' preferences, pre-sentencing objections, sentencing briefs, and minor role and safety valve adjustments.

April 9, 2025, 12:00 PM – 1:00 PM

Panelists:

**U.S. District Judge James E. Simmons**  
**Assistant U.S. Attorney Matthew Sutton**  
**Federal Defender Rachel Eaton**

1 hour general MCLE credit.

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**Federal Bar  
Association**  
San Diego Chapter



**SAN DIEGO COUNTY  
BAR ASSOCIATION**





# Federal Bar Association

## San Diego Chapter

### **FBA Navigating Sentencing: Key Factors and Considerations**

**April 9, 2025**

**12:00-1:00 PM**

**Via Zoom**

**MCLE: 1.0 Hour**

This webinar will cover various aspects of sentencing and the panel hopes to touch on judges' preferences, pre-sentence objections, sentencing briefs, minor role, and safety valve.

Panelists: Honorable James E. Simmons, Assistant United States Attorney Matthew Sutton, and Federal Defender Rachel Eaton.

Co-Sponsor: San Diego County Bar Association Criminal Law Section

FBA Legal Education Committee: Arshi Baig, Carson Baucher, Dacely Garcia, and Carmen Rivera.

#### **Introduction**

- Panelists:
  - Judge James E. Simmons
    - Judge James E. Simmons Jr. was nominated by President Joe Biden to serve as a United States District Judge to the Southern District of California on July 14, 2022. He was confirmed by the Senate on March 9, 2023, and received his commission on March 10, 2023.
    - Prior to his nomination to the Southern District of California, Judge Simmons was appointed to the San Diego Superior Court bench by Gov. Jerry Brown on November 3, 2017, at the age of 37. He presided over criminal calendars and in April 2022, Judge Simmons became the first African American Supervising Judge of the North County Branch of the San Diego Superior Court, the largest branch court in the county. Prior to his appointment, Judge Simmons was a prosecutor with the San Diego District Attorney's Office working in the Gang Prosecution Unit.
    - Judge Simmons received a bachelor's degree in Political Science and African American Studies from the University of California at Berkeley and received his law degree from Golden Gate University School of Law in San Francisco.

- Assistant U.S. Attorney Matthew Sutton
  - AUSA Matthew J. Sutton serves as the Deputy Chief in the Organized Crime and Drug Enforcement Task Force (OCDETF) Section of the U.S. Attorney's Office for the Southern District of California and supervises 17 attorneys handling complex investigations targeting international and domestic drug and firearms traffickers, money launderers, and street gang members. During his ten years as a narcotics prosecutor, Mr. Sutton has led dozens of OCDETF investigations and successfully prosecuted over six hundred defendants, ranging from local gang members to high-profile Mexican cartel leaders. Mr. Sutton is a graduate of the College of William and Mary and William and Mary School of Law.
- Federal Defender Rachel Eaton
  - Rachel Eaton is a trial attorney at Federal Defenders of San Diego, Inc. As a federal public defender, she represents clients charged with committing federal criminal and immigration offenses before the U.S. District Court for the Southern District of California. Prior to joining Federal Defenders, Ms. Eaton served as a Judicial Law Clerk for the Honorable John B. Owens, U.S. Circuit Judge for the Ninth Circuit Court of Appeals. She earned a B.A. in political science from the University of Texas at Dallas and her J.D. from the University of Chicago Law School.
- Moderator:
  - Michelle Camacho
    - Michelle is a criminal defense attorney at Michelle Camacho Law in San Diego. Her practice focuses on all criminal matters in both federal and state courts. Michelle serves on the CJA Criminal Defense Panel for the Southern District of California. She received a bachelor's degree in Political Science from the University of California at San Diego and received her law degree from California Western School of Law.

**18 U.S.C. § 3553 – Imposition of a Sentence**

**U.S.S.G. § 3B1.2 – Mitigating Role**

**U.S.S.G. § 5C1.2 – Safety Valve**

**U.S.S.G. § 5K1.1 – Substantial Assistance to Authorities**

**Q & A**

# 18 U.S.C. § 3553

## Section 3553 - Imposition of a sentence

**(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.**-The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

- (1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2)** the need for the sentence imposed-
  - (A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B)** to afford adequate deterrence to criminal conduct;
  - (C)** to protect the public from further crimes of the defendant; and
  - (D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3)** the kinds of sentences available;
- (4)** the kinds of sentence and the sentencing range established for-
  - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-
    - (i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    - (ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5)** any pertinent policy statement-
  - (A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.<sup>1</sup>

