APPENDICES

APPENDIX A

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA

No. 3:-15-CR- 107-SI

v.

INFORMATION

JASON ANDREW DUNLAP,

[18 U.S.C. §§ 2251(a) and (e)]

Defendant.

Forfeiture Allegation

THE UNITED STATES ATTORNEY ALLEGES:

Count One
Production of Child Pornography
18 U.S.C. §§ 2251(a) and (e)

Beginning sometime on or after January 1, 2012, and continuing to on or about July 18, 2014, in Yamhill County, in the District of Oregon and elsewhere, defendant JASON ANDREW DUNLAP, having previously been convicted of Encouraging Child Sexual Abuse in the Second Degree, in the Circuit Court of the State of Oregon for Yamhill County, in case number CR030520, an offense involving the possession of child pornography, knowingly employed, used, persuaded, induced, enticed, or coerced minors

identified herein as *"PD," "HR," "KH,"* and *"KK,"* to engage in sexually explicit conduct for the purpose of producing visual depictions of that conduct, knowing or having reason to know that those visual depictions would be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce; said visual depictions having been produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; and having actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce.

All in violation of Title 18, United States Code, Sections 2251(a) and (e).

Criminal Forfeiture Allegation

Upon conviction of the offense described above in Count One of this information, defendant JASON ANDREW DUNLAP shall forfeit to the United States pursuant to Title 18, United States Code, Section 2253, any and all matter which contains visual depictions produced, transported, or shipped in violation thereof, and any and all property used or intended to be used in any manner or part to commit or to promote the commission of the aforementioned violations.

DATED this 18th day of March 2015.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney

GARY Y. SUSSMAN, OSB 87356
Assistant United States Attorney

APPENDIX B

731 Fed.Appx. 698 (Mem)

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee, v. Jason Andrew DUNLAP, Defendant-Appellant.

No. 16-30211
Argued and Submitted July 10, 2018 Portland, Oregon
Filed July 19, 2018

Attorneys and Law Firms

Gary Y. Sussman, Assistant U.S. Attorney, Kelly A. Zusman, Assistant U.S. Attorney, DOJ-USAO, Portland, OR, Amy Potter, Assistant U.S. Attorney, U.S. Attorney's Office, Eugene, OR, for Plaintiff-Appellee

Thomas J. Hester, Assistant Federal Public Defender, Stephen R. Sady, Attorney, FPDOR—Federal Public Defender's Office, Portland, OR, for Defendant-Appellant

Appeal from the United States District Court for the District of Oregon, Michael H. Simon, District Judge, Presiding, D.C. No. 3:15-cr-00107-SI-1

Before: WARDLAW and OWENS, Circuit Judges, and MÁRQUEZ, * District Judge.

*699 MEMORANDUM **

Jason Andrew **Dunlap** ("Defendant") appeals his sentence,

arguing that the district court miscalculated the applicable guideline range and erroneously concluded it lacked authority to sentence Defendant below the statutory mandatory minimum. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We vacate and remand for resentencing in light of *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018).

The parties first addressed *Reinhart* in Rule 28(j) letters filed shortly before oral argument. Defendant had previously conceded that the prior state conviction charged in the Information triggered a 25-year mandatory minimum sentence under 18 U.S.C. § 2251(e). However, *Reinhart* constitutes an intervening change in the law that may affect the analysis of this issue, and the parties agree that remand is appropriate to allow the district court to evaluate in the first instance the potential impact of *Reinhart* on the applicable statutory mandatory minimum. Because we find that remand is appropriate in light of *Reinhart*, we decline to address at this juncture the other issues raised in Defendant's appeal.

VACATED and REMANDED for resentencing.

All Citations

731 Fed.Appx. 698 (Mem)

Footnotes

* The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

End of Document

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Related documents

Sentencing and Punishment

Mandatory Sentencing Guidelines Regime

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

JASON ANDREW DUNLAP

Defendant.

JUDGMENT IN A CRIMINAL CASE

Case No.: 3:15-CR-00107-SI-1

USM Number: 76421-065

Thomas J. Hester,
Defendant's Attorney

Gary Y. Sussman,
Assistant U.S. Attorney

THE DEFENDANT:

☒pleaded guilty to count(s) 1 of the Information.

The defendant is adjudicated guilty of the following offense(s):

Title, Section & Nature of Offense	Date Offense Concluded	Count Number
18U.S.C.§§ 2251 (a) and (e) - Production of Child Pornography	Beginning on or about 1/1/2012 and continuing until 7/18/2014	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) and is discharged as to such count(s).

