

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted June 11, 2021

Decided June 23, 2021

## Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 20-2493

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

Appeal from the United States District  
Court for the Southern District of Indiana,  
Indianapolis Division.

*v.*

No. 1:19CR00081-001

SHERIDAN SISK,  
*Defendant-Appellant.*

James R. Sweeney II,  
*Judge.*

## ORDER

Sheridan Sisk pleaded guilty to being a felon in possession of a firearm. *See* 28 U.S.C. § 922(g)(1). The district court held that his prior Indiana conviction for dealing cocaine, *see* Ind. Code § 35-48-4-1, involved a “controlled substance” under the Sentencing Guidelines and thus increased his sentencing range, *see* U.S.S.G. § 2K2.1(a)(2). On appeal Sisk argues that Indiana’s cocaine-trafficking law is broader than the federal definition, so it should not count as a “controlled substance offense” under the Guidelines.

Sisk’s arguments are foreclosed by *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), and *United States v. Wallace*, 991 F.3d 810 (7th Cir. 2021), and we decline his invitation to revisit those decisions. In *Ruth* we rejected an argument that the term

No. 20-2493

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“controlled substance,” as defined in U.S.S.G. § 4B1.2(b), refers only to a substance banned by the federal Controlled Substances Act, 21 U.S.C. § 802(6). The defendant there argued that because the Illinois statute prohibits distribution of “positional isomers” of cocaine and the Controlled Substances Act does not, a conviction under the Illinois statute does not involve a “controlled substance” under § 4B1.2(b) and thus cannot be used to increase the sentencing range under § 4B1.1. We disagreed, explaining that the Guidelines’ use of the term “controlled substance” broadly refers to the ordinary meaning of that term—not just to the federal Controlled Substances Act—and that the ordinary meaning includes Illinois’s definition. *Ruth*, 966 F.3d at 654.

In *Wallace*, we were urged to revisit and overrule *Ruth* but declined to do so. 991 F.3d at 817. Alternatively, we were asked to hold that the Illinois statute is broader than *Ruth*’s ordinary-meaning definition of “controlled substance” because positional isomers of cocaine are not psychoactive. We rejected this argument too, noting that *Ruth* itself involved the Illinois statute and that positional isomers of cocaine “fit the natural meaning of ‘controlled substance.’” *Id.* We also declined the defendant’s invitation to “speculate about whether [positional isomers of cocaine] alter behavior.” *Id.*

Sisk was convicted under the Indiana statute for dealing cocaine rather than the Illinois statute at issue in *Ruth* and *Wallace*. But Indiana’s definition of cocaine includes “any ... isomer,” Ind. Code § 35-48-1-7, and is functionally identical to the Illinois definition. See *United States v. De La Torre*, 940 F.3d 938, 951–52 (7th Cir. 2019) (holding Indiana definition of isomer includes optical, positional, and geometric isomers). Sisk does not argue that his case can be distinguished on this basis.

Sisk makes the same arguments we rejected in *Ruth* and *Wallace* (and no others). We therefore summarily AFFIRM the judgment.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, )  
 ) CAUSE NO.  
Plaintiff, ) 1:19-cr-00081  
 )  
-vs- )  
 ) Indianapolis, Indiana  
SHERIDAN SISK, ) July 28, 2020  
 ) 1:30 p.m.  
Defendant. )

**BEFORE THE  
HONORABLE JAMES R. SWEENEY II**

OFFICIAL REPORTER'S TRANSCRIPT OF  
VIDEO PLEA AND SENTENCING HEARING

FOR THE PLAINTIFF: Peter A. Blackett  
Assistant United States Attorney  
10 West Market Street  
Suite 2100  
Indianapolis, IN 46204

FOR THE DEFENDANT: Thomas A. Brodnik  
McNEELY LAW LP  
143 W. Market Street  
Suite 600-A  
Indianapolis, IN 46204

Court Reporter: Cathy Easley Jones, RDR, FCRR  
Official Court Reporter  
46 East Ohio Street, Room 290  
Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND  
COMPUTER-AIDED TRANSCRIPTION

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Now, as you kind of just alluded to, you  
3 have the right to have me read each of those conditions to you  
4 as I pronounce sentence; but if you believe that you do  
5 understand them and why they're being waived -- or imposed,  
6 you can waive that reading. I heard you say that you would  
7 like to waive reading. Is that, in fact, what you would like  
8 to do?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Very well. I find that the defendant  
11 has waived formal reading, and I accept that waiver.

