

APPENDICES

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APPENDIX A

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

A – Order Denying En Banc Review (Aug. 16, 2024)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3005

United States of America

Appellee

v.

Steven Douglas Freno, Jr.

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:22-cr-00067-CJW-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 16, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX B

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

B – Order Granting Extension for En Banc to July 26, 2024 (July 26, 2024)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3005

United States of America

Appellee

v.

Steven Douglas Freno, Jr.

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:22-cr-00067-CJW-1)

ORDER

The motion of appellant for an extension of time until July 26, 2024, to file a petition for rehearing is granted.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

July 26, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX C

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

C – Order Granting Extension to July 25, 2024 (July 8, 2024)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3005

United States of America

Appellee

v.

Steven Douglas Freno, Jr.

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:22-cr-00067-CJW-1)

ORDER

The motion of appellant for an extension of time until July 25, 2024, to file a petition for rehearing is granted.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

July 08, 2024

Order Entered Under Rule 27A(a):
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX D

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

D – Judgment (June 27, 2024)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3005

United States of America

Plaintiff - Appellee

v.

Steven Douglas Freno, Jr.

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:22-cr-00067-CJW-1)

JUDGMENT

Before COLLOTON, Chief Judge, ARNOLD, and GRUENDER, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 27, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX E

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

E – Panel Opinion Affirming Judgment (June 27, 2024)

United States Court of Appeals
For the Eighth Circuit

No. 23-3005

United States of America

Plaintiff - Appellee

v.

Steven Douglas Freno, Jr.

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: June 10, 2024

Filed: June 27, 2024

[Unpublished]

Before COLLOTON, Chief Judge, ARNOLD and GRUENDER, Circuit Judges.

PER CURIAM.

Steven Freno pleaded guilty to possession of a firearm by a prohibited person, *see* 18 U.S.C. § 922(g)(1), (9), and possession with intent to distribute marijuana mixture after having been convicted of a felony drug offense, *see* 21 U.S.C. § 841(a)(1), (b)(1)(D). With a total offense level of 21 and a criminal history category of II, Freno's initial advisory sentencing guidelines range was 41 to 51

months of imprisonment. At sentencing, the district court¹ departed upward because it found that Freno's "criminal history category substantially under-represents the seriousness of his criminal history" and the "likelihood that he will commit other crimes." U.S.S.G. § 4A1.3(a)(1). The district court determined that Freno's criminal history most closely resembles that of a defendant with a criminal history category of IV and used that category as a reference to determine the extent of an appropriate upward departure. *See id.* § 4A1.3(a)(4)(A). The guidelines suggest 57 to 71 months of imprisonment for defendants with an offense level of 21 and a criminal history category of IV. The district court also ruled in the alternative that it would vary upward to the same degree based on Freno's criminal history. The district court then varied upward due to other aggravating circumstances and sentenced Freno to 84 months in prison. Freno appeals.

Freno principally asserts that the district court improperly departed upward under U.S.S.G. § 4A1.3. However, the district court explained that it was also varying upward to the same extent based on Freno's criminal history. *See* 18 U.S.C. § 3553(a)(1)-(2). In other words, "the departure and the variance were alternative, rather than cumulative, bases" for Freno's sentence. *United States v. Grandon*, 714 F.3d 1093, 1098 (8th Cir. 2013). Because we conclude below that the district court did not abuse its discretion in deciding to vary upward, "any error in alternatively imposing an upward departure would be harmless because the district court would have imposed the same sentence absent the error." *Id.* (internal quotation marks omitted).

Freno argues that the district court abused its discretion in varying upward based on the § 3553(a) factors. *See United States v. McDaniels*, 19 F.4th 1065, 1067 (8th Cir. 2021) (*per curiam*) (noting the standard of review). Here, the district court explained its reasons for varying upward and determining Freno's sentence. Especially important to the district court were Freno's thirty-three adult criminal

¹The Honorable C.J. Williams, United States District Judge for the Northern District of Iowa.

convictions. His criminal history includes three violent crimes and numerous convictions involving drugs or guns, indicating Freno's tendency "to commit crime over and over again." The district court also noted the presence of additional "aggravating factors," including Freno's continued criminal conduct while under the court's supervision, his "violent[,] . . . intimidating[,] and traumatizing conduct" that led to this prosecution, as well as his "repeated" lying to the police. Though Freno urged the district court to give great weight to his claim to be "a hard working, non-violent man" with "a supportive network of friends and family," it does not appear to us that the district court failed to consider a relevant and significant factor, gave significant weight to an irrelevant or improper factor, or committed a clear error of judgment in weighing the appropriate factors. *See id.*; *see also United States v. Nguyen*, 829 F.3d 907, 926 (8th Cir. 2016) ("A district court does not abuse its discretion simply because it weighs the relevant factors more heavily than the defendant would prefer." (internal quotation marks omitted)). Accordingly, we discern no abuse of discretion.

Affirmed.

APPENDIX F

8th Circuit Court of Appeals – *United States v. Steven Freno* – 23-3005

F – Order Appointing Criminal Justice Act Counsel (Sept. 5, 2023)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3005

United States of America

Appellee

v.

Steven Douglas Freno, Jr.

