No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

****

FRANKLIN ANTONIO RIOS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

MOTION TO PROCEED IN FORMA PAUPERIS

****

Petitioner, Franklin Antonio Rios, by his undersigned counsel, requests leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006 and Rule 44, Fed. R. CR. P.

This the 17th day of June, 2021.

Respectfully submitted,

RUDOLPH A. ASHTON, III
Panel Attorney,
Eastern District of North Carolina
N.C. State Bar No. 0125
Post Office Drawer 1389
New Bern, North Carolina 28563-1389
Telephone: (252) 633-3800
Email: RAshton@dunnpittman.com

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

****

FRANKLIN ANTONIO RIOS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

RUDOLPH A. ASHTON, III
Panel Attorney
Eastern District of North Carolina
North Carolina State Bar No. 0125
P.O. Drawer 1389
New Bern, North Carolina 28563-1389
Telephone: (252) 633-3800
Facsimile: (252) 633-6669
Email: RAshton@dunnpittman.com

QUESTION PRESENTED

I. WHETHER, AFTER THE PETITIONER PLED GUILTY TO A DRUG CONSPIRACY AND TWO FIREARM CHARGES UNDER 18 U.S.C. § 924(c), RESULTING IN MANDATORY MINIMUM SENTENCES TOTALING 35 YEARS, THE FIRST STEP ACT INTERVENED AND REDUCED THE MANDATORY MINIMUM SENTENCES TO 15 YEARS, THE DISTRICT COURT ERRED IN RAISING THE PETITIONER'S CRIMINAL HISTORY CATEGORY FROM IV TO VI UNDER GUIDELINE § 4A1.3 AND RAISING HIS OFFENSE LEVEL FROM 29 TO 37 UNDER GUIDELINE § 5K2.8, IN ORDER TO ACHIEVE A COMPARABLE SENTENCE OF 408 MONTHS.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF CASES AND STATUTES

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin Antonio Rios, respectfully prays this Court that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit, issued on March 24, 2021, affirming his judgment and sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Franklin Antonio Rios, No. 20-4209 (4th Cir., March 24, 2021). The opinion is unpublished. The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was issued on March 24, 2021. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

On February 22, 2018 Franklin Rios was charged along with Kayla Hoskins in a 21 count indictment with drug and firearm offenses. On August 7, 2018, pursuant to a written plea agreement, Mr. Rios pled guilty to Count 1 conspiracy and Counts 13 and 17, firearm charges under 18 U.S.C. § 924(c). A copy of 18

U.S.C. § 924(c) is produced as Appendix E. A copy of 18 U.S.C. § 924(c) after the First Step Act, is reproduced as Appendix F.

The First Step Act reduced the mandatory minimum sentence under 18 U.S.C. § 924(c) from 25 years to 5 years consecutive where the offenses were in the same charging indictment. The issue herein is whether the district court erred in raising petitioner's criminal history category from IV to VI under guideline § 4A1.3 and raising his offense level from 29 to 37 under guideline § 5K2.8 in order to achieve a comparable sentence of 408 months. Guideline § 4A1.3 is reproduced herein as Appendix G. Guideline § 5K2.1 is reproduced herein as Appendix H. Guideline § 5K2.8 is reproduced herein as Appendix I.

STATEMENT OF THE CASE

Procedural History

On February 22, 2018 Franklin Rios and Kayla Hoskins were charged in a 21 count indictment with drug and firearm offenses. Count 1 charged them both with conspiracy to distribute and possess with intent to distribute heroin; Counts 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, and 15 charged Rios with distribution and possession with intent to distribute heroin; Counts 10, 12, 18, and 21 charged Rios with possession of a firearm and ammunition by a felon; Counts 13 and 17 charged Rios with possession of a firearm in furtherance of a drug trafficking crime; Count 16 charged Rios and Hoskins with distribution and possession with intent to distribute heroin; Count 19 charged Rios and Hoskins with possession with intent to distribute heroin and other

drugs; and Count 20 charged Hoskins with possession of a firearm in furtherance of a drug trafficking crime.