12 Now, I'm going to try to summarize here. It's  
13 something we've seen a lot of lately, Mr. Brodник; and of  
14 course, we also have a recent pronouncement now from the  
15 Seventh Circuit, and that has to do with the objection to the  
16 base offense level.

17 I think that you're arguing under *De La Torre*, that  
18 the offense -- base offense level should be 20 rather than 24  
19 pursuant to Guideline Section 2K2.1(a)(4) as opposed to just  
20 being based on one prior felony controlled substance offense,  
21 which would make the base offense level 20.

22 Mr. Sisk is conceding that one prior felony offense  
23 in paragraph 36 counts but that the controlled substance  
24 offense in paragraph 32 does not qualify. And then referring  
25 to Section 2K2.1, controlled substance offense has a meaning

1 set forth in Section 4B1.2(b) and application note of the  
2 commentary, which is Section 2K2.1, application note 1.

3 And then it talks about -- or you talk about the  
4 definition of Section 4B1.2(b).

5 Now, as I understand it, looking there, Mr. Sisk --  
6 in that paragraph 32, he was convicted of dealing in cocaine,  
7 a narcotic drug; and that was in Marion County Superior Court;  
8 and again, you talk about *U.S. v De La Torre*, which is 940  
9 F.3rd 938 Seventh Circuit, which talked about methamphetamine  
10 and talked about it being broader than the federal definition;  
11 and therefore, that was remanded for resentencing.

12 Then you talk about some other cases, to include one  
13 under Vales, which is under ACCA, Armed Career Criminal Act,  
14 with respect to what drug trafficking offense is and that kind  
15 of thing. And then some other cites, *United States versus*  
16 *Vega*, *United States versus Sanchez-Garcia* and *United States*  
17 *versus Townsend*.

18 Now, in response, the government brings to the  
19 Court's attention this recent pronouncement from the Seventh  
20 Circuit, literally two weeks old, which is at *United States*  
21 *versus Ruth*, which will be an F.3rd; but it's 2020 Westlaw  
22 4045885, Seventh Circuit, July 20th, 2020. And in that case,  
23 which had to do with career offender enhancement, the Seventh  
24 Circuit said that the definition of controlled substance  
25 offense -- well, it talks about the very guideline here,

1 Section 2K2.1; and it says that that refers to Section 4B1.2,  
2 and that that specifically includes offenses under state law  
3 and does not include any cross-references, for example, to the  
4 Controlled Substances Act; so that given the natural meaning  
5 of the controlled substance, Ruth's 2006 cocaine conviction  
6 was upheld; but also it cites to *Hudson*.

7 I'll add one thing to that, which is I recently  
8 determined in another case, *U.S. v Owens*, that was similar and  
9 that Mr. Owens was convicted under this same statute, I  
10 believe, which is this dealing in cocaine statute, and *United*  
11 *States versus Smith*, 921 F.3rd 708, which is a Seventh Circuit  
12 2019 case. The Seventh Circuit held that Indiana's dealing in  
13 cocaine statute is a predicate controlled substance offense  
14 under Section 4B1.2(b).

15 So first of all, other than that last part, which I  
16 don't think either party mentioned, did I lay out the parties'  
17 positions correctly?

18 Mr. Brodnik, did I summarize your position  
19 correctly?

20 MR. BRODNIK: Yes, Your Honor, I believe so.

21 THE COURT: Mr. Blackett, did I outline your  
22 response correctly?

23 MR. BLACKETT: You did, Your Honor.

24 THE COURT: All right. Mr. Brodnik, in light of  
25 this very recent -- unfortunately, for your argument, I

1 believe two weeks ago this *United States versus Ruth* coming  
2 down from the Seventh Circuit, do you have anything else that  
3 you would like to add?

4 MR. BRODNIK: Your Honor, yes. The only thing I  
5 would say is I believe *Ruth* -- now that I've had an  
6 opportunity to review it, I indicated in our sentencing  
7 memorandum that I was aware that it had come down but had not  
8 had time to substantively review it prior to filing that  
9 document and now would be ready to discuss it here at  
10 sentencing.

11 I believe *Ruth*, in effect, ties the Court's hands.  
12 I think it's on all fours with the argument I made; and as the  
13 Court has indicated, it came down against us.