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.-**

**(1) IN GENERAL.-**Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

**(2) CHILD CRIMES AND SEXUAL OFFENSES.-**

**(A)<sup>2</sup> SENTENCING.-**In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless-

**(i)** the court finds that there exists an aggravating 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 greater than that described;

**(ii)** the court finds that there exists a mitigating circumstance of a kind or to a degree, that-

**(I)** has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

**(II)** has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

**(III)** should result in a sentence different from that described; or

**(iii)** the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has

committed an offense and that this assistance established a 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 lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

**(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.**-The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence-

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,<sup>3</sup> and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.**-Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall-

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

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

**(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.**-Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that-

(1) the defendant does not have-

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or

that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement. Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

**(g) DEFINITION OF VIOLENT OFFENSE.**-As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

<sup>1</sup> So in original. The period probably should be a semicolon.

<sup>2</sup> So in original. No subpar. (B) has been enacted.

<sup>3</sup> So in original.

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Added Pub. L. 98-473, title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub. L. 99-570, title I, §1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub. L. 99-646, §§8(a), 9 (a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100-182, §§3, 16 (a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100-690, title VII, §7102, Nov. 18, 1988, 102 Stat. 4416; Pub. L. 103-322, title VIII, §80001(a), title XXVIII, §280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub. L. 104-294, title VI, §§601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub. L. 107-273, div. B, title IV, §4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub. L. 108-21, title IV, §401(a), (c), (j) (5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub. L. 111-174, §4, May 27, 2010, 124 Stat. 1216; Pub. L. 115-391, title IV, §402(a), Dec. 21, 2018, 132 Stat. 5221.

**EDITORIAL NOTES**

**REFERENCES IN TEXT**The Federal Rules of Criminal Procedure, referred to in subsec. (c)(2), are set out in the Appendix to this title. Section 408 of the Controlled Substances Act, referred to in subsec. (f)(4), is classified to section 848 of Title 21, Food and Drugs.

**CONSTITUTIONALITY**For information regarding the constitutionality of certain provisions of this section, as amended by section 401(a)(1) of Pub. L. 108-21 see the Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court on the Constitution Annotated website, [constitution.congress.gov](http://constitution.congress.gov).

**AMENDMENTS**2018-Subsec. (f). Pub. L. 115-391, §402(a)(1)(A), (C), in introductory provisions, substituted ", section 1010" for "or section 1010" and inserted ", or section 70503 or 70506 of title 46" after "963)", and inserted concluding provisions. Subsec. (f)(1). Pub. L. 115-391, §402(a)(1)(B), added par. (1) and struck out former par. (1) which read as follows: "the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;". Subsec. (g). Pub. L. 115-391, §402(a)(2), added subsec. (g). 2010-Subsec. (c)(2). Pub. L. 111-174 substituted "a statement of reasons form issued under section 994(w)(1)(B) of title 28" for "the written order of judgment and commitment". 2003-Subsec. (a)(4)(A). Pub. L. 108-21, §401(j)(5)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or". Subsec. (a)(4)(B). Pub. L. 108-21, §401(j)(5)(B), inserted before semicolon at end ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless



*of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)".Subsec. (a)(5). Pub. L. 108-21, §401(j)(5)(C), amended par. (5) generally. Prior to amendment, par. (5) read as follows: "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;"Subsec. (b). Pub. L. 108-21, §401(a), designated existing provisions as par. (1), inserted par. heading, substituted "Except as provided in paragraph (2), the court" for "The court", and added par. (2) and concluding provisions.Subsec. (c). Pub. L. 108-21, §401(c)(2), (3), in concluding provisions, inserted ", together with the order of judgment and commitment," after "the court's statement of reasons" and "and to the Sentencing Commission," after "to the Probation System".Subsec. (c)(2). Pub. L. 108-21, §401(c)(1), substituted "described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements" for "described". 2002-Subsec. (e). Pub. L. 107-273 inserted "a" before "minimum sentence".1996-Subsec. (f). Pub. L. 104-294, §601(h), amended directory language of Pub. L. 103-322, §80001(a). See 1994 Amendment note below. Pub. L. 104-294, §601(b)(5), in introductory provisions, substituted "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963)" for "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963)".Subsec. (f)(4). Pub. L. 104-294, §601(b)(6), substituted "section 408 of the Controlled Substances Act" for "21 U.S.C. 848".1994-Subsec. (a)(4). Pub. L. 103-322, §280001, amended par. (4) generally. Prior to amendment, par. (4) read as follows: "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;"Subsec. (f). Pub. L. 103-322, §80001(a), as amended by Pub. L. 104-294, §601(h), added subsec. (f). 1988-Subsec. (c). Pub. L. 100-690 inserted "or other appropriate public record" after "transcription" in second sentence and struck out "clerk of the" before "court" in last sentence. 1987-Subsec. (b). Pub. L. 100-182, §3(1), (2), substituted "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" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result". Pub. L. 100-182, §3(3), inserted after first sentence "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." Pub. L. 100-182, §16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)." Subsec. (c)(1). Pub. L. 100-182, §17, inserted "and that range exceeds 24 months.".1986-Subsec. (a)(7). Pub. L. 99-646, §81(a), added par. (7).Subsec. (b). Pub. L. 99-646, §9(a), inserted provision relating to sentencing in the absence of applicable guidelines.Subsec. (c). Pub. L. 99-646, §8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not*