☐Count(s) are dismissed on the motion of the United States.

☒The defendant shall pay a special assessment of $100 for Count(s) 1 of the Information payable immediately to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

January 28, 2019
Date of Imposition of Sentence

Signature of Judicial Officer

Michael H. Simon, U.S. District Judge
Name and Title of Judicial Officer

January 29, 2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **THREE HUNDRED SIXTY (360) MONTHS.**

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be incarcerated at USP Marion where he is currently serving his sentence

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the custody of the United States Marshal for this district:

☐ at _____ on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **LIFE**.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties section of this judgment.

The defendant shall comply with the Standard Conditions of Supervised Release that have been adopted by this court as set forth in this judgment. The defendant shall also comply with the Special Conditions of Supervision as set forth below and any additional conditions attached to this judgment.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of DNA as directed by the probation officer, if required by law.

2. The defendant shall pay full restitution to the victim identified in the presentence report in the amount of $9,105.85 to be paid to the victims identified in the presentence report. If there is any unpaid balance at the time of the defendant's release from custody, it shall be paid at the maximum installment possible and not less than $100 per month.

3. For as long as any restitution is still owing, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer. This condition shall be deleted as soon as restitution is paid in full.

4. For as long as any restitution is still owing, the defendant shall authorize release to the U.S. Probation Officer any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer. This condition shall be deleted as soon as restitution is paid in full.

5. The defendant's employment shall be subject to approval by the probation officer.

6. The defendant shall disclose all assets and liabilities to the probation officer. Defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the probation officer. This condition shall be deleted as soon as restitution is paid in full.

7. The defendant shall not make application for any loan, enter into any credit arrangement, or enter into any residential or business lease agreement without approval of the probation officer. This condition shall be deleted as soon as restitution is paid in full.

8. The defendant shall participate in a sex offender assessment and treatment program, as directed by the probation officer. The defendant shall abide by all rules and requirements of such program. This assessment and treatment program may include the use of the polygraph to assist in case planning and case monitoring.

9. The sex offender treatment program may include the use of a penile plethysmograph to assist in case planning and case monitoring.

10. The defendant shall not view, purchase, or possess (1) any materials including visual depictions of minors under the age of 18 engaged in sexually explicit conduct, as defined in 18 U.S.C. § 2256(2); or (2) any materials depicting sexually explicit conduct involving adults, including depictions of actual or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex), bestiality, masturbation, sadistic or masochistic abuse, or other depictions of explicit adult sexual conduct. The defendant is prohibited from patronizing any place where such material or entertainment is available.

11. The defendant shall not view, purchase, or possess any materials, including visual depictions of nudity and sexually explicit conduct, as defined at 18 USC § 2256(2) and (5).

12. The defendant is prohibited from being present within 100 feet of places where minor children under the age of 18 congregate, such as playgrounds and schools, unless approved by the probation officer.

13. The defendant is prohibited from residing within 100 yards of schools and playgrounds and other places where minor children congregate, unless approved by the probation officer.

14. The defendant shall register, if required by law, with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student and shall provide written notification of compliance with this condition as directed by the probation officer.

15. The defendant shall reside at a residence approved by the probation officer, and shall notify the probation officer at least 30 days prior to any change in residence.

16. The defendant shall have no contact with minors (in person, by telephone, through correspondence, or a third party) unless approved by the probation officer and the Court.

17. The defendant shall provide the probation officer with any requested financial information needed to verify there have been no payments to entities that provide access to the Internet.

18. The defendant shall provide the U.S. Probation Officer with truthful and complete information regarding all computer hardware, software, electronic services, and data storage media to which the defendant has access.

19. The defendant shall submit to a search of defendant's computer (including any handheld computing device, any electronic device capable of connecting to any on-line service, or any data storage media) conducted by a U.S. Probation Officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn all individuals that have access to defendant's computer that it is subject to search and/or seizure.

20. The defendant is prohibited from accessing any on-line computer service at any location (including employment or education) without the prior written approval of the U.S. Probation Officer.

21. The defendant is prohibited from using or possessing any computer(s) (including any handheld computing device, any electronic device capable of connecting to any on-line service, or any data storage media) without the prior written approval of the U.S. Probation Officer. This includes, but is not limited to, computers at public libraries, Internet cafes, or the defendant's place of employment or education.