14 So I think the Court is bound to follow Seventh  
15 Circuit precedent. I'm not in a position to withdraw the  
16 objection because the Seventh Circuit indicated in *Ruth* that  
17 it was the minority position; and it's certainly possible that  
18 the Supreme Court may weigh in on this issue due to the  
19 circuit split. For purposes here today, Your Honor, I agree  
20 the Court has no discretion and must follow the Seventh  
21 Circuit.

22 THE COURT: Okay. And I agree with that --  
23 everything there, Mr. Brodник, in that, one, there is a  
24 circuit split with respect to that particular issue.

25 Now, I'm not sure even if the Supreme Court resolved

1 that, that *United States versus Smith* might still weigh  
2 against you; but in any event, as you say, I'm bound by one or  
3 both of those in this instance. So your objection with  
4 respect to that offense level is overruled. So that offense  
5 level will be 24.

6 And then why don't you talk to me about the  
7 objection on the criminal history category.

8 MR. BRODNIK: Yes, Your Honor, I would be happy to.

9 With regard specifically, Your Honor, the objection  
10 that we were just talking about, the one back from 19 in  
11 paragraph 32, it dates back to the 1990s; that is, the Indiana  
12 case Mr. Sisk has with regard to dealing in cocaine or a  
13 narcotic drug. We set forth some cases in our sentencing  
14 memorandum with regard to the standards, with regard to  
15 criminal history being overstated.

16 Some of the things that the Court can consider is  
17 the age of Mr. Sisk at the time, the age of the defendant at  
18 the time, the defendant's prior history, a variety of factors  
19 as set forth in the Anderson case that we had talked about.

20 In addition to those cases, I would point out that  
21 this offense that creates three criminal history points for  
22 Mr. Sisk involves 0.2 grams of cocaine, as set out in the PSR.  
23 Mr. Sisk was 16 years old at the time, so he was a juvenile  
24 and was waived to adult court. The transaction was valued at  
25 \$20. So the offense conduct there occurred 22 years ago; and

1 taken some amount of time here.

2           This sentence will be -- that I am going to state  
3 here, the sentence that I intend to impose -- and it will be  
4 pursuant to the Sentencing Reform Act of 1984 -- it's the  
5 judgment of the Court that the defendant, Sheridan Sisk, is  
6 hereby committed to the custody of the Bureau of Prisons, to  
7 be imprisoned for a term of 46 months. This sentence is  
8 sufficient but not greater than necessary to protect the  
9 public from further crimes of the defendant, to reflect the  
10 seriousness of the offense, and to afford adequate deterrence  
11 to criminal conduct, and to otherwise comply with the purposes  
12 set forth in 18 USC, Section 3553(a).

13           The defendant shall forfeit to the United States a  
14 Glock .40 caliber firearm bearing serial number CDV611US; a  
15 Beretta .40 caliber firearm, P, as in Papa, Z39877; all  
16 recovered ammunition, and \$121,068 in United States currency.

17           The defendant shall pay a fine to the United States  
18 of \$500. The Court is departing from the fine guideline range  
19 based on the defendant's financial resources and future  
20 ability to pay. The Court finds the defendant does not have  
21 the ability the pay interest and waives the interest  
22 requirement.

23           The defendant shall notify the probation officer of  
24 any material change in economic circumstances that might  
25 affect his ability to pay the fine.

This is not the official court record. Official records of court proceedings may only be obtained directly from the court maintaining a particular record.

## State of Indiana vs. Sisk, Sheirdan

Case Number	49G20-9809-CF-150131
Court	Marion Superior Court, Criminal Division 20
Type	CF - Criminal Felony
Filed	09/22/1998
Status	06/17/1999 , Decided

## Parties to the Case

Defendant Sisk, Sheirdan L

### Description

Male, Black

### Address

2450 AUTUMN DR  
INDIANAPOLIS, IN 46229

### Other Agency Numbers

000000532040 Indianapolis Metropolitan Police

### Attorney

Hilary Bowe Ricks  
#1078849, Lead, Retained

7858 Prairie View Lane  
Suite 715  
Indianapolis, IN 46256  
317-231-1403(W)

### Attorney

Jeffrey Allen Baldwin  
#1189249, Retained

One Indiana Square  
211 N. Pennsylvania St.  
Suite 2400  
Indianapolis, IN 46204  
317-632-4463(W)