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include an order of restitution". Subsec. (d). Pub. L. 99-646, §80(a), struck out "or restitution" after "notice" in heading, and struck out "or an order of restitution pursuant to section 3556," after "section 3555," in introductory text. Subsec. (e). Pub. L. 99-570 added subsec. (e).

**STATUTORY NOTES AND RELATED SUBSIDIARIES**

**EFFECTIVE DATE OF 2018 AMENDMENT** Pub. L. 115-391, title IV, §402(b), Dec. 21, 2018, 132 Stat. 5221, provided that: "The amendments made by this section [amending this section] shall apply only to a conviction entered on or after the date of enactment of this Act [Dec. 21, 2018]."

**EFFECTIVE DATE OF 1994 AMENDMENT** Pub. L. 103-322, title VIII, §80001(c), Sept. 13, 1994, 108 Stat. 1986, provided that: "The amendment made by subsection (a) [amending this section] shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act [Sept. 13, 1994]."

**EFFECTIVE DATE OF 1987 AMENDMENT** Amendment by Pub. L. 100-182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100-182 set out as a note under section 3006A of this title.

**EFFECTIVE DATE OF 1986 AMENDMENTS** Pub. L. 99-646, §8(c), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]." Pub. L. 99-646, §9(b), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]." Pub. L. 99-646, §80(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473 effective Nov. 1, 1987]." Pub. L. 99-646, §81(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473 effective Nov. 1, 1987]." Pub. L. 99-570, title I, §1007(b), Oct. 27, 1986, 100 Stat. 3207-7, provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

**EFFECTIVE DATE** Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98-473 set out as a note under section 3551 of this title.

**REPORT BY ATTORNEY GENERAL** Pub. L. 108-21, title IV, §401(f), Apr. 30, 2003, 117 Stat. 674, provided that: "(1) **DEFINED TERM.**-For purposes of this section [amending this section, section 3742 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure, enacting provisions set out as a note under section 991 of Title 28, and enacting provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28], the term 'report described in paragraph (3)' means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act [Apr. 30, 2003]-"(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;"(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;"(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;"(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse

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sentencing decisions; and"(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions. "(2) REPORT REQUIRED.-(A) IN GENERAL.-Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B). "(B) CONTENTS.-The report submitted pursuant to subparagraph (A) shall set forth-"(i) the case;"(ii) the facts involved;"(iii) the identity of the district court judge;"(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and"(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration."(C) APPEAL OF THE DEPARTURE.-Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision."(3) EFFECTIVE DATE.-Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act [Apr. 30, 2003], except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3)."

**AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES** Pub. L. 100-182, §24, Dec. 7, 1987, 101 Stat. 1271, provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [ section 235 of Pub. L. 98-473 set out as a note under section 3551 of this title]-"(1) section 3553(e) of title 18, United States Code;"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code, shall apply in the case of an offense committed before the taking effect of such guidelines."

## §3B1.2

3. **“Otherwise Extensive”.**—In assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.
4. **Factors to Consider.**—In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as “kingpin” or “boss” are not controlling. Factors the court should consider include the exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

**Background:** This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission’s intent is that this adjustment should increase with both the size of the organization and the degree of the defendant’s responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 414); November 1, 1993 (amendment 500); November 1, 2024 (amendment 831).
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### §3B1.2. Mitigating Role

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Based on the defendant’s role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.