22. The defendant shall participate in the U.S. Probation Office's Computer Monitoring Program. Participation in the Program may include installation of software or hardware on the defendant's computer that allows random or regular monitoring of the defendant's computer use; periodic inspection of defendant's computer (including retrieval, copying, and review of its electronic contents) to determine defendant's compliance with the Program; and restriction of the defendant's computer use to those computers, software programs, and electronic services approved by the U.S. Probation Officer.

23. The defendant shall have no contact with any victims (P.D., H.R., K.H., K.K.) in person, by telephone, through correspondence or a third party unless approved in advance by the probation officer. If upon the defendant's release from custody, victim P.D., wants to have contact with the defendant, it should be allowed, but not otherwise. This condition may be modified.

24. As directed by the probation officer, the defendant shall take psychotropic medication, if medically approved, for the treatment of a mental or emotional disorder.

25. The defendant shall obtain one primary care physician and one mental health provider, who will prescribe defendant's medications. The defendant will provide documentation of changes in medication and is required to sign a release of information form allowing for the exchange of information between the medication prescribers and the probation officer.

26. The defendant shall utilize one pharmacy to fill prescription medications and shall sign a release of information form allowing for the exchange of information between the pharmacy and the probation officer.

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

The Judges of the District of Oregon adopt the following standard conditions of probation and supervised release to apply in every case in which probation and/or supervised release is imposed upon a defendant. The individual judge may impose other conditions deemed advisable in individual cases of probation or supervised release supervision, as consistent with existing or future law.

1. The defendant shall report in person to the probation office for the district to which he or she is released within 72 hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation or supervised release is mandatory for illegal possession of a controlled substance.
3. The defendant shall not possess a firearm, destructive, or dangerous device.
4. If the defendant illegally uses drugs or abuses alcohol, has a history of drug or alcohol abuse, or drug use or possession is determined to be an element of the defendant's criminal history or instant offense, the defendant shall participate in a substance abuse treatment program as directed by the probation officer which may include urinalysis testing to determine if the defendant has used drugs or alcohol. In addition to urinalysis testing that may be part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.
5. The defendant shall submit to a search of his/her person, residence, office or vehicle, when conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn other residents that the premises may be subject to searches pursuant to this condition.
6. The defendant shall not leave the judicial district without the permission of the court or probation officer.
7. The defendant shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
8. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. The defendant may decline to answer inquiries if a truthful response would tend to incriminate him/her. Such a refusal to answer may constitute grounds for revocation.
9. The defendant shall support his or her dependents and meet other family responsibilities to the best of his or her financial ability.
10. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.
11. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
12. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. If, at any time, the probation officer has reasonable cause to believe the defendant is using illegal drugs or is abusing alcohol, the defendant shall submit to urinalysis testing, breathalyzer testing, or reasonable examination of the arms, neck, face, and lower legs.
13. The defendant shall not knowingly frequent places where controlled substances are illegally sold, used, distributed, or administered.
14. The defendant shall not knowingly associate with any persons engaged in criminal activity, and shall not knowingly associate with any person convicted of a felony, unless granted permission to do so by the probation officer.
15. The defendant shall permit a probation officer to visit him or her at any reasonable time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer.
16. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
17. The defendant shall not enter into any agreement to act as an informant or special agent of a law enforcement agency without the permission of the court.
18. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his or her criminal record or personal history and characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such a notification requirement. This requirement will be exercised only when the probation officer believes a reasonably foreseeable risk exists or a law mandates such notice. Unless the probation officer believes the defendant presents an immediate threat to the safety of an identifiable individual, notice shall be delayed so the probation officer can arrange for a court hearing and the defendant can obtain legal counsel.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	Assessment (as noted on Sheet 1)	Fine	Restitution	TOTAL
TOTALS	$100	$-0-	$9,105.85	$ 9,205.85

☐The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☒The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss[1]	Amount of Restitution Ordered	Priority Order or Percentage of Payment
JS for victim HK (See Statement of Reasons for victim address information)	$	$ 953.23	
Crime Victims' Services Division - CICA 1162 Court Street, NE Salem, Oregon 97301		$ 8,152.62	
TOTALS	$	$ 9,105.85	

☐If applicable, restitution amount order pursuant to plea agreement: $_____.

☐The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒The court determined that the defendant does not have the ability to pay interest and it is ordered that

☒The interest is waived for the ☐ fine and/or ☒ restitution.