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:22-cr-00067-CJW-1)

ORDER

Attorney Rockne Ole Cole is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

September 05, 2023

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

**District Court in the Northern District of Iowa – United States v. Steven
Freno, No. 1:22-CR-67-CJW-MAR-1**

G – Notice of Appeal (Sept. 4, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,)

) Case No. 1:22-CR-00067-CJW-MAR-1

)

)

Plaintiff,)

)

v.)

)

STEVE FRENO,)

)

Defendant.)

DEFENDANT NOTICE OF APPEAL
IFP PREVIOUSLY GRANTED

Pursuant to Fed. R. App. Proc. 4 (b) (1) (A), Defendant Steven Freno appeals the final Judgment and Sentence entered therein at R. Doc. 53, and all adverse rulings entered therein and previously on the criminal docket. Defendant further states that he has previously been appointed Criminal Justice Act and permitted to proceed in forma pauperis. See R. Doc. 7. He seeks IFP status on appeal and requests Rockne Cole to be appointed under Criminal Justice Act.

RESPECTFULLY SUBMITTED,
/s/ Rockne Cole

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the parties or attorneys of record.

/s/ Rockne Cole

APPENDIX H

**District Court in the Northern District of Iowa – United States v. Steven
Freno, No. 1:22-CR-67-CJW-MAR-1**

H – Judgment (Aug. 31, 2023)

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

STEVEN DOUGLAS FRENO, JR.

) JUDGMENT IN A CRIMINAL CASE

) Case Number: 0862 1:22CR00067-001

) USM Number: 09469-029

Rockne Cole

Defendant's Attorney

☒ ORIGINAL JUDGMENT☐ AMENDED JUDGMENT

Date of Most Recent Judgment:

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2 of the Indictment filed on August 17, 2022☐ 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:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1), 922(g)(9), and 924(a)(2)	Possession of a Firearm by a Prohibited Person	01/27/2022	1
21 U.S.C. §§ 841(a)(1), 841(h)(1)(D), and 851	Possession with Intent to Distribute a Controlled Substance After Having Been Convicted of a Felony Drug Offense	01/27/2022	2

The defendant is sentenced as provided in pages 2 through 7 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) _____ 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.

C.J. Williams
United States District Court Judge

Name and Title of Judge

August 30, 2023

Date of Imposition of Judgment



Signature of Judge

August 31, 2023

Date

DEFENDANT: **STEVEN DOUGLAS FRENO, JR.**
CASE NUMBER: **0862 1:22CR00067-001**

PROBATION

☐ The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

☒ The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **84 months. This term of imprisonment consists of an 84-month term imposed on Count 1 and an 84-month term imposed on Count 2 of the Indictment, to be served concurrently. It is ordered that the term of imprisonment for the instant offense be served consecutively to any term of imprisonment that may be imposed for the cases set forth in paragraph 60 (Linn County, Iowa, Case No. SMSM135261) and paragraph 64 (Linn County, Iowa, Case No. FECR145689) of the presentence report, pursuant to 18 U.S.C. § 3584.**

☒ The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the United States 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: **STEVEN DOUGLAS FRENO, JR.**
CASE NUMBER: **0862 1:22CR00067-001**

SUPERVISED RELEASE

- ☒ Upon release from imprisonment, the defendant will be on supervised release for a term of:
4 years. This term of supervised release consists of a 3-year term imposed on Count 1 and a 4-year term imposed on Count 2 of the Indictment, to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant 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 the defendant poses a low risk of future controlled substance abuse. *(Check, if applicable.)*
- 4) ☒ The defendant must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- 5) ☐ The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. *(Check, if applicable.)*
- 6) ☐ The defendant must participate in an approved program for domestic violence. *(Check, if applicable.)*

The defendant 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: STEVEN DOUGLAS FRENO, JR.
CASE NUMBER: 0862 1:22CR00067-001

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's 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 the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant 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) The defendant 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) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **STEVEN DOUGLAS FRENO, JR.**
CASE NUMBER: **0862 1:22CR00067-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. **The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.**
2. **The defendant must participate in a mental health evaluation. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program. The defendant must take all medications prescribed to the defendant by a licensed medical provider.**
3. **The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.**
4. **If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.**

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

Judgment 6 of 7

DEFENDANT: **STEVEN DOUGLAS FRENO, JR.**
CASE NUMBER: **0862 1:22CR00067-001**

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>AVAA Assessment¹</u>	<u>JVTA Assessment²</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200	\$ 0	\$ 0	\$ 0	\$ 0

☐ 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.

<u>Name of Payee</u>	<u>Total Loss³</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____ \$ _____

☐ 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:

¹Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

²Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

³Findings 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: **STEVEN DOUGLAS FRENO, JR.**
CASE NUMBER: **0862 1:22CR00067-001**

SCHEDULE OF PAYMENTS

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

- A ☒ \$ **200** due immediately;
- ☐ 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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 will 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 must pay the cost of prosecution.
- ☐ The defendant must pay the following court cost(s):
- ☐ The defendant must forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX I
Relevant Statute and Guidelines

I – U.S.S.G. §4A1.3 and 18 U.S.C. § 3553 (a)

APPENDIX I - PERTINENT GUIDELINE AND STATUTE

U.S.S.G. § 4A1.3 AND 18 U.S. Code § 3553 (a)

**§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 under-represents 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.—Unless otherwise specified, 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.—A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(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.

18 U.S. Code § 3553 (a) - Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

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

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement—

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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(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.