### Commentary

#### Application Notes:

1. **Definition.**—For purposes of this guideline, “*participant*” has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. **Requirement of Multiple Participants.**—This guideline is not applicable unless more than one participant was involved in the offense. *See* the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. **Applicability of Adjustment.**—

- (A) **Substantially Less Culpable than Average Participant.**—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant’s personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

- (B) **Conviction of Significantly Less Serious Offense.**—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.
- (C) **Fact-Based Determination.**—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

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- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

- 4. **Minimal Participant.**—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
- 5. **Minor Participant.**—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.
- 6. **Application of Role Adjustment in Certain Drug Cases.**—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1992 (amendment 456); November 1, 2001 (amendment 635); November 1, 2002 (amendment 640); November 1, 2009 (amendment 737); November 1, 2011 (amendments 749 and 755); November 1, 2014 (amendment 782); November 1, 2015 (amendment 794).
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### §3B1.3. Abuse of Position of Trust or Use of Special Skill

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If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense

must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. **Use of Substitutes for Imprisonment.**—The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
8. **Residential Treatment Program.**—In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
9. **Application of Subsection (f).**—Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).
10. **Zero-Point Offenders.**—
  - (A) **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).
  - (B) **Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.**—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 51); November 1, 1989 (amendments 271, 275, and 302); November 1, 1992 (amendment 462); November 1, 2002 (amendment 646); November 1, 2009 (amendment 733); November 1, 2010 (amendment 738); November 1, 2018 (amendment 811); November 1, 2023 (amendments 821 and 824).
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**§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases**

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- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or

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§ 70506, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) as follows:

- (1) the defendant does not have—
    - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
    - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
    - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
  - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
  - (3) the offense did not result in death or serious bodily injury to any person;
  - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
  - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the applicable guideline range shall not be less than 24 to 30 months of imprisonment.



## Commentary

### Application Notes:

#### 1. Definitions.—

- (A) The term “*violent offense*” means a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment.
- (B) “*Dangerous weapon*” and “*firearm*,” as used in subsection (a)(2), and “*serious bodily injury*,” as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).
- (C) “*Offense*,” as used in subsection (a)(2)–(4), and “*offense or offenses that were part of the same course of conduct or of a common scheme or plan*,” as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

#### 2. Application of subsection (a)(2).—

Consistent with §1B1.3 (Relevant Conduct), the term “*defendant*,” as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

#### 3. Application of Subsection (a)(4).—

- (A) “**Organizer, leader, manager, or supervisor of others in the offense**.”—The first prong of subsection (a)(4) requires that the defendant was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).
- (B) “**Engaged in a continuing criminal enterprise**.”—“*Engaged in a continuing criminal enterprise*,” as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who “engaged in a continuing criminal enterprise” but is convicted of an offense to which this section applies will be an “organizer, leader, manager, or supervisor of others in the offense.”

#### 4. Use of Information Disclosed under Subsection (a).—

Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).

#### 5. Government’s Opportunity to Make Recommendation.—

Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. *See also* Fed. R. Crim. P. 32(f), (i).

#### 6. Exemption from Otherwise Applicable Statutory Minimum Sentences.—

A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.

**Background:** This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994 and subsequently amended, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). *See also* H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

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<i>Historical Note</i>	Effective September 23, 1994 (amendment 509). Amended effective November 1, 1995 (amendment 515); November 1, 1996 (amendment 540); November 1, 1997 (amendment 570); November 1, 2001 (amendment 624); October 27, 2003 (amendment 651); November 1, 2004 (amendment 674); November 1, 2009 (amendment 736); November 1, 2023 (amendment 817).
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## PART K — DEPARTURES

### 1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

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#### §5K1.1. Substantial Assistance to Authorities (Policy Statement)

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Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
  - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
  - (3) the nature and extent of the defendant's assistance;
  - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
  - (5) the timeliness of the defendant's assistance.

#### Commentary

##### Application Notes:

1. **Sentence Below Statutorily Required Minimum Sentence.**—Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.
2. **Interaction with Acceptance of Responsibility Reduction.**—The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.
3. **Government's Evaluation of Extent of Defendant's Assistance.**—Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

**Background:** A defendant’s assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 290); November 1, 2024 (amendment 831).
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**§5K1.2. Refusal to Assist (Policy Statement)**

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A defendant’s refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 291).
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**2. OTHER GROUNDS FOR DEPARTURE**

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 358).
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**§5K2.0. Grounds for Departure (Policy Statement)**

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- (a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—
  - (1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—
    - (A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or
    - (B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,