☐The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be as follows:

A. ☒ Lump sum payment of $9,205.85 due immediately, balance due
☐ not later than _____, or

☒ in accordance with ☒ C or ☐ D below; or

B. ☒ Payment to begin immediately (may be combined with ☒ C or ☐ D below); or
C. ☒ If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than $100 until paid in full, to commence immediately upon release from imprisonment.
D. ☐ Special instructions regarding the payment of criminal monetary penalties:

☒ Payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) $25 per quarter if the defendant is not working in a prison industries program.

It is ordered that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

Clerk of Court
U.S. District Court - Oregon
1000 S.W. 3rd Ave., Ste. 740
Portland, OR 97204

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ **Joint and Several**

Case Number Defendant and Co-Defendant Names (including Defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court costs:
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

a. One Apevia brand homebuilt tower-type personal computer, no serial number, containing a Hitachi 500 GB hard drive, a Seagate 500 GB hard drive, and a Western Digital 1 TB hard drive;

b. One Olympus Model ND C-770 Ultra Zoom 4.0 Megapixel digital camera; and

c. One Vixia HF20A digital video camera, with power cord.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, v. **JASON ANDREW DUNLAP**, Defendant.	Case No. 3:15-cr-107-SI **MEMORANDUM ON RESENTENCING**

Michael H. Simon, District Judge.

Defendant Jason Andrew Dunlap waived his right to indictment pleaded guilty to a one-count Information charging him with production of child pornography, in violation of 18 U.S.C. § 2251(a)(1). On September 6, 2016, the Court sentenced Defendant to a term of 360 months imprisonment (30 years), along with a life term of supervised release and restitution in the amount of $9,105.85. Defendant timely appealed, arguing that the Court miscalculated the applicable guideline range and erroneously concluded it lacked authority to sentence Defendant below the statutory mandatory minimum. While Defendant's appeal was pending, the Ninth Circuit decided *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018). On August 15, 2018, the Ninth Circuit vacated and remanded for resentencing in light of *Reinhart*. The Ninth Circuit explained:

> The parties first addressed *Reinhart* in Rule 28(j) letters filed shortly before oral argument. Defendant had previously conceded that the prior state conviction charged in the Information triggered a 25-year mandatory minimum sentence under 18 U.S.C. § 2251(e). However, *Reinhart* constitutes an intervening change in the law that may affect the analysis of this issue, and the parties agree that remand is appropriate to allow the district court to evaluate in the first instance the potential impact of *Reinhart* on the applicable statutory mandatory minimum. Because we find that remand is appropriate in light of *Reinhart*, we decline to address at this juncture the other issues raised in Defendant's appeal.

The Court allowed additional briefing and argument on resentencing. On January 28, 2019, the Court held a hearing and re-imposed a sentence of 360 months imprisonment (30 years), along with a life term of supervised release and restitution in the amount of $9,105.85. The Court explained its reasons from the bench and noted that it would be supplementing its explanation in writing. This memorandum is that supplement.

A. Application of *United States v. Reinhart*

Defendant pleaded guilty to one count of production of child pornography, in violation of 18 U.S.C. § 2251(a)(1). The penalty for such a violation is set forth in § 2251(e), which provides, in relevant part:

> Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years[.]

18 U.S.C. §2251(e).

In 2005, Defendant was convicted in Oregon state court of two counts of encouraging child sex abuse in the second degree. The Information specifically alleged that prior conviction. Based on this prior conviction, the Government argued that under § 2251(e), Defendant was subject to a mandatory minimum term of imprisonment of 25 years and a maximum term of 50 years. Defendant did not disagree with the Government's position. The Ninth Circuit's decision in *Reinhart*, however, significantly changed the analysis under § 2251(e) of prior state court convictions.

At resentencing, both the Government and Dunlap agree that under Oregon law the Oregon state crime of encouraging child sex abuse in the second degree does not categorically match its federal counterpart and that the applicable Oregon statute is not divisible. The parties further agree that under *Reinhart*, the relevant Oregon state crime may no longer serve as a sentence-enhancing predicate under § 2251(e). Thus, the parties agree that on resentencing Dunlap may be sentenced to a term of imprisonment of not less than 15 years and not more than 30 years.

B. Calculation of Applicable Sentencing Guidelines Range

Both the Government and the U.S. Probation Office calculate the applicable sentencing guidelines range under the United States Sentencing Guidelines ("USSG") as follows:

Base offense level	USSG § 2G2.1(a)	32
Minor victims under the age of 12	USSG § 2G2.1(b)(1)(A)	4
Aggravated sexual above	USSG § 2G2.1(b)(2)(B)	4
Distribution	USSG § 2G2.1(b)(3)	2
Defendant is a parent of a victim	USSG § 2G2.1(b)(5)	2
Additional victims (four victims in total)	USSG § 2G2.1(d)	4
Combined total adjusted offense level		48

Acceptance of responsibility	USSG § 3E1.1	-3
Total offense level	Chap. 5, Part A, cmt. n.2	43

The parties agree that Dunlap's criminal history category is I. Accordingly, both the Government and the U.S. Probation Office calculate the applicable sentencing guidelines range as life, which then becomes the statutory maximum of 360 months, or 30 years.

Defendant disagrees. According to Defendant, the sentencing table establishes offense levels that range from a floor of one to ceiling of 43, increasing in one-level increments. Thus, argues Defendant, the sentencing table and the guidelines commentary establish 43 as an absolute ceiling, and that is the level from which credit for acceptance of responsibility, when applicable, should be deducted. The parties agree that Defendant is entitled to a three-level decrease for acceptance of responsibility. Accordingly, Defendant concludes, his total offense level should be 40 (43 minus 3), yielding an advisory guidelines range of 292-365 months, rather than 360 months.

Defendant offers a policy argument in support of his conclusion. Specifically, Defendant argues that if a defendant's offense level before any reduction for accepting responsibility is 46 or higher, then there is no incentive, at least under the guidelines, for a defendant to accept responsibility because such a defendant would not benefit from the three-level reduction allowed under USSG § 3E1.1. That may be a reasonable policy argument, but it should be directed to the United States Sentencing Commission, not to a sentencing court. The responsibility of the sentencing court is correctly to calculate the applicable guidelines range following the directions set forth in the guidelines. *See generally Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (noting that the guidelines serve as the starting point and initial benchmark in all sentencing proceedings).

Section 1B1.1(a) of the USSG directs sentencing courts to apply the provisions of the guidelines manual in order, by: (1) determining the base offense level and any specific offense characteristics, cross-references, and special instructions in Chapter Two; (2) applying any adjustments related to the victim, the defendant's role in the offense, and obstruction of justice from Parts A, B, and C of Chapter Three; (3) applying any multiple count adjustments from Part D of Chapter Three; (4) applying any adjustment for acceptance of responsibility under Part E of Chapter Three; (5) determining the defendant's criminal history category under Chapter 4; and (6) then determining the guideline range from Chapter 5. From there, sentencing courts must consider any other grounds for departure under Parts H and K of Chapter 5, other policy statements or commentary in the guidelines, and the statutory sentencing factors in § 3553(a). USSG § 1B1.1(b), (c). Further, USSG Chapter 5, Part A, Application Note 2 provides:

> In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

(Emphasis added.) Thus, the guidelines contemplate capping the defendant's total offense level at 43 after all guidelines adjustments have been made, and not, as Defendant suggests, at some intermediate point in the calculation.

Following the methodology set forth in the guidelines themselves, the Court accepts the guidelines calculation urged by the Government and the U.S. Probation Office and concludes that the applicable guidelines "range" is 360 months (30 years). The guidelines, however, are only advisory. *United States v. Booker*, 543 U.S. 220 (2005). Thus, even if the Court were to accept Defendant's calculation of the applicable guidelines range of 292-365 months, that would not change the Court's determination of the appropriate sentence. After considering all of the

factors in 18 U.S.C. § 3553(a), as discussed below, the Court concludes that a term of imprisonment of 360 months is the appropriate sentence in this case.

C. Defendant's Previous Argument Regarding the Mandatory Minimum

At the original sentencing hearing, the parties agreed that the mandatory minimum sentence was 25 years, under § 2251(e). Defendant nevertheless argued that under 18 U.S.C. § 3553(e), the Court has the authority to impose a sentence below a mandatory minimum to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Defendant argued that predicate was satisfied and thus the Court had the authority to impose a sentence below 25 years.

Section 3553(e) provides:

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

18 U.S.C. § 3553(e) (emphasis added). The Government responded to Defendant's argument by stating that the Court had no authority to impose a sentence below a mandatory minimum established by statute unless there was a motion of the Government to that effect. The Court agreed with the Government as a matter of statutory interpretation, and that was one of the points Defendant had raised on appeal.

The parties agree that, after *Reinhart*, the applicable minimum sentence is 15 years. Defendant urges the Court to impose a sentence of 21 years, which is above the mandatory minimum. Accordingly, the question of whether a sentencing court has the legal authority to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance in

the investigation or prosecution of another person, in the absence of a Government motion to that effect, is moot and need not be resolved by the Court in this case.

D. Appropriate Sentence Under Section 3553(a)

Section 3553(a) directs a sentencing court, after considering the nature and circumstances of the offense and the history and characteristics of the defendant, to impose a sentence that is sufficient, but not greater than necessary, to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed training, care, or other correctional treatment. 18 U.S.C. § 3553(a)(1)-(2). The Court has followed this direction and concludes that a term of imprisonment of 360 months (30 years) best satisfies the sentencing objectives.

Of particular importance in this case is the need to protect the public (specifically, children) from further crimes of the Defendant. As explained by the Government:

> This case arose from an investigation into two online bulletin boards that operated on the "dark web." Their primary purposes were the advertisement and distribution of child pornography, and providing a forum in which to discuss incest and pedophilia (PSR ¶ 6). Members on the two sites posted images of child pornography, bestiality, bondage, and child erotica involving both boys and girls, ranging in age from toddlers to prepubescent children (*id*.).
>
> Defendant was a member of both sites. Between May 2012 and July 2013, he posted 61 images, most of which depicted child pornography, to one of the sites (PSR ¶ 9). He also posted a number of messages to that site, many of which referenced his daughter. Posting under the screen name "Busterhymen," defendant described himself as a child pornography producer who was "always up for chatting about the ins and outs of producing and getting it done safely," and who was willing to "fulfill requests" for "[s]trange, kinky, simple, [or] cum filled" images (PSR ¶ 11). Defendant said he would "not do anything I am not comfortable with," but indicated a willingness to "do what I can to help [his daughter's] fans get hard and cum ;-)" (*id*.). He marveled

over his daughter's prepubescent anatomy and the pleasure he received from having sex with her, describing it as "[s]o much harder and stronger than [with] any woman" (PSR ¶ 15). Images of child pornography accompanied that post (PSR ¶ 16).

Defendant wrote that he was debating posting additional photos of his daughter (PSR ¶ 11). He said he was "always happy to chat and trade ideas and pics with other producers," but admonished those who neither had a "lil one" nor access to one to not contact him for additional images (*id*.). In a later post, defendant wrote that his daughter was "so very special" and that she "loves to hear how much guys like her body" (PSR ¶ 13). Each post was accompanied by images of child pornography involving a prepubescent girl (PSR ¶¶ 12, 14, 16).

In September 2013, the FBI served a federal search warrant on an e-mail account associated with Busterhymen. Agents found over 100 e-mails in the account, most of which pertained to molesting children or trading in child pornography (PSR ¶ 17). There were over 50 pictures attached to the e-mails, most of which depicted child pornography (*id*.).

Investigators eventually located an Internet Protocol (IP) address associated with Busterhymen, and traced the IP address back to defendant's residence (PSR ¶ 18). They learned that defendant was a previously convicted sex offender (*id*.). Defendant's Yamhill County probation officer described defendant as having an interest in hard-core child pornography, and as someone who was "high-risk, deviant, and predatory" (*id*.).

On July 18, 2014, agents arrested defendant at his place of employment, and executed a search warrant at his Newberg home (PSR ¶¶ 20, 22). During the search, they found and seized a purple dress that matched the dress shown in some of the images of child pornography Busterhymen posted, rectal thermometers, anal dilators, and written directions for sedating a child using ketamine and Xanax (PSR ¶ 20). They also seized a box containing, among other things, an enema, child's panties, anal beads, personal lubricant, a pediatric stool softener, and packages of "perfect measure" Benadryl (PSR ¶ 21). Another box contained a Minnie Mouse costume, two pairs of children's tights with the crotch areas cut out, a leopard-print child's skirt, sex toys (including a butt plug and a vibrator), a pink penis-shaped candle, lipstick, and a tube of "Recti-Care" (*id*.).

Defendant declined to make any statement at the time of his arrest (PSR ¶ 22). However, he later met with investigators and

> prosecutors (with counsel present), agreed to decrypt his computer, and provided information about his involvement in the production and distribution of child pornography (PSR ¶¶ 23, 24).
>
> Defendant admitted sexually abusing and exploiting four young children, including his own daughter. He admitted producing and distributing child pornography depicting all four children (PSR ¶¶ 24, 25). He drugged the children before abusing them, and used photo-editing software to obliterate distinguishing marks or characteristics on the children or in the backgrounds of the images (PSR ¶¶ 26, 27).
>
> Evidence found on defendant's computer led to the arrest and successful prosecution of two other child pornography producers and the identification of three victims. Information gleaned from online chat logs found on defendant's computer helped to corroborate information investigators learned from other sources, although it did not directly lead to the prosecution of any other defendants. In addition, based on information provided by defendant, investigators were able to identify and arrest an individual who had been extorting money from people who had produced or traded in child pornography, including defendant. In 2018, the extortionist was sentenced in this Court following pleas of guilty to a number of offenses.