On August 7, 2018, pursuant to a written plea agreement, Mr. Rios pled guilty to Counts 1, 13, and 17. The Government agreed to dismiss the remaining counts against Mr. Rios. The plea was accepted by the court.

The case came on for sentencing at the January 7, 2020 term before the Honorable James C. Dever, III, judge presiding. Due to additional sentencing discovery provided by the Government to the Petitioner, the sentencing hearing was continued. On February 10, 2020 the Government filed a supplement to its motion for upward departure or variance attaching portions of redacted exhibits. Said exhibits concerned the death of one "Samantha", who died as a result of an alleged drug overdose.

The case came on for sentencing before Judge Dever at the February 19, 2020 term of court. The judge upwardly departed raising Petitioner's criminal history category from IV to VI. He further upwardly departed for extreme conduct raising the offense level from 29 to 37. This raised his advisory guideline range on Count 1 from 121 to 151 months to 360 months to life; however it was noted that the statutory maximum was 480 months, so the guideline range became 360 to 480 months.

The prosecutor had filed a 5K1.1 substantial assistance motion. He recommended a 15 percent reduction off the top of the new guideline range resulting in a sentence of 408 months. He further suggested that could be reached

with a 288 month sentence on Count 1 and 60 months consecutive on each of the firearm counts. Judge Dever then sentenced Mr. Rios as suggested producing a total term of 408 months. (App. D).

Notice of appeal was filed on February 19, 2020. In an opinion filed on March 24, 2021, the Fourth Circuit Court of Appeals affirmed. (App. A).

Statement Of Facts

This case arose out of an investigation by the Cumberland County Sheriff's Office in Fayetteville, North Carolina and the Drug Enforcement Administration (DEA) into a heroin distribution network that was operating from on or about November, 2014 to on or about June, 2016. Between October 20, 2015, and May 2, 2016, undercover agents and confidential informants conducted undercover purchases of heroin and firearms from Petitioner Rios and co-defendant Kayla Hoskins.

Evidence was introduced at sentencing regarding alleged purchases of heroin from Petitioner that resulted in overdoses. Evidence was offered that one John Britt overdosed when Ms. Hoskins was present, and Petitioner administered Narcan to him. Evidence was also offered that Petitioner provided heroin to a girl named Samantha, who overdosed and died. Government exhibits were introduced to show Samantha was released from the Cumberland County Detention Center on January 4, 2016, a police report that she was found deceased on January 7, 2016, a cell phone extraction revealing phone calls between Samantha and Petitioner, and a

toxicology report and autopsy examination. The final cause of death was listed as the drugs heroin, oxycodone, and alprazolam.

In contesting this evidence that the heroin caused the overdose death of Samantha, defense counsel cited the District Court to the Supreme Court decision in Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), which addressed a but-for test where a combination of drugs may have caused the death, as here. The court ultimately decided not to upwardly depart under Guideline § 5K2.1, death, and upwardly departed under Guideline § 5K2.8, extreme conduct. The district court also upwardly departed from criminal history category IV to VI pursuant to Guideline § 4A1.3(a).

Further facts will be developed during the argument portion of this petition.

REASONS FOR GRANTING THE PETITION

I. AFTER THE PETITIONER PLED GUILTY TO A DRUG CONSPIRACY AND TWO FIREARM CHARGES UNDER 18 U.S.C. § 924(c), RESULTING IN MANDATORY MINIMUM SENTENCES TOTALING 35 YEARS, THE FIRST STEP ACT INTERVENED AND REDUCED THE MANDATORY MINIMUM SENTENCES TO 15 YEARS, AND THE DISTRICT COURT ERRED IN RAISING PETITIONER'S CRIMINAL HISTORY CATEGORY FROM IV TO VI UNDER GUIDELINE § 4A1.3 AND RAISING HIS OFFENSE LEVEL FROM 29 TO 37 UNDER GUIDELINE § 5K2.8 IN ORDER TO ACHIEVE A COMPARABLE SENTENCE OF 408 MONTHS, AND THE FOURTH CIRCUIT ERRED IN AFFIRMING.

On August 7, 2018 Petitioner Franklin Antonio Rios pled guilty to a drug conspiracy and two firearm charges pursuant to a plea agreement. Count 1 charged conspiracy to distribute and possess with intent to distribute 100 grams or more of a mixture and substance containing a detectable amount of heroin in violation of 21 U.S.C. § 846. Counts 13 and 17 charged Rios with possession of a firearm in

furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). At the time Petitioner pled guilty, the minimum term of imprisonment for the first § 924(c) charge was 5 years consecutive, and the minimum term of imprisonment for the second § 924(c) charge was 25 years consecutive. (Appendix E).

Several months later, and prior to sentencing, Congress passed the First Step Act which went into effect on December 21, 2018. Section 403 of the Act amended § 924(c)(1)(C) to establish that the 25-year mandatory minimum for a "second or subsequent conviction" of § 924(c) applies only to such subsequent convictions that occur after a prior conviction has become final. Thus, a defendant convicted of multiple § 924(c) offenses, like Petitioner, would now face the standard 5-year consecutive penalty on each count, rather than the 25-year penalty on second or subsequent counts. (Appendix F).

On June 4, 2019, the Government filed a motion for upward departure or variance on the grounds of inadequacy of criminal history under Guideline § 4A1.3 (App. G), death under Guideline § 5K2.1 (App. H), extreme conduct under Guideline § 5K2.8 (App. I), and dismissed and uncharged conduct under Guideline § 5K2.21. When the case first came on for sentencing at the January 7, 2020 term of court, the Government served additional sentencing discovery on counsel for the Petitioner, and sentencing was continued. The discovery concerned the death of one Samantha, who, it was contended, was alleged to have died of an overdose from heroin purchased from Petitioner. On February 10, 2020 the Government filed a

supplement to its motion for upward departure or variance attaching portions of the redacted exhibits.

At sentencing defense counsel argued that the death enhancement under Guideline § 5K2.1 was not applicable due to the Supreme Court decision in Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). In Burrage this Court held that a defendant cannot be liable under the penalty enhancement provision of the Controlled Substances Act applicable when death or serious bodily injury results from the use of the distributed substance unless such use is a "but-for" cause of the death or injury. In Burrage the district court had instructed the jury that the Government only had to prove that the heroin was a contributing cause of death, and that was deemed improper. In the instant case, the autopsy listed the final cause of death as the drugs "heroin, oxycodone, and alprazolam." The district judge side-stepped Guideline § 5K2.1 and stated that Guideline § 5K2.8, extreme conduct, provided the appropriate forum for an upward departure. The court then raised the defendant's criminal history category from category IV to the maximum category VI pursuant to Guideline § 4A1.3, and significantly raised his offense level from level 29 to level 37 for extreme conduct. This resulted in an increase of the guideline range from 121 to 151 months to 360 months to life imprisonment. The guideline figure was then reduced to 360 to 480 months because of the 40 year maximum sentence for the drug charge.

Petitioner respectfully contends that there was an insufficient basis to raise his criminal history category and to enhance his guideline range for extreme

conduct under the totality of the facts and circumstances in his case. He further contends that it appears that the District Court did this because the Burrage case made the death enhancement under Guideline § 5K2.1 inapplicable, and because the First Step Act reduced the second consecutive § 924(c) sentence to 5 years. Petitioner urges that the extreme upward departures herein were erroneously based on insufficiently supported adjustments to achieve an end result that was no longer permitted.

In his appeal to the Fourth Circuit, the Petitioner argued that his prior record did not "substantially" underrepresent the seriousness of his criminal history and the likelihood of committing other crimes. He argued that many of his prior convictions were older and involved hunting violations and traffic charges that did not fit the criteria for underrepresentation. He cited a number of cases where departures under Guideline § 4A1.3 were upheld. He argued that the prior records in those cases were substantially more serious than that of the Petitioner both in scope and violence. See United States v. McNeill, 598 F.3d 161 (4th Cir. 2010), United States v. Heath, 559 F.3d 263 (4th Cir. 2009), and United States v. McCoy, 804 F.3d 349 (4th Cir. 2015).

Petitioner also cited to the Fourth Circuit's earlier decision in United States v. Howard, 773 F.3d 519 (4th Cir. 2014). In Howard the original guidelines range called for 120-121 months of imprisonment, plus a consecutive 60 months for the firearm offense. The district court judge in Howard increased the criminal history category to VI and the offense level to 37, resulting in a sentencing range of 420

months to life for the conspiracy charge, 360 months to life for the substantive charges in Counts 2 through 10, and 60 months consecutive for the firearm. The district court in Howard sentenced the defendant to life imprisonment on Count 1, 360 months imprisonment concurrent for Counts 2 through 10, and 60 months consecutive for Count 11. In reversing, the Fourth Circuit noted that Howard was 41 at the time of the sentencing, and that recidivism is substantially lower the older a person becomes. Petitioner Rios was 50 years old at the time of sentencing herein.

Although the Fourth Circuit failed to follow the Howard case as requested by Petitioner Rios, the analysis therein is worthy of review.

Petitioner also argued that the district court judge erred in using Guideline § 5K2.8, extreme conduct, as a substitute for Guideline § 5K2.1, death, when that was held inapplicable due to this Court's decision in Burrage. Petitioner argued in the Fourth Circuit that his conduct did not rise to the level of the extreme conduct contemplated under Guideline § 5K2.8. Guideline § 5K2.8 states as follows:

> "If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation."

The Supreme Court has long held that courts should review a sentence for reasonableness applying an abuse-of-discretion standard. Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The standard of review encompasses both procedural and substantive reasonableness. It is urged that Mr. Rios' sentence is substantively unreasonable based upon the facts and

circumstances of his case. Additional evidence brought to sentencing involved the death of Samantha based upon an overdose that contained heroin. However the death enhancement under Guideline § 5K2.1 was inapplicable due to this Court's decision in Burrage, supra. In order to enhance the sentence without § 5K2.1, the Court used § 5K2.8, extreme conduct, which is not applicable, and increased Petitioner's criminal history category from IV to VI under § 4A1.3, which together resulted in a tripled guideline range. It is urged that the totality of the facts and circumstances in this case do not support the maximum upward adjustments made in the criminal history category and total offense level.

Additionally, it appears that the district court was attempting to side-step the First Step Act. The purpose of the First Step Act was to eliminate and lessen certain extreme penalties and to provide for more favorable treatment of inmates while in the Bureau of Prisons. When Mr. Rios was charged and pled guilty, the second firearm offense had a consecutive sentence of 25 years. While the First Step Act may be termed a "windfall" to him, his guilty plea still exposed him to a mandatory minimum of 15 years and a minimum guideline of 241 months. This is a substantial sentence for a 50 year old individual. It is urged that it was substantively unreasonable to use other avenues to enhance Petitioner's sentence in order to avoid the intent of the First Step Act.

The Supreme Court decision in Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996), is instructive. In fashioning the appropriate standards of appellate review of a district court's decision to depart from the

guidelines, the Supreme Court divided departures into three categories: (a) departures based on an encouraged factor; (b) departures based on a discouraged factor, or an encouraged factor already taken into account in the applicable guideline; and (c) departures based on factors not mentioned in the guidelines. This was summarized as follows:

> "If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present, Cf. *ibid.* If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' *ibid.,* decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.' 1995 U.S.S.G. ch. 1, pt. A, pg. 6."

518 U.S. at 95-96, 116 S.Ct. at 2045.

Petitioner Rios respectfully contends that the Guideline § 5K2.1 enhancement for "death" is an encouraged factor, but is not applicable herein due to this Court's decision in the Burrage case. Therefore it becomes a discouraged factor, or an encouraged factor already taken into account by the applicable guideline. Therefore the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where

the factor is present. Petitioner contends that the extreme conduct enhancement under Guideline § 5K2.8 is inapplicable, and therefore becomes a discouraged factor. Therefore, when the district court moved from a Guideline § 5K2.1 departure to the Guideline § 5K2.8 departure, the standard of review should be whether that factor is present to an exceptional degree or in some way makes this case different from the ordinary case where the factor is present. The Petitioner contends that the facts and circumstances in this case do not fit extreme conduct and certainly do not rise to an exceptional degree of extreme conduct. Therefore the district court erred in raising the offense level from 29 to 37, and by increasing the criminal history category from IV to VI.

The issue of substituting upward departures to achieve a sentence no longer permitted under the First Step Act is an issue of significant importance to judicial proceedings. Certiorari should be granted in order to review this issue.

CONCLUSION

For the foregoing reasons, Petitioner Franklin Antonio Rios, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his conviction and sentence.

This the 17th day of June, 2021.

DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC
Counsel for Petitioner Franklin Antonio Rios

By: 

RUDOLPH A. ASHTON, III
Panel Attorney
Eastern District of North Carolina
North Carolina State Bar No. 0125
3230 Country Club Road
Post Office Drawer 1389
New Bern, NC 28563
Telephone: (252) 633-3800
Facsimile: (252) 633-6669
Email: RAshton@dunnpittman.com

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2020

****

FRANKLIN ANTONIO RIOS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

ENTRY OF APPEARANCE

and

CERTIFICATE OF SERVICE

****

I, Rudolph A. Ashton, III, a member of the North Carolina State Bar, having been appointed to represent the Petitioner in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court in respect to this Petition for a Writ of Certiorari.

I, Rudolph A. Ashton, III, do swear or declare that on this date, the 17th day of June, 2021, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States mail properly addressed to each of them and

with first-class postage prepaid. The names and addresses of those served are as follows:

Jennifer P. May-Parker, AUSA
Evan Rikhye, AUSA
Office of the United States Attorney
Eastern District of North Carolina
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington DC 20530-0001

This the 17th day of June, 2021.

Respectfully submitted,

RUDOLPH A. ASHTON, III
Panel Attorney,
Eastern District of North Carolina
N.C. State Bar No. 0125
Post Office Drawer 1389
New Bern, North Carolina 28563-1389
Telephone: (252) 633-3800
Facsimile: (252) 633-6669
Email: RAshton@dunnpittman.com

Subscribed and Sworn to Before Me

This the 17th day of June, 2021.

TERESA K. LEWIS NOTARY PUBLIC CRAVEN COUNTY, NC

Notary Public

My Commission Expires: 3/19/2024

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4209

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANKLIN ANTONIO RIOS, a/k/a Frank, a/k/a Frankie,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:18-cr-00051-D-1)

Submitted: December 30, 2020 Decided: March 24, 2021

Before KEENAN and DIAZ, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Rudolph A. Ashton, III, DUNN PITTMAN SKINNER & CUSHMAN, PLLC, New Bern, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Evan Rikhye, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Franklin Antonio Rios appeals the 408-month sentence imposed following his guilty plea to drug and firearm offenses. On appeal, he challenges the district court's application of the Sentencing Guidelines. Finding no error, we affirm.

Rios first argues that the district court erred in calculating the drug quantity attributable to him. "We review the district court's calculation of the quantity of drugs attributable to a defendant for sentencing purposes for clear error." *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (internal quotation marks omitted). "In conducting our review, we accord the district court's credibility determinations great deference." *United States v. Henry*, 673 F.3d 285, 292 (4th Cir. 2012). A court imposing a sentence may "consider any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its accuracy." *United States v. Mondragon*, 860 F.3d 227, 233 (4th Cir. 2017) (internal quotation marks omitted).

The district court relied on statements from Rios' codefendant to calculate the total drug quantity. Rios maintains that those statements were incorrect, and thus that the drug quantity is inaccurate. However, at sentencing, the district court credited testimony from a law enforcement officer who explained why Rios' codefendant provided a more persuasive and accurate account of the drug quantity than did Rios, and we will not question the district court's credibility determination. We therefore discern no basis for disturbing the court's drug weight finding.

Rios next argues that the district court improperly departed upwardly from the advisory Guidelines range based on the criminal history category underrepresenting the seriousness of Rios' criminal history and based on Rios' extreme conduct. *See* U.S. Sentencing Guidelines Manual §§ 4A1.3, 5K2.8 (2018). When the district court decides that the circumstances of a case justify an upward departure, it "is engaged in factfinding, and we use a standard of review approximating the clearly erroneous standard." *United States v. Rusher*, 966 F.2d 868, 882 (4th Cir. 1992); *see also United States v. Oceanic Illsabe Ltd.*, 889 F.3d 178, 194 (4th Cir. 2018). If the district court provided "a reasoned statement of the specific reasons for its departure in language relating to the Guidelines," we will accord appropriate deference to the district court's conclusions. *Rusher*, 966 F.2d at 882 (internal quotation marks omitted); *see also Butts v. United States*, 930 F.3d 234, 238 (4th Cir. 2019) (stating that if court's findings are "plausible in light of the record," appellate court may not reverse for clear error), *cert. denied*, 140 S. Ct. 1113 (2020).

Here, prior to increasing Rios' criminal history category from IV to VI, the district court noted that several of Rios' prior crimes did not contribute to his criminal history score due to their age or the type of sentence imposed. The court further noted that Rios had received lenient sentences despite recidivism and probation violations and emphasized that Rios' persistent recidivism continued well into his middle age. Likewise, prior to departing upwardly on the grounds of extreme conduct, the court discussed Rios' callous conduct toward his codefendant and buyers of the heroin he sold. Because the court pointed to specific evidence in the record that justified departing upwardly and explained the "reasons for its departure[s] in language relating to the Guidelines," *Rusher*, 966 F.2d at 882

(internal quotation marks omitted), we conclude that the court did not clearly err in departing upwardly.

Finally, Rios argues that the district court's upward departures rendered his sentence unreasonably high. We review a sentence for substantive reasonableness under a deferential abuse-of-discretion standard, "tak[ing] into account the totality of the circumstances." *Gall v. United States*, 552 U.S. 38, 51 (2007). When, as here, the district court departs above the initial advisory Guidelines range, we consider whether the sentencing court acted reasonably with respect to "the extent of the divergence from the sentencing range." *United States v. Hernandez–Villanueva,* 473 F.3d 118, 123 (4th Cir. 2007). However, because our review ultimately is for an abuse of discretion, while we "may consider the extent of the deviation," we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the [divergence]." *Gall*, 552 U.S. at 51.

The district court, highlighting the seriousness of Rios' offense, his brutal conduct toward his victims, and his repeated recidivism, reasonably determined that the sentence was proper in light of the nature and circumstances of the offense, Rios' history and characteristics, and the remaining § 3553(a) factors. Based on the court's thorough and considered explanation of the sentence imposed, we conclude that the court did not abuse its discretion and that the 408-month sentence is substantively reasonable.

We therefore affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

FILED: March 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4209
(5:18-cr-00051-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANKLIN ANTONIO RIOS, a/k/a Frank, a/k/a Frankie

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

FILED: April 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4209
(5:18-cr-00051-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANKLIN ANTONIO RIOS, a/k/a Frank, a/k/a Frankie

Defendant - Appellant

M A N D A T E

The judgment of this court, entered March 24, 2021, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA
v.
FRANKLIN ANTONIO RIOS

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:18-CR-51-1-D

USM Number: 96252-071

Deirdre A. Murray
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1, 13, and 17 of the Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 841(a)(1)	Conspiracy to Distribute and Possess With the Intent to Distribute 100 Grams or More of Heroin	6/30/2016	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)

☑ Count(s) 2 through 12, 14 through 16, 18, 19 and 21 of the Indictment ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

2/19/2020
Date of Imposition of Judgment

Signature of Judge

James C. Dever III, United States District Judge
Name and Title of Judge

2/19/2020
Date

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	6/30/2016	13
18 U.S.C. § 924(c)(1)(C)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	6/30/2016	17

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1: 288 months
Count 13: 60 months, to be served consecutively to all other counts
Count 17: 60 months, to be served consecutively to all other counts - (Total term: 408 months)
The court orders that the defendant provide support for all dependents while incarcerated.

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

The court recommends that the defendant receive intensive substance abuse treatment and vocational and educational training opportunities. The court recommends that he be housed separately from his co-defendant, Kayla Nicole Hoskins.

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

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

☐ at _____ ☐ a.m. ☐ p.m. 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 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Counts 1, 13 and 17: 4 years per count, all such terms shall run concurrently - (Total term: 4 years)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate in a vocational training program as directed by the probation office.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall support his dependent(s).

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must 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 nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered 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 requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: FRANKLIN ANTONIO RIOS
CASE NUMBER: 5:18-CR-51-1-D

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of $300.00 shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
The defendant shall forfeit to the United States the defendant's interest in the property specified in the Order of Forfeiture entered on June 17, 2019.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

law enforcement agency, or a Federal, State, or local prosecutor; or (2) a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution; or (3) a Federal agency for a national security or intelligence purpose; unless such disclosure of such data to any of the entities described in (1), (2) or (3) of this proviso would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data; and all such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of chapter 44 of such title [this chapter], or a review of such an action or proceeding; except that this proviso shall not be construed to prevent: (A) the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer (as defined in section 921(a)(9) of such title [18 U.S.C.A. § 921(a)(9)]) and licensed manufacturer (as defined in section 921(a)(10) of such title [18 U.S.C.A. § 921(a)(10)]); (B) the sharing or exchange of such information among and between Federal, State, local, or foreign law enforcement agencies, Federal, State, or local prosecutors, and Federal national security, intelligence, or counterterrorism officials; or (C) the publication of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, including total production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations".

Similar provisions were contained in the following prior Appropriations Act:

Pub.L. 111–117, Div. B, Title II, Dec. 16, 2009, 123 Stat. 3128.

Pub.L. 111–8, Div. B, Title II, Mar. 11, 2009, 123 Stat. 575.

Pub.L. 110–161, Div. B, Title II, Dec. 26, 2007, 121 Stat. 1903.

Pub.L. 109–108, Title I, Nov. 22, 2005, 119 Stat. 2295.

Pub.L. 108–447, Div. B, Title I, Dec. 8, 2004, 118 Stat. 2859.

Funding Not Authorized to be Used to Electronically Retrieve Information Relating to Discontinuance of Firearms or Ammunition Business

Pub.L. 112–55, Div. B, Title II, Nov. 18, 2011, 125 Stat. 610, provided in part: "That, hereafter, no funds made available by this or any other Act [Commerce, Justice, Science, and Related Agencies Appropriations Act, 2012, Pub.L. 112–55, Div. B, Nov. 18, 2011, 125 Stat. 591; see Tables for classification] may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g) (4) by name or any personal identification code".

Statutory Construction; Evidence

Pub.L. 105–277, Div. A, § 101(b) [Title I, § 119(d)], Oct. 21, 1998, 112 Stat. 2681–70, provided that:

"(1) **Statutory construction.**—Nothing in the amendments made by this section [amending this section and section 921 of this title and enacting provisions set out as a note under this section] shall be construed—

"(A) as creating a cause of action against any firearms dealer or any other person for any civil liability; or

"(B) as establishing any standard of care.

"(2) **Evidence.**—Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity."

[Amendment by Pub.L. 105–277, Div. A, § 101(b) [Title I, § 119(d)], effective 180 days after Oct. 21, 1998, see Div. A, § 101(b) [Title I, § 119(e)] of Pub.L. 105–277, set out as a note under 18 U.S.C.A. § 921.]

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this para-

graph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display

Federal, State, local, or tribal law enforcement agency, or a Federal, State, or local prosecutor; or (2) a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution; or (3) a Federal agency for a national security or intelligence purpose; unless such disclosure of such data to any of the entities described in (1), (2) or (3) of this proviso would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data; and all such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of chapter 44 of such title [this chapter], or a review of such an action or proceeding; except that this proviso shall not be construed to prevent: (A) the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer (as defined in section 921(a)(9) of such title [18 U.S.C.A. § 921(a)(9)]) and licensed manufacturer (as defined in section 921(a)(10) of such title [18 U.S.C.A. § 921(a)(10)]); (B) the sharing or exchange of such information among and between Federal, State, local, or foreign law enforcement agencies, Federal, State, or local prosecutors, and Federal national security, intelligence, or counterterrorism officials; or (C) the publication of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, including total production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations".

Similar provisions were contained in the following prior Appropriations Act:

Pub.L. 111–117, Div. B, Title II, Dec. 16, 2009, 123 Stat. 3128.
Pub.L. 111–8, Div. B, Title II, Mar. 11, 2009, 123 Stat. 575.
Pub.L. 110–161, Div. B, Title II, Dec. 26, 2007, 121 Stat. 1903.
Pub.L. 109–108, Title I, Nov. 22, 2005, 119 Stat. 2295.
Pub.L. 108–447, Div. B, Title I, Dec. 8, 2004, 118 Stat. 2859.

Funding Not Authorized to be Used to Electronically Retrieve Information Relating to Discontinuance of Firearms or Ammunition Business

Pub.L. 112–55, Div. B, Title II, Nov. 18, 2011, 125 Stat. 610, provided in part: "That, hereafter, no funds made available by this or any other Act [Commerce, Justice, Science, and Related Agencies Appropriations Act, 2012, Pub.L. 112–55, Div. B, Nov. 18, 2011, 125 Stat. 591; see Tables for classification] may be used to electronically retrieve information gathered pursuant to 18 U.S.C. 923(g)(4) by name or any personal identification code".

Statutory Construction; Evidence

Pub.L. 105–277, Div. A, § 101(b) [Title I, § 119(d)], Oct. 21, 1998, 112 Stat. 2681–70, provided that:

"(1) **Statutory construction.**—Nothing in the amendments made by this section [amending this section and section 921 of this title and enacting provisions set out as a note under this section] shall be construed—

"(A) as creating a cause of action against any firearms dealer or any other person for any civil liability; or

"(B) as establishing any standard of care.

"(2) **Evidence.**—Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity."

[Amendment by Pub.L. 105–277, Div. A, § 101(b) [Title I, § 119(d)], effective 180 days after Oct. 21, 1998, see Div. A, § 101(b) [Title I, § 119(e)] of Pub.L. 105–277, set out as a note under 18 U.S.C.A. § 921.]

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation

(B) Local Ordinance Violations.—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check.**—"*Insufficient funds check*," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 262–265); November 1, 1990 (amendments 352 and 353); November 1, 1991 (amendments 381 and 382); November 1, 1992 (amendment 472); November 1, 1993 (amendment 493); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2011 (amendment 758); November 1, 2012 (amendment 766); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2018 (amendment 813).

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—

(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this policy statement, the terms "***depart***", "***departure***", "***downward departure***", and "***upward departure***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Upward Departures.**—

(A) **Examples.**—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.**—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants

in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 381); November 1, 1992 (amendment 460); October 27, 2003 (amendment 651); November 1, 2018 (amendment 805).

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

> "(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
>
> (2) promulgate, pursuant to section 994 of title 28, United States Code—
>
> (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
>
> (B) a policy statement authorizing a departure pursuant to an early disposition program; and
>
> (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0".

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 57); November 1, 1990 (amendment 358); November 1, 1994 (amendment 508); November 1, 1997 (amendment 561); November 1, 1998 (amendment 585); April 30, 2003 (amendment 649); October 27, 2003 (amendment 651); November 1, 2008 (amendment 725); November 1, 2010 (amendment 739); November 1, 2011 (amendment 757); November 1, 2012 (amendment 770).

§5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of

personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

Historical Note	Effective November 1, 1987.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

Historical Note	Effective November 1, 1987.

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Historical Note	Effective November 1, 1987.

would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

Historical Note	Effective November 1, 1987.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Historical Note	Effective November 1, 1987.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

Historical Note	Effective November 1, 1987.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.