### Attorney

Mark Inman  
#485049, Retained

141 E. Washington St.  
Suite 200  
Indianapolis, IN 46204  
317-924-3545(W)

State Plaintiff State of Indiana

## Charges

01 09/15/1998 DEALING IN COCAINE OR NARCOTIC/FB

10a

## Citation#

0248706

## Statute

35-48-4-1

## Degree

CNV

02 09/15/1998 POSSESSION COCAINE OR SCH.I,II DRUG/FD

## Citation#

0248707

## Statute

35-48-4-6

## Degree

CNV

## Chronological Case Summary

09/15/1998 **New Filings Pre 01/01/2002**

New Filings Pre 01/01/2002

09/15/1998 **Converted Event**

PRELIMINARY SCREENING

09/22/1998 **Converted Event**

Power of Attorney Number: NA5607620

09/22/1998 **Converted Event**

WARRANT REQUEST SCREENING

09/22/1998 **Converted Event**

CASE FILED

09/24/1998 **Converted Event**

OUT OF SESSION 001 PROBABLE CAUSE MINUTES 9/24/1998 002 Magistrate 003 Information and Probable Cause Affidavit filed (H.I.). Probable cause found. Clerk ORDERED to issue Warrant for the arrest of the Defendant and ORDERS bond set in the amount of \$ 100000 Type SR.

09/29/1998 **Converted Event**

OUT OF SESSION 001 MINUTE ENTRY 09/29/98 002 HINI on 09/30/98 at A.

09/30/1998 **Converted Event**

INITIAL HEARING 000 Court Reporter: LESSIE CRAWLEY. 001 INITIAL HEARING MINUTES 9/30/1998 002 SENIOR JUDGE 003 Defendant in person and by counsel C.GRAHAM. 004 State of Indiana by L.GORDON. 005 Defendant found to be indigent; Public Defender CLAYTON GRAHAM appointed. 006 Public Defender CLAYTON GRAHAM files appearance (H.I.). 007 Court advises the Defendant pursuant to I.C. 35-33-7-5, 6. Defendant or counsel provided with a copy of Information. A preliminary plea of NOT GUILTY is entered for the Defendant. Court now sets: Omnibus d 008 Defendant moves for Bond Reduction. 009 BOND HEARING on 10/01/98 at A. Into Court Room 010 COURT SCHEDULING ORDER FILED.

10/01/1998 **Converted Event**

HEARING OTHER 000 Court Reporter: LESSIE CRAWLEY. 001 MINUTE ENTRY 10/01/98 002 Defendant in person and by counsel C.GRAHAM. 003 State of Indiana by S.MONTGOMERY. 004 SUBMITTED FOR BOND REDUCTION. 005 Hearing held. 006 Court ORDERS bond to be set in the amount of \$ 1000 Type PR. 007 CONDITIONS OF BOND FILED. RULES OF 008 HOUSE FILED.

**04/20/1999 Judgment**

Judicial Officer: Eichholtz, Steven R

01. DEALING IN COCAINE OR NARCOTIC/FB

- Finding of Guilty

**04/20/1999 Judgment**

Judicial Officer: Eichholtz, Steven R

02. POSSESSION COCAINE OR SCH.I,II DRUG/FD

- Finding of Guilty

**04/20/1999 Converted Event**

COURT TRIAL 000 Court Reporter: ANDREA WOMACK. 001 COURT TRIAL MINUTES 4/20/1999 002 Matter submitted to Court for Trial on Defendant's plea of NOT GUILTY. 003 Defendant in person and by counsel MARK INMAN. 004 State of Indiana by D.GRIFFITH. 005 State makes opening statement. 006 Defendant makes opening statement. 007 Witnesses sworn as called. 008 Defendant moves for separation of witnesses. 009 Separation granted, admonishment given, and witnesses separated. 010 State submits evidence. 011 State rests. 012 Defendant rests. 013 Defendant makes closing argument. 014 State responds to Defendant's closing argument. 015 Court now finds the Defendant: 016 Count (001) G 017 Count (002) G 018 Judgment of conviction entered on count(s) 1,2. 019 Court ORDERS Presentence Investigation report and sets cause for Sentencing 05/20/99 AM.

**05/19/1999 Converted Event**

OUT OF SESSION 001 OUT OF COURT FILING/RULING MINUTES 5/19/1999 002 Notice of Pre-Trial Release Violation filed (H.I.). 003 Defendant having violated certain conditions of release. Clerk ORDERED to issue Warrant for the arrest of the Defendant and ORDERS bond set in the amount of \$ 0 Type NB.