ECF 89 at 2-5 (footnote omitted).

The Government also explained the Defendant's history. The Government stated:

> Defendant has a troubling and repetitive criminal history. He incurred his first criminal conviction in 2000, at the age of 27. He was convicted of invasion of personal privacy in Yamhill County after he videotaped a 10-year-old girl using the toilet in the women's restroom at a McDonald's restaurant (PSR ¶ 62). Two months after his conviction, he violated his probation by peeping into a women's restroom several times over a five- to six-hour period (*id*.).
>
> In 2001, he was convicted of encouraging child sex abuse in the third degree and invasion of personal privacy in Washington County after he went into the women's restroom of a Taco Bell restaurant and videotaped a 12-year-old girl using the toilet (PSR ¶ 63). A search of defendant's computer pursuant to a state search warrant revealed images of naked children posed in sexually provocative positions (id.). During an interview following the search, defendant admitted taking pictures of other young girls

> sitting on toilets in various fast food restaurants in Tualatin, Tigard, and Newberg (*id*.).
>
> While on probation in the Washington and Yamhill County cases, defendant admitted to viewing hundreds of images of child pornography on his computer (PSR ¶ 64). As a result, he was convicted of two counts of encouraging child sex abuse in the second degree in Yamhill County (*id*.). He was placed on probation for the third time (*id*.).
>
> Defendant was placed in sex offender treatment while he was on probation in Yamhill County. An assessment completed by Dr. Richard King of Child/Adult Intervention Services in Tigard concluded that defendant was "narcissistic, depressive, antisocial and dependent" (PSR ¶ 76). Dr. King also concluded that defendant displayed passive-aggressive behaviors with emerging violence indicators that may lead to forced sexual incidences directed toward females – both children and adults (*id*.). Dr. King expressed concern that defendant posed a risk of re-offending (id.). Following a 2004 psychosexual evaluation, Dr. King diagnosed defendant as having a chronic adjustment disorder with "Mixed Disturbance of Emotions and Conduct," deferred diagnoses for pedophilia and sexual sadism, and noted narcissistic, depressive, and antisocial personality traits with schizoid and obsessive-compulsive personality features (PSR ¶ 79).
>
> Randy Settell, defendant's Yamhill County probation officer, noted that defendant was into hard-core child pornography, including images of infants being sexually penetrated and children being tortured (PSR ¶ 33). Settell described defendant as "high-risk, deviant, and predatory" (*id.*).

ECF 89 at 18-19 (footnote omitted).

At the original sentencing hearing, the Court explained that the Court's primary concern was protecting the public from further crimes of the Defendant. That is still the Court's primary concern. The Court was, and remains, seriously concerned that the Defendant either cannot or will not be able to control himself upon release, even with supervision. Thus, the Defendant presents a very serious risk to the public upon release from incarceration. The Defendant was born in 1972 and is currently 46 years old. Even under a 30-year sentence, assuming full credit for good behavior, Defendant will be in his young 70's upon release.

Defendant argues that imposing a sentence equal to the statutory maximum of 30 years does not reflect either his acceptance of responsibility or his substantial assistance and cooperation provided to the Government. In response, the Government explains:

> A person who sexually exploits four separate children over a two-year period would ordinarily be charged with at least four separate counts of producing child pornography – not less than one count per child. Even without the sentence enhancement, four production counts would carry a maximum penalty of 120 years' imprisonment. Instead, defendant was charged with a single count, which substantially limited his potential sentencing exposure. Moreover, since defendant committed that offense while he was required to register as a sex offender, he was subject to an additional charge under 18 U.S.C. § 2260A, which would have carried a mandatory, consecutive penalty of at least ten years' imprisonment. Yet because of his cooperation, the government did not raise that allegation, sparing defendant from ten additional years in prison. Those charging decisions were deliberate, and were made with an eye toward a negotiated settlement based on defendant's cooperation (RTP 3-4). Defendant received the benefits of those charging concessions, even though he ultimately rejected the government's plea offer and pled guilty without an agreement.
>
> Defendant has already received a substantial benefit from his cooperation. Given the horrendous nature of his conduct and in light of his very troubling criminal history, he deserves nothing more.

ECF 89 at 22. The Court is satisfied that the sentence imposed is appropriate in light of the sentencing objectives set forth in Section 3553(a) and sufficiently accounts for Defendant's acceptance of responsibility and substantial cooperation and assistance to the Government.

IT IS SO ORDERED.

DATED this 29th day of January, 2019.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

APPENDIX E

801 Fed.Appx. 593 (Mem)

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jason Andrew DUNLAP, Defendant-Appellant.

No. 19-30029
Submitted March 3, 2020 * Portland, Oregon
FILED April 17, 2020

Attorneys and Law Firms

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Thomas J. Hester, Assistant Federal Public Defender, FPDOR - Federal Public Defender's Office, Portland, OR, for Defendant - Appellant

Appeal from the United States District Court for the District of Oregon, Michael H. Simon, District Judge, Presiding, D.C. No. 3:15-cr-00107-SI-1

Before: WOLLMAN, ** FERNANDEZ, and PAEZ, Circuit Judges.

MEMORANDUM ***

Jason Andrew **Dunlap** pleaded guilty to one count of production of child pornography, in violation of 18 U.S.C. § 2251(a) and (e). He argues that the district court erred on

remand when it calculated his sentencing range under the U.S. Sentencing Guidelines. *See United States v.* ***Dunlap***, 731 F. App'x 698, 699 (9th Cir. 2018) (per curiam) (remanding for resentencing in light of *United States v. Reinhart*, 893 F.3d 606 (9th Cir. 2018)). Having reviewed the district court's interpretation and application of the Guidelines *de novo*, we affirm. *See United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (standard of review).

The district court correctly applied the Guidelines in the order set forth in § 1B1.1(a). The court determined that **Dunlap**'s combined adjusted offense level was 48 under § 2G2.1, then decreased the adjusted offense level by 3 for acceptance of responsibility under § 3E1.1, and thereafter applied application note 2 of Part A of Chapter 5, which states that "[a]n offense level of more than 43 is to be treated as an offense level of 43." We reject **Dunlap**'s argument that the Guidelines establish an offense-level cap of 43, from which the 3-level reduction for acceptance of responsibility should have been deducted.

AFFIRMED.

All Citations

801 Fed.Appx. 593 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JASON ANDREW DUNLAP, Defendant-Appellant.	No. 19-30029 D.C. No. 3:15-cr-00107-SI-1 District of Oregon, Portland ORDER

Before: WOLLMAN,* FERNANDEZ, and PAEZ, Circuit Judges.

The Petition for Rehearing En Banc was circulated to the full court. No judge called for rehearing en banc. The Petition for Rehearing En Banc is DENIED. Fed. R. App. P. 35.

* The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX G

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an

eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "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." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit

the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they

will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed "single acts of aberrant behavior" at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead

to sentences of life imprisonment — sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.*, separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely.

Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.*, 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

PART B — GENERAL APPLICATION PRINCIPLES

§1B1.1. Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(A) "***Abducted***" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

(B) "***Bodily injury***" means any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.

(C) "***Brandished***" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

(D) "***Court protection order***" means "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).

(E) "***Dangerous weapon***" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

(F) "***Departure***" means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure.

"***Downward departure***" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "***Depart downward***" means grant a downward departure.

"***Upward departure***" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "***Depart upward***" means grant an upward departure.

(G) "***Destructive device***" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).

PART E — ACCEPTANCE OF RESPONSIBILITY

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

   (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. 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, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;

   (B) voluntary termination or withdrawal from criminal conduct or associations;

   (C) voluntary payment of restitution prior to adjudication of guilt;

   (D) voluntary surrender to authorities promptly after commission of the offense;

   (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

   (F) voluntary resignation from the office or position held during the commission of the offense;

   (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and

   (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

   Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

   If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for

his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 46); November 1, 1989 (amendment 258); November 1, 1990 (amendment 351); November 1, 1992 (amendment 459); April 30, 2003 (amendment 649); November 1, 2010 (amendments 746 and 747); November 1, 2013 (amendment 775); November 1, 2018 (amendment 810).

CHAPTER FIVE

DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note	Effective November 1, 1987.

PART A — SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	**5**	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	**10**	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	**12**	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	**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

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "***Life***" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 270); November 1, 1991 (amendment 418); November 1, 1992 (amendment 462); November 1, 2010 (amendment 738).