**05/20/1999 Converted Event**

SENTENCING 000 Court Reporter: CONNIE MCKAY. 001 MINUTE ENTRY 05/20/99 002 Defendant in person and by counsel MARK INMAN. 003 .... 004 State of Indiana by C.PLOUGHE. 005 Court ORDERS Presentence Investigation report. 006 Court ORDERS Defendant remanded to custody of Marion County Sheriff. 007 HSTN on 06/17/99 at A. 008 Court ORDERS Warrant recalled.

**06/17/1999 Converted Event**

SENTENCING 000 Court Reporter: CONNIE MCKAY. 001 SENTENCING HEARING MINUTES 6/17/1999 002 Defendant by counsel M.INMAN. 003 State of Indiana by D.GRIFFITH. 004 Probation department files Presentence Investigation report (H.I.). Parties served. 005 Court accepts plea of Guilty and terms of Plea Agreement. 006 Judgment of conviction entered on count(s) 1,2. 007 Court conducts Sentencing hearing and, after considering the Presentence Investigation report and all evidence presented, sentences the Defendant as follows: 008 As to Count 001, Sentence imposed 8 Y; Executed 730 D; Suspended 6 Y. 009 As to Count 002, Sentence imposed 0 Y; Executed 0 D; Suspended 0 Y. 010 All counts to run concurrently with one another. 011 Defendant placed on probation for 730 D; Order of probation Conditions signed and filed (H.I.). Defendant and Probation Department served. 012 Defendant assessed court costs of \$125.00 and total fines of \$5.00. 013 Defendant ordered committed to Department of Correction and given 33 days credit time. 014 Abstract of Judgment issued and filed (H.I.). 015 Criminal Court Commitment Order 016 End of Update Sentencing/Commitment 017 Sentencing comments: COUNT 2 TO MERGE WITH COUNT 1 018 Court finds mitigating circumstances. 019 Court advises Defendant and Counsel of rights of appeal. 020 Court finds Defendant indigent for appeal purposes and refers matter to Marion County Pauper Appeals Panel. 021 Defendant's license suspended for 180 D with 0 days credit. Total suspended time: 180 D. Clerk ORDERED to certify Abstract of Court Record to the Bureau of Motor Vehicles. 022 THE COURT IMPOSES A \$200 DRUG 023 INTERDICTION FEE. 024 ADDITIONAL ORDERS/INSTRUCTIONS: 2 025 YEARS AT COMMUNITY CORRECTIONS 026 RESIDENTIAL COMPONENTS AS A CONDITION 027 OF PROBATION. 028 COURT WAIVES FINES AND COSTS. 029 Court signs and issues ORDER appointing Pauper Appellate Counsel (H.I.). 030 CRT APPOINTING PAUPER APPEL. COUNSEL

"(1) compile and analyze any information contained in documentation described in subsection (a) relating to the use of encryption or scrambling technology to facilitate or conceal criminal conduct; and

"(2) based on the information compiled and analyzed under paragraph (1), annually report to the Congress on the nature and extent of the use of encryption or scrambling technology to facilitate or conceal criminal conduct."

### § 3553. Imposition of a sentence

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amend-

ments issued under section 994(p) of title 28); and

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

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

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

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

(1) **IN GENERAL.**—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

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

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

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

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

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

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

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

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

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

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

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

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

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

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

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

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice

pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

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

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

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

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

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

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

(1) the defendant does not have—

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

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

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

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

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

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

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

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

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

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

#### REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (c)(2), are set out in the Appendix to this title.

Section 408 of the Controlled Substances Act, referred to in subsec. (f)(4), is classified to section 848 of Title 21, Food and Drugs.

#### CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as amended by section 401(a)(1) of Pub. L. 108-21, see Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, Appendix I, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

#### AMENDMENTS

2018—Subsec. (f). Pub. L. 115-391, § 402(a)(1)(A), (C), in introductory provisions, substituted “, section 1010” for “or section 1010” and inserted “, or section 70503 or 70506 of title 46” after “963”, and inserted concluding provisions.

Subsec. (f)(1). Pub. L. 115-391, § 402(a)(1)(B), added par. (1) and struck out former par. (1) which read as follows: “the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;”.

Subsec. (g). Pub. L. 115-391, § 402(a)(2), added subsec. (g).

2010—Subsec. (c)(2). Pub. L. 111-174 substituted “a statement of reasons form issued under section 994(w)(1)(B) of title 28” for “the written order of judgment and commitment”.

2003—Subsec. (a)(4)(A). Pub. L. 108-21, § 401(j)(5)(A), amended subpar. (A) generally. Prior to amendment,

subpar. (A) read as follows: “the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or”.

Subsec. (a)(4)(B). Pub. L. 108-21, § 401(j)(5)(B), inserted before semicolon at end “, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)”.

Subsec. (a)(5). Pub. L. 108-21, § 401(j)(5)(C), amended par. (5) generally. Prior to amendment, par. (5) read as follows: “any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;”.

Subsec. (b). Pub. L. 108-21, § 401(a), designated existing provisions as par. (1), inserted par. heading, substituted “Except as provided in paragraph (2), the court” for “The court”, and added par. (2) and concluding provisions.

Subsec. (c). Pub. L. 108-21, § 401(c)(2), (3), in concluding provisions, inserted “, together with the order of judgment and commitment,” after “the court’s statement of reasons” and “and to the Sentencing Commission,” after “to the Probation System”.

Subsec. (c)(2). Pub. L. 108-21, § 401(c)(1), substituted “described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements” for “described”.

2002—Subsec. (e). Pub. L. 107-273 inserted “a” before “minimum sentence”.

1996—Subsec. (f). Pub. L. 104-294, § 601(h), amended directory language of Pub. L. 103-322, § 80001(a). See 1994 Amendment note below.

Pub. L. 104-294, § 601(b)(5), in introductory provisions, substituted “section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963)” for “section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963)”.

Subsec. (f)(4). Pub. L. 104-294, § 601(b)(6), substituted “section 408 of the Controlled Substances Act” for “21 U.S.C. 848”.

1994—Subsec. (a)(4). Pub. L. 103-322, § 280001, amended par. (4) generally. Prior to amendment, par. (4) read as follows: “the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;”.

Subsec. (f). Pub. L. 103-322, § 80001(a), as amended by Pub. L. 104-294, § 601(h), added subsec. (f).

1988—Subsec. (c). Pub. L. 100-690 inserted “or other appropriate public record” after “transcription” in second sentence and struck out “clerk of the” before “court” in last sentence.

1987—Subsec. (b). Pub. L. 100-182, § 3(1), (2), substituted “court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result” for “court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result”.

Pub. L. 100-182, § 3(3), inserted after first sentence “In determining whether a circumstance was adequately

taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Pub. L. 100-182, §16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)."

Subsec. (c)(1). Pub. L. 100-182, §17, inserted "and that range exceeds 24 months,".

1986—Subsec. (a)(7). Pub. L. 99-646, §81(a), added par. (7).

Subsec. (b). Pub. L. 99-646, §9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c). Pub. L. 99-646, §8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

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

Subsec. (e). Pub. L. 99-570 added subsec. (e).

#### EFFECTIVE DATE OF 2018 AMENDMENT

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

#### EFFECTIVE DATE OF 1994 AMENDMENT

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

#### EFFECTIVE DATE OF 1987 AMENDMENT

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

#### EFFECTIVE DATE OF 1986 AMENDMENTS

Pub. L. 99-646, §8(c), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99-646, §9(b), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99-646, §80(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Pub. L. 99-646, §81(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Pub. L. 99-570, title I, §1007(b), Oct. 27, 1986, 100 Stat. 3207-7, provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

#### EFFECTIVE DATE

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

#### REPORT BY ATTORNEY GENERAL

Pub. L. 108-21, title IV, §401(7), Apr. 30, 2003, 117 Stat. 674, provided that:

"(1) DEFINED TERM.—For purposes of this section [amending this section, section 3742 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure, enacting provisions set out as a note under section 991 of Title 28, and enacting provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28], the term 'report described in paragraph (3)' means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act [Apr. 30, 2003].—

"(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

"(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

"(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

"(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

"(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

"(2) REPORT REQUIRED.—

"(A) IN GENERAL.—Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

"(B) CONTENTS.—The report submitted pursuant to subparagraph (A) shall set forth—

"(i) the case;

"(ii) the facts involved;

"(iii) the identity of the district court judge;

"(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

"(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

"(C) APPEAL OF THE DEPARTURE.—Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

"(3) EFFECTIVE DATE.—Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act [Apr. 30, 2003], except that such paragraph

shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3)."

**AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES**

Pub. L. 100-182, § 24, Dec. 7, 1987, 101 Stat. 1271, provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub. L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code;

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code, shall apply in the case of an offense committed before the taking effect of such guidelines."

**§ 3554. Order of criminal forfeiture**

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

**REFERENCES IN TEXT**

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, is Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended. Title II of this Act, known as the Controlled Substances Act, is classified principally to subchapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. Title III of this Act, known as the Controlled Substances Import and Export Act, is classified principally to subchapter II (§ 951 et seq.) of chapter 13 of Title 21. Section 413 of this Act is classified to section 853 of Title 21. For complete classification of this Act to the Code, see Short Title note set out under sections 801 and 951 of Title 21 and Tables.

**EFFECTIVE DATE**

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

**§ 3555. Order of notice to victims**

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in sec-

tion 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of \$20,000.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

**EFFECTIVE DATE**

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

**§ 3556. Order of restitution**

The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991; amended Pub. L. 99-646, § 20(b), Nov. 10, 1986, 100 Stat. 3596; Pub. L. 104-132, title II, § 202, Apr. 24, 1996, 110 Stat. 1227.)

**AMENDMENTS**

1996—Pub. L. 104-132 substituted "shall order restitution" for "may order restitution" and "section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section" for "sections 3663 and 3664".

1986—Pub. L. 99-646 substituted "may order restitution in accordance with sections 3663 and 3664" for "under this title, or an offense under section 902(h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664".

**EFFECTIVE DATE OF 1996 AMENDMENT**

Amendment by Pub. L. 104-132 to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104-132, set out as a note under section 2248 of this title.

**EFFECTIVE DATE OF 1986 AMENDMENT**

Pub. L. 99-646, § 20(c), Nov. 10, 1986, 100 Stat. 3596, provided that: "The amendments made by this section [amending this section and section 3663 of this title] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

**EFFECTIVE DATE**

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

**§ 3557. Review of a sentence**

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

**EFFECTIVE DATE**

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this sec-



## §2K1.7. [Deleted]




Historical Note: Section 2K1.7 (Use of Fire or Explosives to Commit a Federal Felony), effective November 1, 1989 (amendment 188), amended effective November 1, 1990 (amendment 332), was deleted by consolidation with §2K2.4 effective November 1, 1993 (amendment 481).

\* \* \* \* \*

## 2. FIREARMS

### §2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

#### (a) Base Offense Level (Apply the Greatest):

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm  that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **24**, if the defendant committed any part of the instant  offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm  that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to



(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);



(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;



(7) **12**, except as provided below; or



(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.



(b) Specific Offense Characteristics




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<u>Number of Firearms</u>
<u>Increase in Level</u>
(A)
3-7
add 2
(B)
8-24
add 4
(C)
25-99
add 6
(D)
100-199
add 8
(E)
200 or more
add 10.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or





(3) If the offense involved—



(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.



The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.



(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.



(6) If the defendant—



(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

**21a**



(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.



Regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine. 

—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. Definition of "Prohibited Person."—For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n). 

4. Application of Subsection (a)(7).—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the 



ms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. Application of Subsection (b)(2).—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. Destructive Devices.—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive



(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).


Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).


(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. Application of Subsection (b)(7).—Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person). +

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2). +



11. Upward Departure Provisions.—An upward departure may be warranted in  any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4. 

13. Application of Subsection (b)(5).— 

(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful;  
or

(II) who intended to use or dispose of the firearm unlawfully.

(B) Definitions.—For purposes of this subsection:



probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

#### 14. Application of Subsections (b)(6)(B) and (c)(1).—



(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—

Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is



or another offense, respectively.

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:



Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) Firearm Not Cited in the Offense of Conviction. Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See §1B1.3(a)



possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A). 

—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629-631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804).

**§2K2.2. [Deleted]**

Historical Note: Section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), effective November 1, 1987, amended effective



Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).

## **§4B1.2. Definitions of Terms Used in Section 4B1.1**

- (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to



controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

## Commentary

### Application Notes:

#### 1. Definitions.—For purposes of this guideline—



"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. .

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."



Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.



Upward Departure for Burglary Involving Violence.—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).

### **§4B1.3. Criminal Livelihood**

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than **13**, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than **11**.

#### **Commentary**

#### **Application Notes:**

1. "Pattern of criminal conduct" means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.
2. "Engaged in as a livelihood" means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded