



CJA Panel Training

Federal Sentencing Update

December 8, 2023

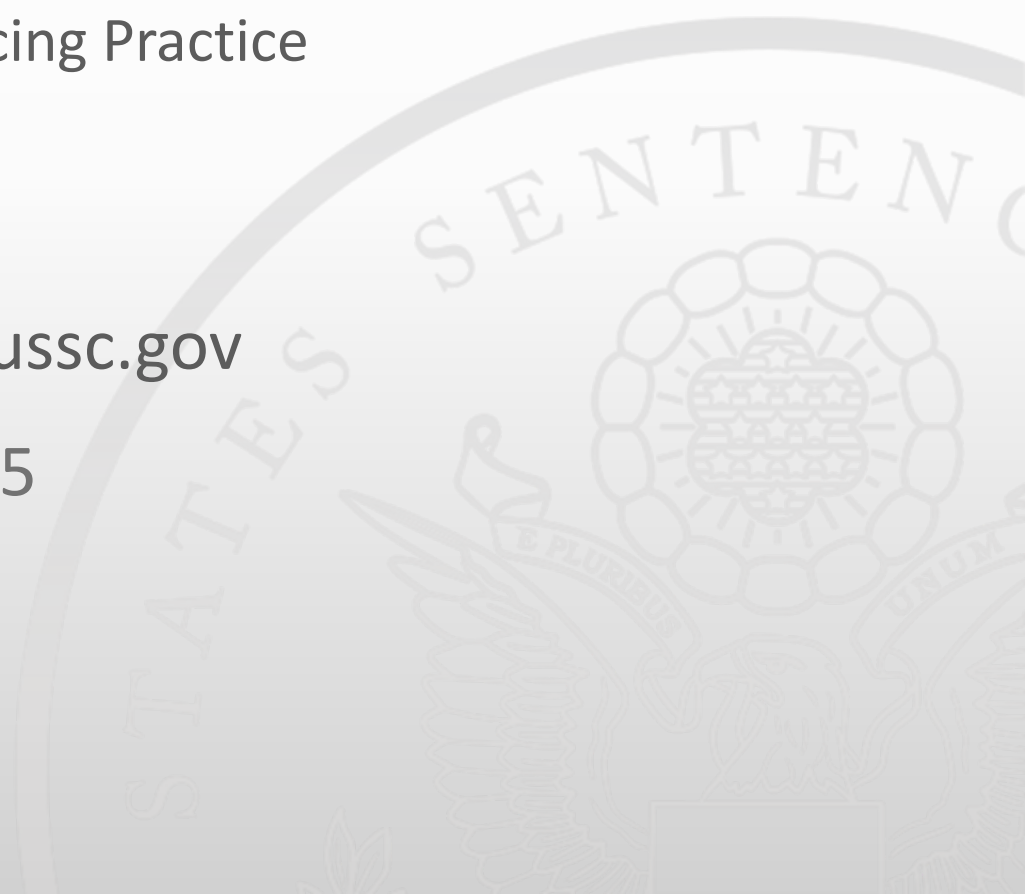
Alan Dorhoffer

Director

Office of Education and Sentencing Practice

Email: adorhoffer@ussc.gov

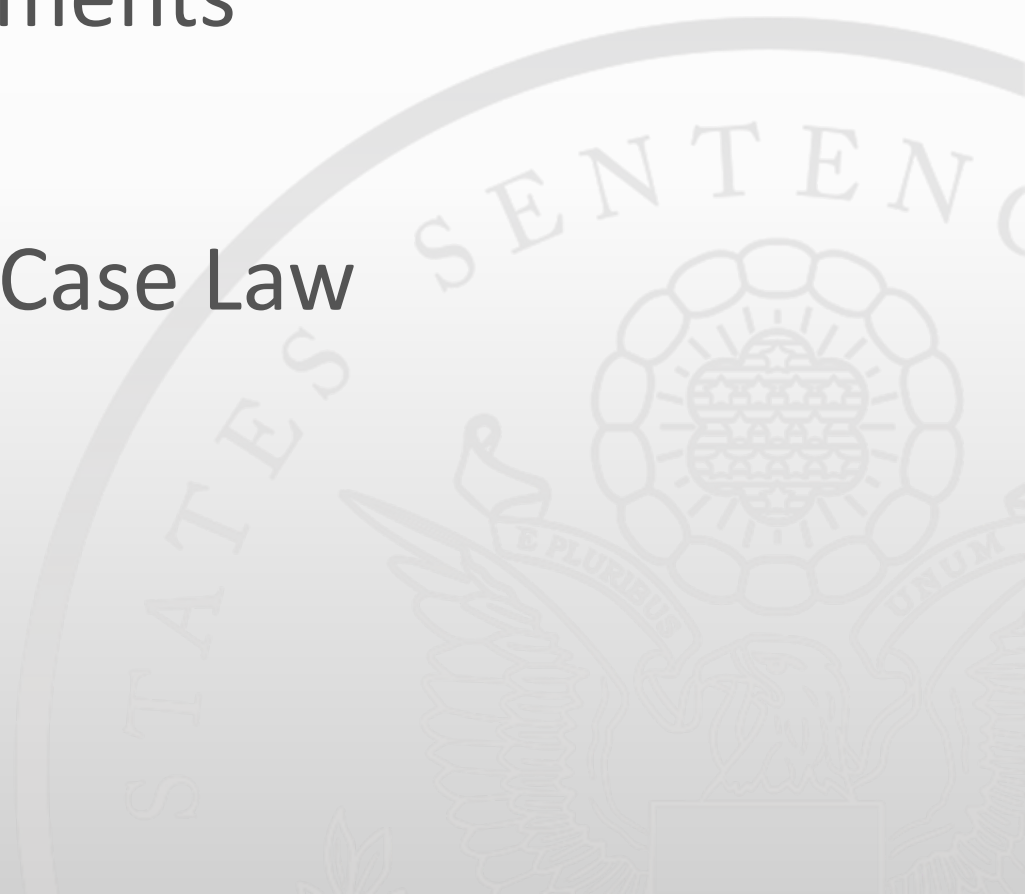
HelpLine: (202) 502-4545



Topics

2023 Selected Guideline Amendments

Supreme Court and Fifth Circuit Case Law



2023 Amendments

Criminal History

Compassionate Release

First Step Act Safety Valve

Career Offender

Firearms

Circuit Conflict

Fake Pills

Criminal History Amendments

1

Status Points

2

Zero-Point Offenders

3

Marijuana Convictions

Why did the Commission Act on Criminal History?

“Status points” do not improve predictive value of criminal history score

Recidivism studies show “zero-point offenders are less likely to be arrested than even “one-point offenders”



Criminal History Amendments

1

Status Points

Numeric Redesignation

7 or More Points Required

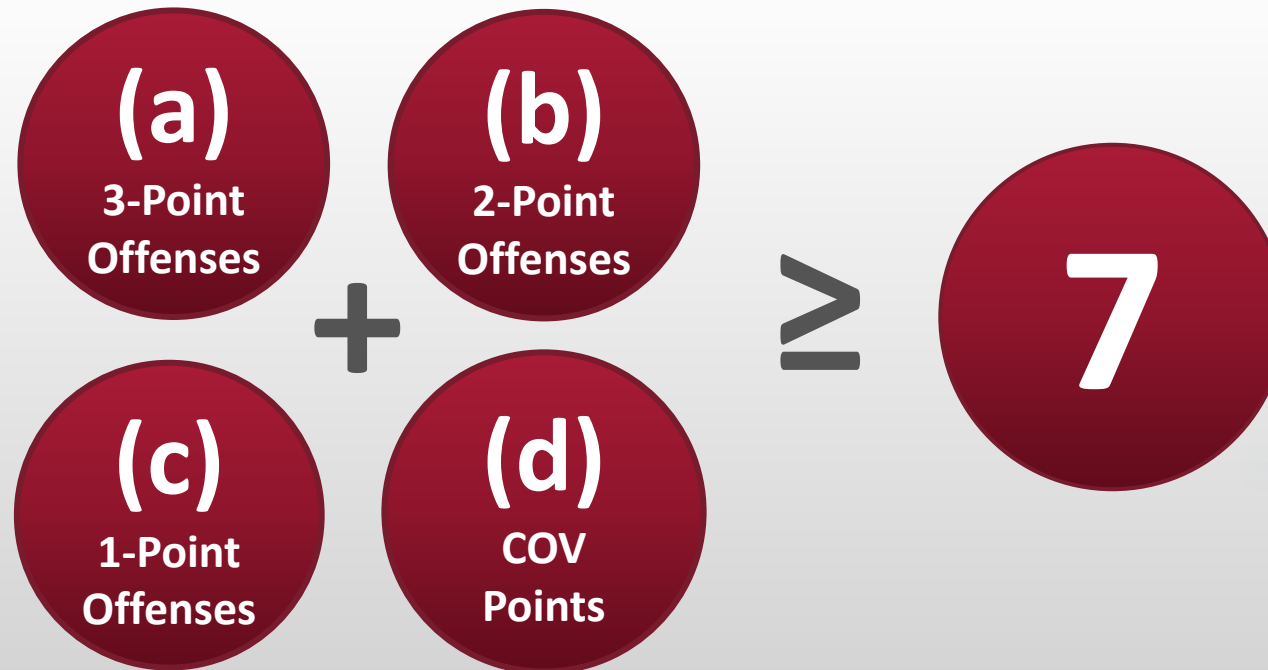
Add 1 Point, Not 2 Points

Status Points

New §4A1.1(e)

(e) **Add 1 point** if the defendant...

- (1) **receives 7 or more points under subsections (a) through (d), AND**
- (2) committed the instant offense while under any criminal justice sentence ...



Criminal History Amendments

2

Zero-Point Offenders

Two-Level Decrease

Sentences Other Than Incarceration

Adjustment for Certain Zero-Point Offenders

Promulgated §4C1.1(a)

Two-Level Decrease If . . .

1

**No Criminal History
Points**

§4C1.1(a)(1)

X

No Offense Exclusions

§4C1.1(a)(2)–(10)

Tanya McQuoid has three prior convictions for drug trafficking. She was released from incarceration on all three offenses 16 years before her instant offense began. The government concedes that she has no offense exclusions but says she is not eligible for a reduction under §4C1.1 because she has a prior conviction?

- A. No
- B. Yes



Conviction-Based Exclusions

Promulgated §§4C1.1(a)(5), (8)–(9)

Conviction-Based

Sex Offense

Individual Rights | §2H1.1

Serious Human Rights Violation | §3A1.5



Defendant-Based Exclusions

Sections 4C1.1(a)(3), (6)–(7), (9)–(10) (p. 411)

Defendant-Based

Violence

Hate Crime Adjustment | §3A1.1(a)

Substantial Financial Hardship

Vulnerable Victim | §3A1.1(b)

Firearm or Dangerous Weapon

Aggravating Role (§3B1.1) & No CCE
See U.S. v. Draheim, 958 F.3d 651 (7th Cir.)

Offense-Based Exclusions

Promulgated §§4C1.1(a)(2), (4)

Offense-Based

Serious Bodily Injury

Terrorism Adjustment | §3A1.4



How does §4C1.1 Operate?

The defendant was convicted of drug trafficking.

His base offense level based upon the quantity of drugs is 16.

The defendant qualified for a reduction under the new §4C1.1.

16 Drug Trafficking | §2D1.1

-3 Acceptance | §3E1.1

-2 Zero-Point | §4C1.1

11

Total Offense Level

Implementation of 28 U.S.C. § 994(j)

If defendant **qualifies under §4C1.1:**

Zone A or B

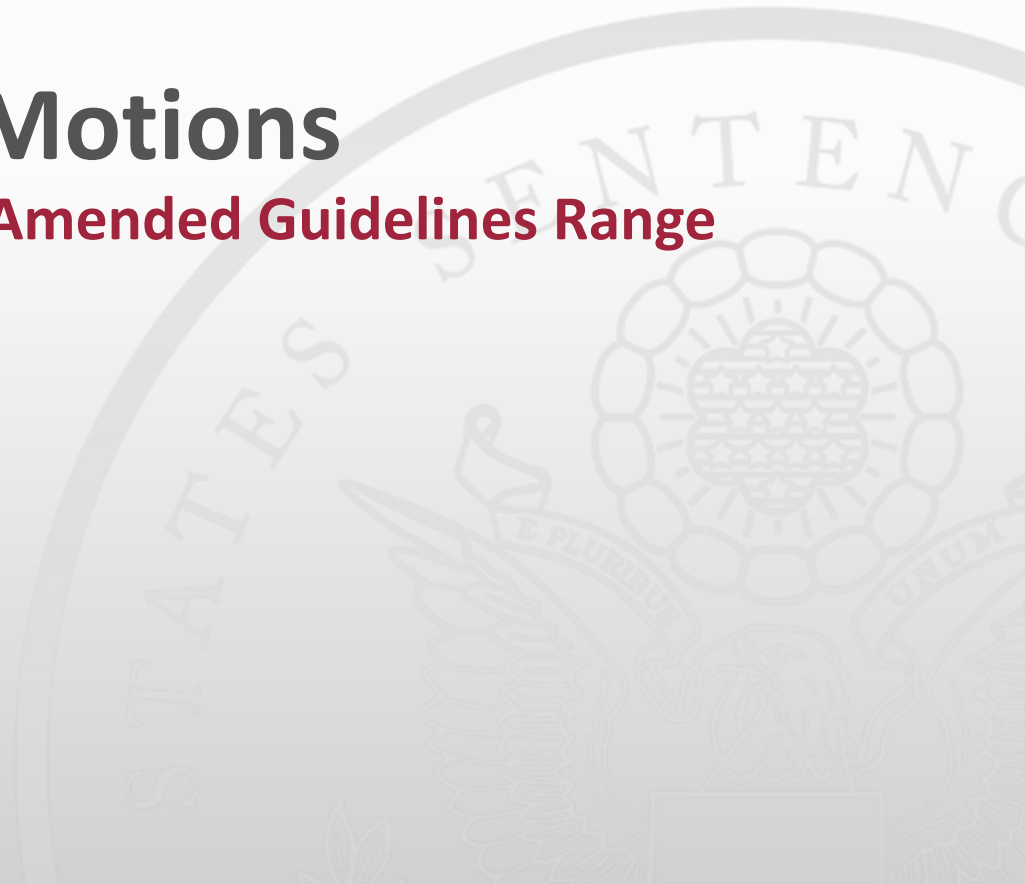
a sentence other than imprisonment is generally appropriate.

Zone C or D

a departure, other than imprisonment may be appropriate, if offense is not a crime of violence or otherwise serious offense.

Section 3582(c)(2) Motions

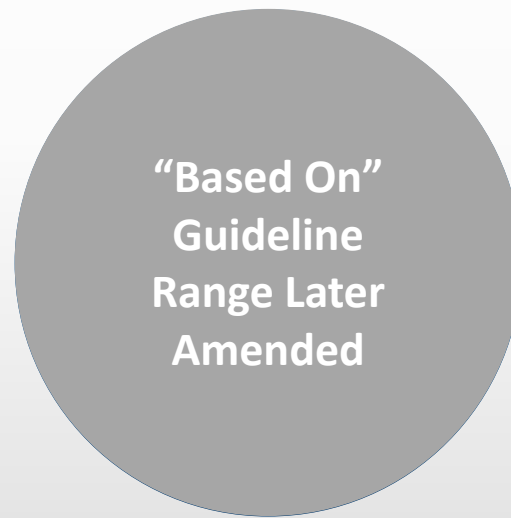
Reduction in Term of Imprisonment Based on Amended Guidelines Range



Sentencing Reductions for Retroactive Guidelines

18 U.S.C. § 3582(c)(2)

A court may reduce a defendant's term of imprisonment if:



Eligibility

Discretion

§1B1.10 (Reduction in Term of Imprisonment)

“Status points” and “Zero-Point Offenders” added to the list at §1B1.10.

Delayed Implementation

The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court’s order is February 1, 2024, or later.

Dillon v. United States

560 U.S. 817 (2010)

Consistent with
Commission
Policy
Statement

Remains Binding after *Booker*



Not a Full Resentencing

Section 1B1.10(a)(3) (p. 39)

Proceedings under 18 U.S.C. § 3582(c)(2) and §1B1.10 are **NOT** full resentencings.

Fed. R. Crim. P. 43(b)(4)



Reduction Example

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
18	27–33	30–37	33–41	41–51	51–63	57–71
19	30–37	33–41	37–46	46–57	57–71	63–78
20	33–41	37–46	41–51	51–63	63–78	70–87
21	37–46	41–51	46–57	57–71	70–87	77–96
22	41–51	46–57	51–63	63–78	77–96	84–105
23	46–57	51–63	57–71	70–87	84–105	92–115
24	51–63	57–71	63–78	77–96	92–115	100–125

TOL
22

CHC
I

TOL
20

CHC
I

Example

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
18	27–33	30–37	33–41	41–51	51–63	57–71
19	30–37	33–41	37–46	46–57	57–71	63–78
20	33–41	37–46	41–51	51–63	63–78	70–87
21	37–46	41–51	46–57	57–71	70–87	77–96
22	41–51	46–57	51–63	63–78	77–96	84–105
23	46–57	51–63	57–71	70–87	84–105	92–115
24	51–63	57–71	63–78	77–96	92–115	100–125

OL
24

CHC
V

OL
24

CHC
IV

“I got status points, why am I not eligible?”

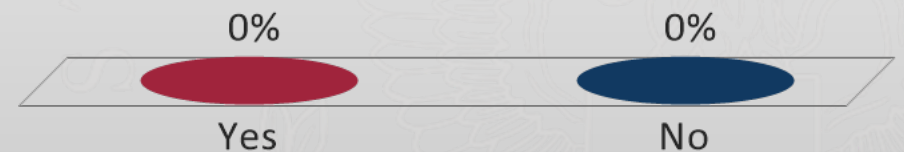
- Change to the individual's criminal history score did not change the Criminal History Category (CHC)
- CHC determined by another guideline (e.g., §4B1.2)
- Current sentence is below the new guideline range and no §5K1.1 departure
- Individual was sentenced to the mandatory minimum

Daniel Cole is currently incarcerated and has filed a pro se motion for retroactivity “status points” amendment. Mr. Cole originally had six criminal history points, including two criminal history points for status points. Mr. Cole argues that because he now would only have four criminal history points, he is eligible for relief under § 3582(c)(2).

Is Mr. Cole eligible for relief under § 3582(c)(2)?

A. Yes

B. No



Not Eligible for Relief

SENTENCING TABLE (in months of imprisonment)						
Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)

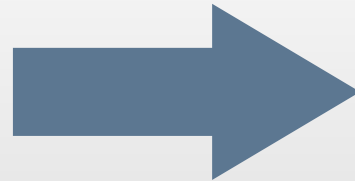


Commission Policy Statement on Retroactivity

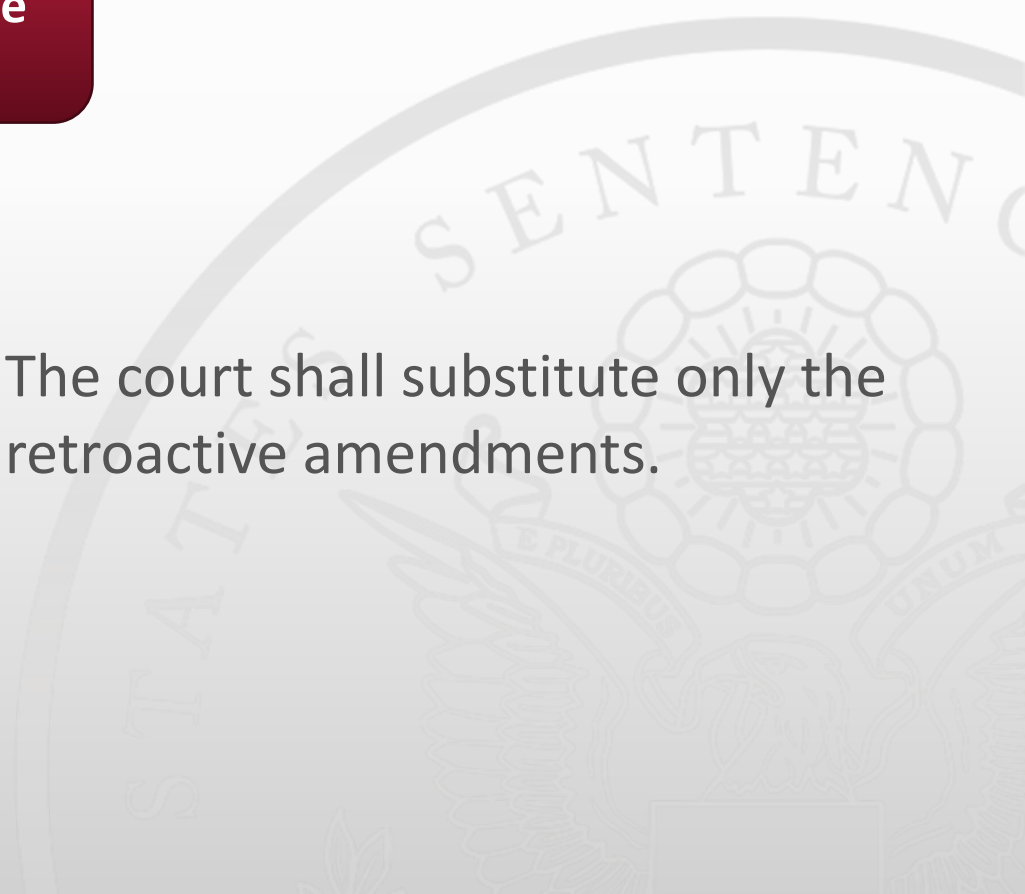
Section 1B1.10(b)(1) & App. Note 2 (pp. 39, 41)

Lowered Guideline Range

Amended Guideline Range



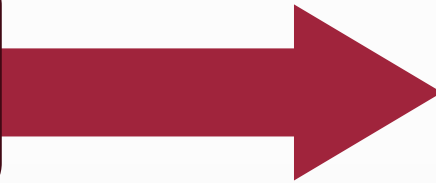
The court shall substitute only the retroactive amendments.



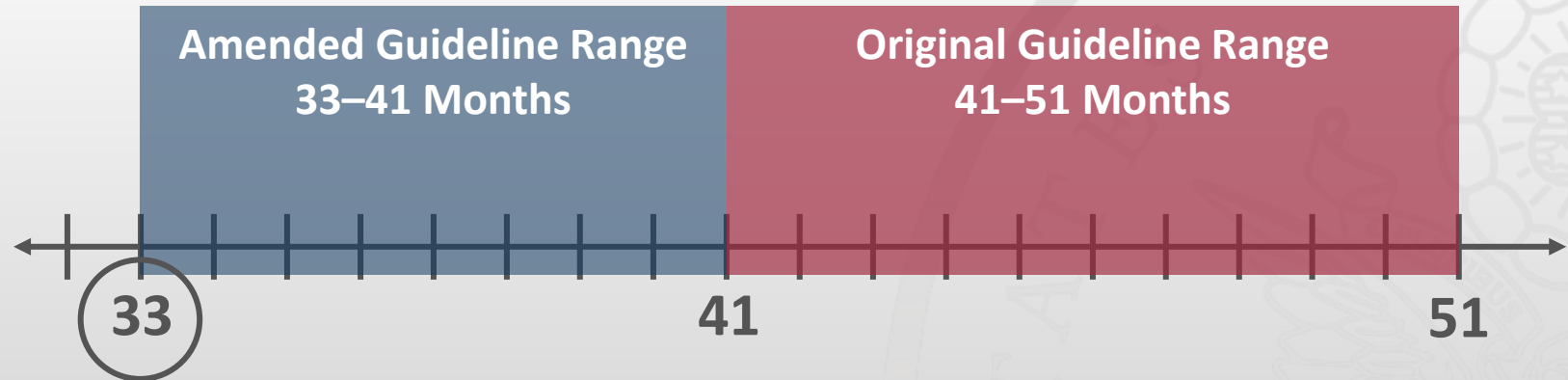
Commission Policy Statement on Retroactivity

Section 1B1.10(b)(2)(A) (p. 39)

**Maximum Reduction
(Generally)**

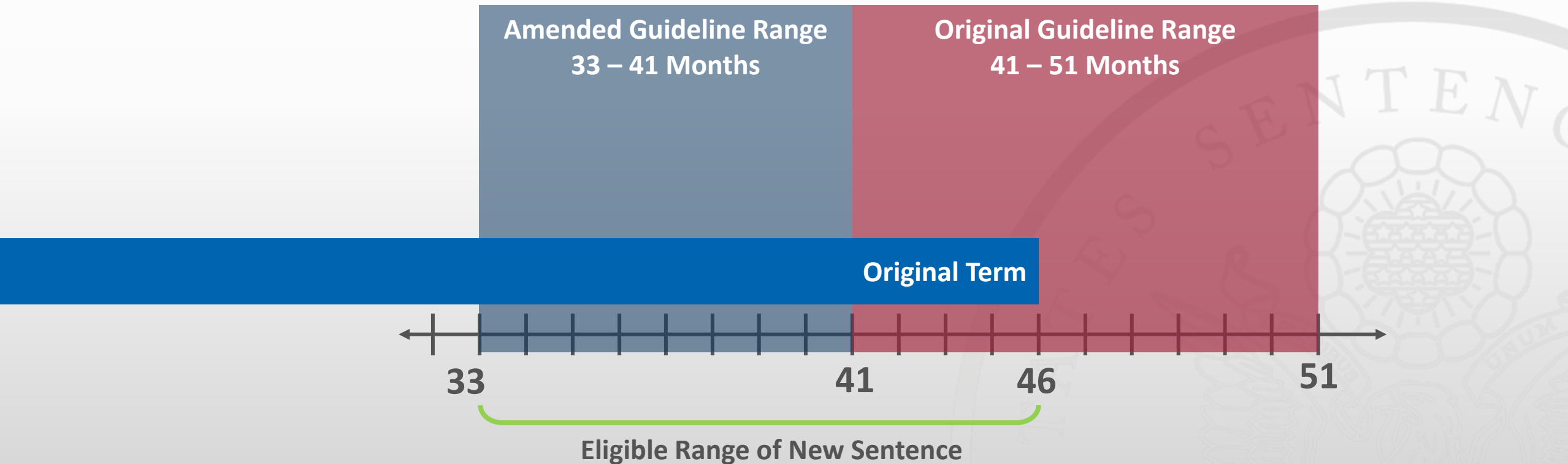


**Bottom of Amended
Guideline Range**



Maximum Reduction Example

Section 1B1.10(b)(2)(A) (p. 39)



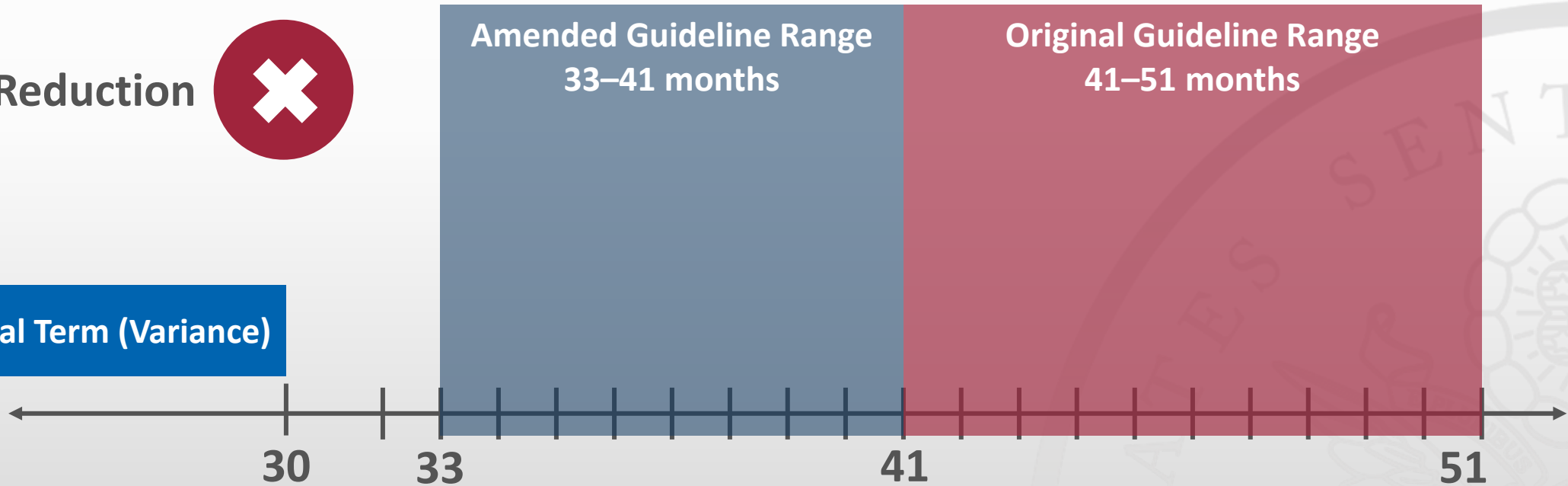
Maximum Reduction Example

Section 1B1.10(b)(2)(A) (p. 39)

Reduction



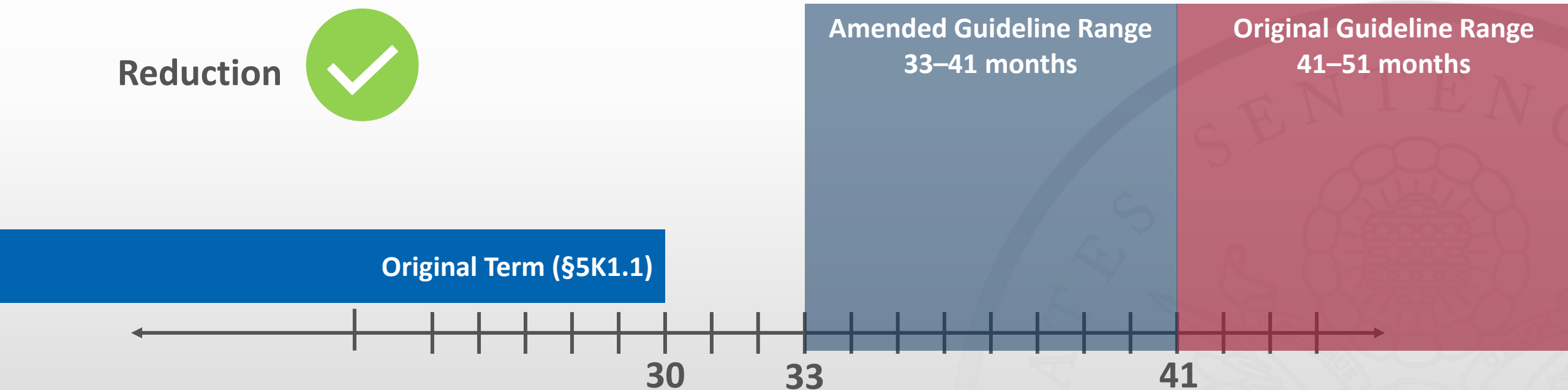
Original Term (Variance)



Substantial Assistance Exception

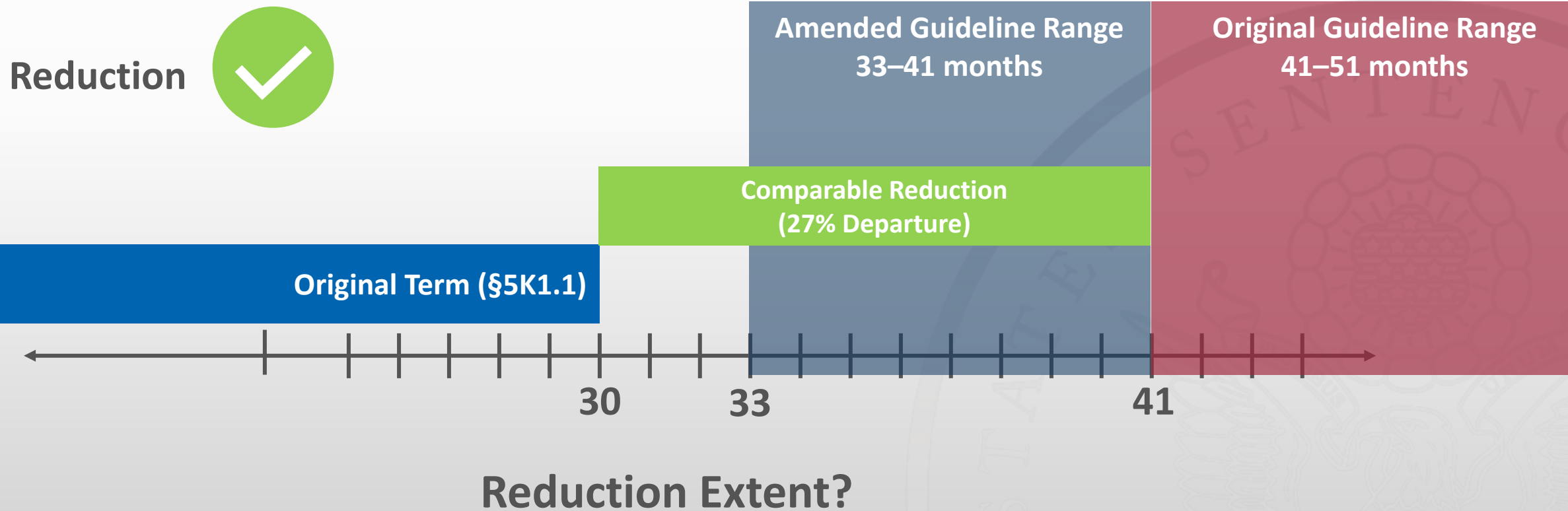
Section 1B1.10(b)(2)(B) & App. Note 3 (pp. 39, 41–42)

Reduction



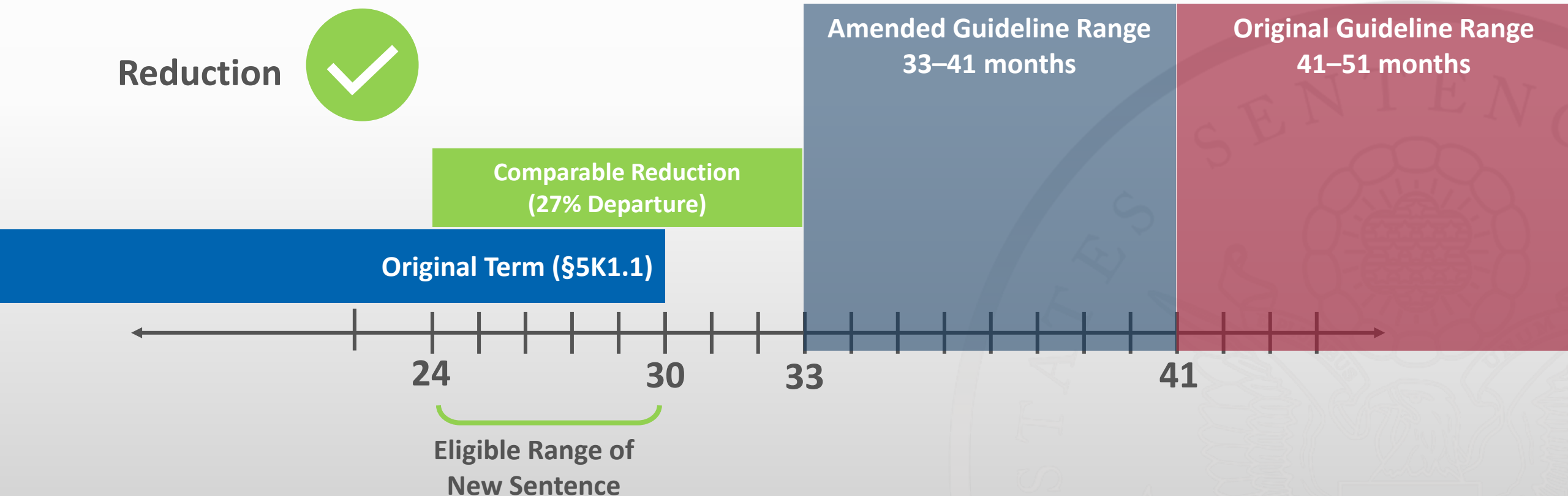
Substantial Assistance Exception

Section 1B1.10(b)(2)(B) & App. Note 3 (pp. 39, 41–42)



Substantial Assistance Exception

Section 1B1.10(b)(2)(B) & App. Note 3 (pp. 39, 41–42)



Hughes v. United States

138 S. Ct. 1765 (2018)

“Based On”
Guideline
Range Later
Amended

Are Type-C plea agreements “based on” a guideline range later amended **generally are eligible**

Reducing Supervised Release

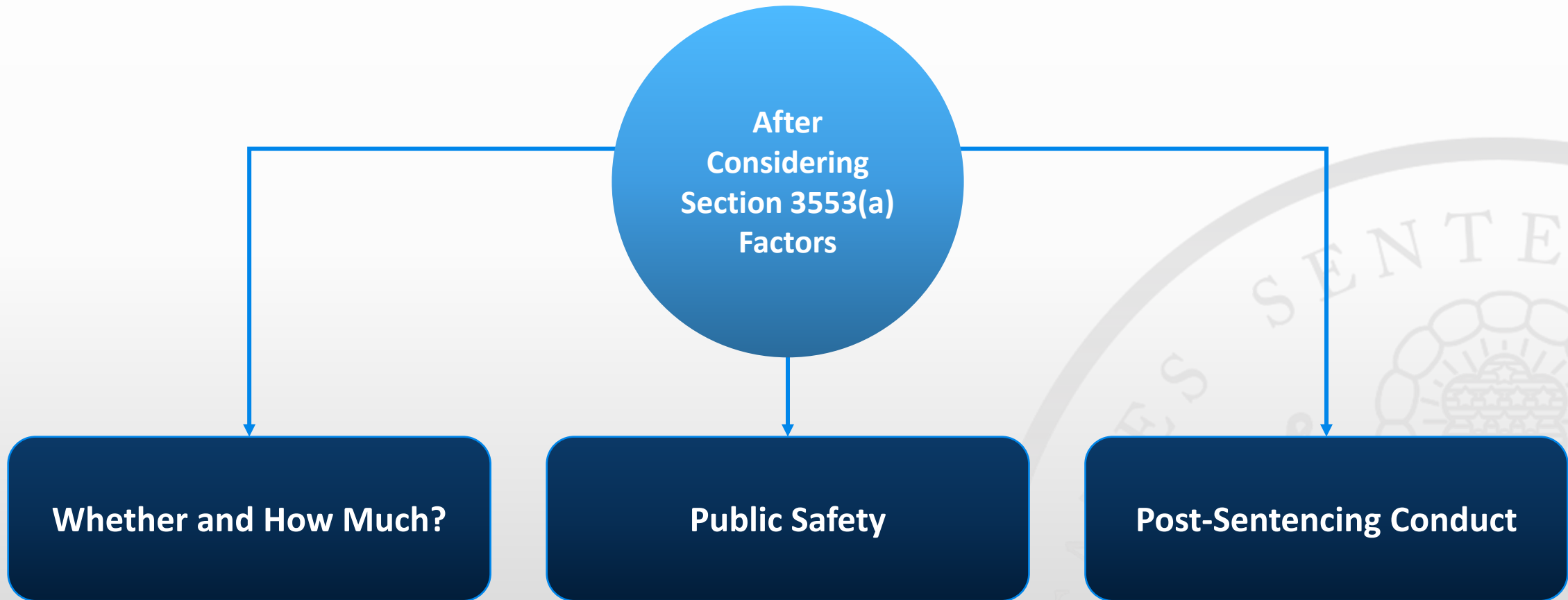
Section 1B1.10, App. Note 8 (pp. 43–44)

A court may only reduce a term of imprisonment under §1B1.10

Courts, however, may consider ineligibility for reduction of term of imprisonment in ruling on motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1).

Sentencing Reductions for Retroactive Guidelines

Section 1B1.10, App. Note 1(B) (pp. 40–41)



Reduction in Sentencings

Section 3582(c)(1)(A) authorized a court, upon motion of the **Director of the Bureau of Prisons**, to reduce a defendant's term of imprisonment if **“extraordinary and compelling reasons”** warrant a reduction.

Congress delegated the task of describing “extraordinary and compelling reasons” **to the Commission**, including the criteria to be applied and a list of specific examples.

Key Changes to §1B1.13

Revises and Expands Extraordinary and Compelling Reasons

Medical Circumstances

Family Circumstances

Victims of Abuse

Catchall

Unusually Long Sentences



Medical Circumstances

Inadequate Medical Care

Health Emergencies



Family Circumstances

Three Grounds

Children Incapable of Self-Care

Incapacitated Parents

Catchall for Family Circumstances



New Extraordinary and Compelling Reason

Victims of Abuse

Sexual or Physical Abuse

Prior Findings

Exception to Prior Findings



Catchall

Promulgated §1B1.13(b)(5)

Other
Circumstance

Combination
of Other
Circumstances

Similar in gravity to...

Medical

Age

Family

Abuse

New Extraordinary and Compelling Factor

Unusually Long Sentences



Changes in Law

Promulgated §§1B.13(b)(6), (c)

Changes in Law

Unusually Long
Sentences



Otherwise E & C



§ 3553(a) Factors



Circuit Split: Changes in Law

May Not Consider

United States v. Andrews, 12 F.4th 255 (3d Cir. 2021)

United States v. McMaryion, 2023 WL 4118015 (5th Cir. 2023) (not reported)

United States v. McCall, 56 F.4th 1048 (6th Cir. 2022)

United States v. King, 40 F.4th 594 (7th Cir. 2022)

United States v. Crandall, 25 F.4th 582 (8th Cir. 2022)

United States v. Jenkins, 50 F.4th 1185 (D.C. Cir. 2022)

May Consider

United States v. Ruvalcaba, 26 F.4th 14 (1st Cir. 2022)

United States McCoy, 981 F.3d 271 (4th Cir. 2020)

United States v. Chen, 48 F.4th 1092 (9th Cir. 2022)

United States v. McGee, 992 F.3d 1035 (10th Cir. 2021)

Unusually Long Sentences

Promulgated §1B1.13(b)(6)

1

Unusually
Long
Sentence

2

Ten Years
Served

3

Change in
Law Creates
Gross
Disparity

4

Individualized
Circumstances

United States v. Escajeda
58 F.4th 184 (5th Cir. 2023)

A prisoner cannot use § 3582(c) to challenge the legality or the duration of his sentence under compassionate release motion

Because the defendant's claims would have been cognizable under § 2255, they are not cognizable under § 3582(c)



United States v Stanford

79 F.4th 461 (5th Cir. 2023)

Remand for the court to explain the reasons for denying
compassionate release motion



First Step Act – Drug Offenses

Safety Valve

2



Statutory Safety Valve

18 U.S.C. § 3553(f)

**First Step Act
(Section 402)**

Expanded Criminal History Eligibility

Defendant does not have:

+4

Criminal
History
Points*

+3

Point
Offense

&

+2

Point
Violent
Offense

*excluding any criminal history points resulting from a 1-point offense

John Jones was convicted of 21 U.S.C. § 841 and is being sentenced on November 3, 2023. Mr. Jones has five prior 2-point drug trafficking convictions for a total of 10 criminal history points

Is Mr. Jones currently excluded from relief under the safety valve in the Fifth Circuit?



Circuit Split: Statutory Safety Valve

Disjunctive (And = Or)

United States v. Palomares, 52 F.4th 640 (5th Cir. 2022)

United States v. Haynes, 55 F.4th 1075 (6th Cir. 2022)

United States v. Pace, 48 F.4th 741 (7th Cir. 2022)

United States v. Pulsifer, 39 F.4th 1018 (8th Cir. 2022)



Supreme Court granted certiorari in this case.

Conjunctive (And = And)

United States v. Jones, 60 F.4th 230 (4th Cir. 2023)

United States v. Lopez, 998 F.3d 431 (9th Cir. 2021)

United States v. Garcon, 54 F.4th 1274 (11th Cir. 2022)

Acceptance of Responsibility

§3E1.1 (p. 376)

-2

Defendant Demonstrates Acceptance of Responsibility

-1

OL $\geq$ 16 AND Government Motion (Avoid Trial Preparation)

Circuit Split: Suppression Motion

May Withhold §3E1.1(b)

United States v. Drennon, 516 F.3d 160 (3d Cir. 2008)

United States v. Longoria, 958 F.3d 372 (5th Cir. 2020)

United States v. Collins, 683 F.3d 697 (6th Cir. 2012)

May Not Withhold §3E1.1(b)

United States v. Marroquin, 136 F.3d 220 (1st Cir. 1998)

United States v. Vargas, 961 F.3d 566 (2d Cir. 2020)

United States v. Kimple, 27 F.3d 1409 (9th Cir. 1994)

United States v. Marquez, 337 F.3d 1203 (10th Cir. 2003)

United States v. Price, 409 F.3d 436 (D.C. Cir. 2005)

Circuit Split: Sentencing Factors

May Withhold §3E1.1(b)

United States v. Beatty, 538 F.3d 8 (1st Cir. 2008)

United States v. Adair, 38 F.4th 341 (3d Cir. 2022)

United States v. Jordan, 877 F.3d 391 (8th Cir. 2017)

United States v. Sainz-Preciado, 566 F.3d 708 (7th Cir. 2009)

May Not Withhold §3E1.1(b)

United States v. Lee, 653 F.3d 170 (2d Cir. 2011)

United States v. Castillo, 779 F.3d 318 (5th Cir. 2015)

Timely Notification

Promulgated §3E1.1(b)

Preparing for trial ordinarily indicated by actions close to trial, such as:



Preparing
Witnesses for
Trial



Preparing Jury
Instructions



Witness and
Exhibit Lists

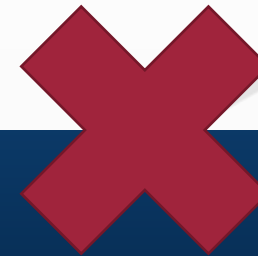
Timely Notification

Promulgated §3E1.1(b)

Preparing for trial is **NOT**:



Pretrial Proceedings



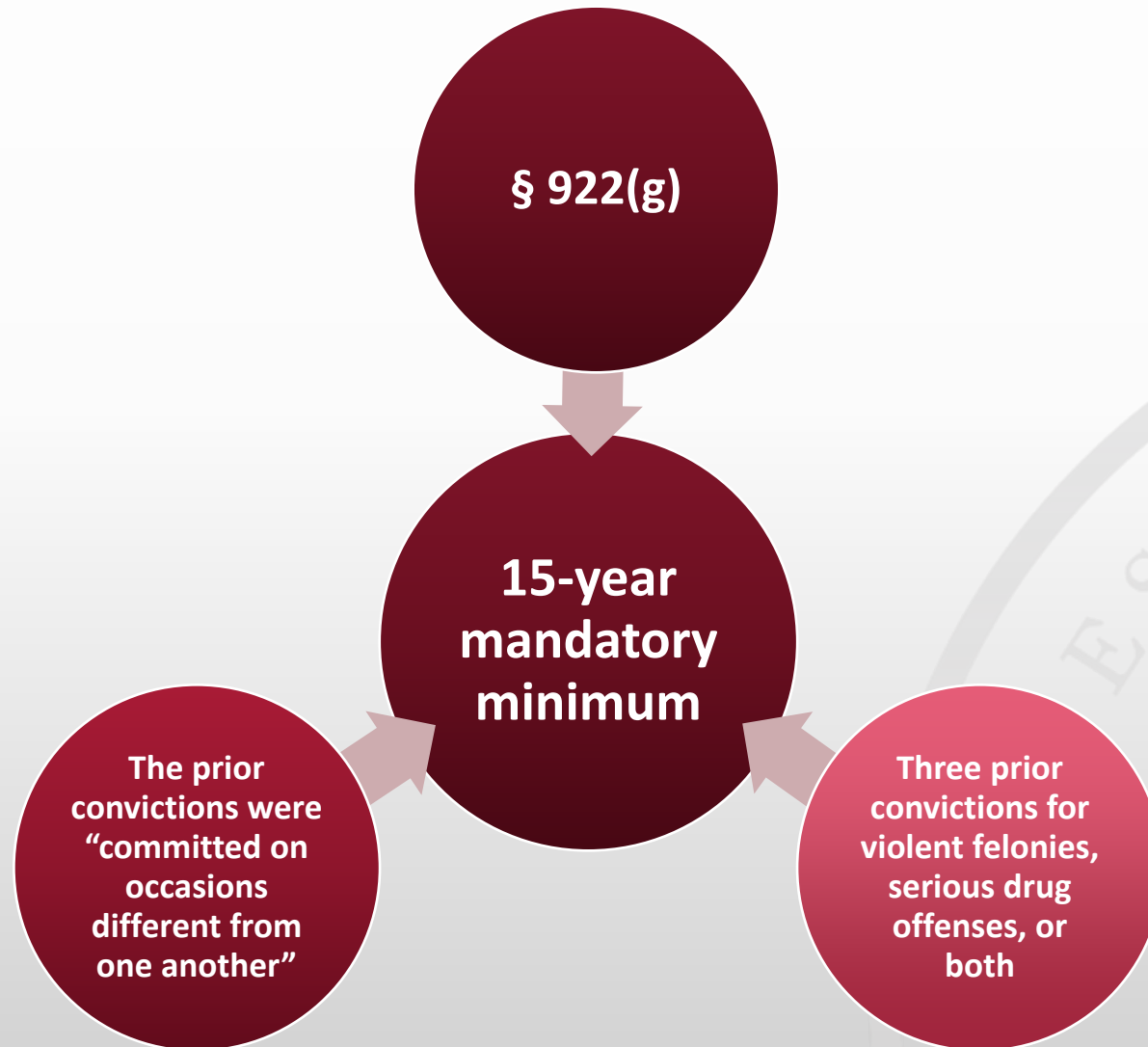
Post-Conviction Matters



Fifth Circuit and Supreme Court Case Law

Armed Career Criminal Act

18 U.S.C. § 924(e)



Wooden v. United States

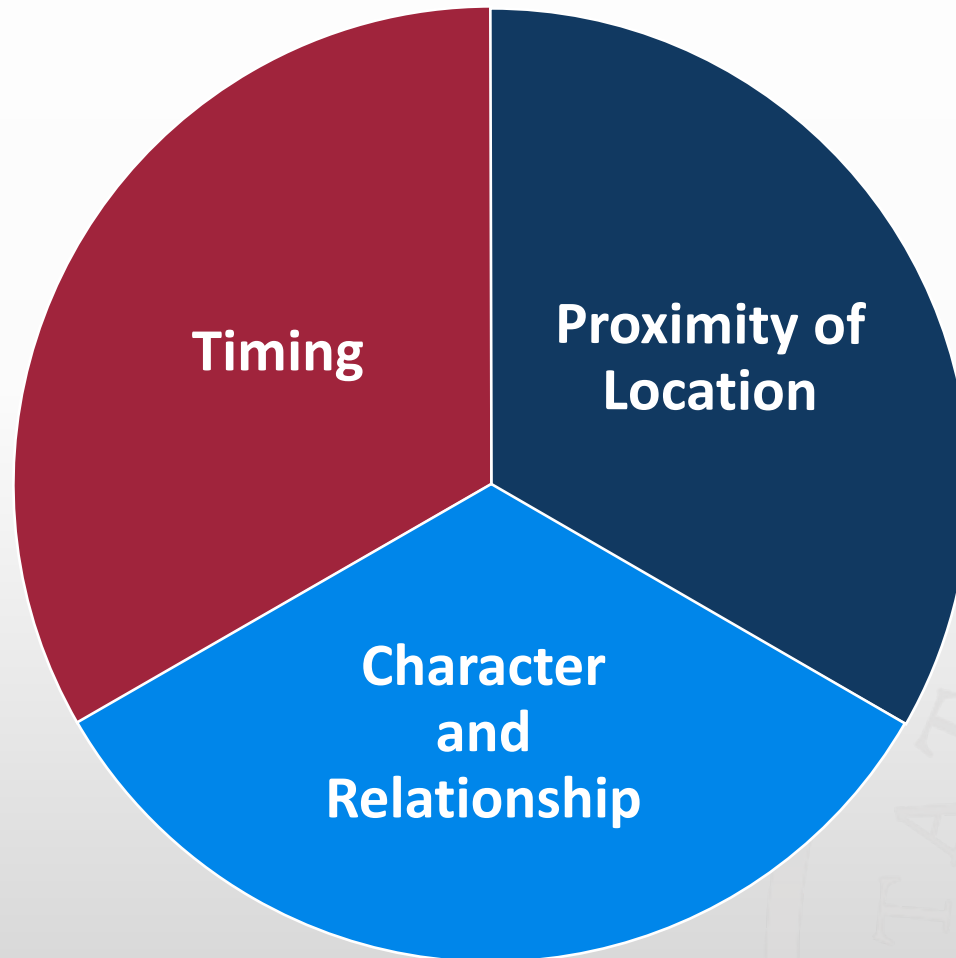
142 S. Ct. 1063 (2022)



Holding:

Offenses arising from a single criminal episode do not occur on different occasions.

Occasions Clause Test



Occasions Clause: Judge or Jury?

Cases

United States v. Brown, 67 F.4th 200 (4th Cir. 2023)

United States v. Valencia, 66 F.4th 1032 (5th Cir. 2023)

United States v. Belcher, 40 F.4th 430 (6th Cir. 2022)

United States v. Erlinger, 77 F.4th 617 (7th Cir., 2023), *cert. granted*

United States v. Reed, 39 F.4th 1285 (10th Cir. 2022)

United States v. Alkheqani

78 F.4th 707 (5th Cir. 2023)

The district court erred in relying on the PSR alone to determine if the prior offenses occurred on occasions different from one another.

The court needs to examine *Shepard* documents.

United States v. Villarreal

-F.4th-, 2023 WL 8422283 (5th Cir. Dec. 5, 2023)

“Because we find that Villarreal asserted a *Borden* claim in his § 2255 motion, and because his two predicate aggravated assault convictions are not violent felonies for purposes of the ACCA, we VACATE Villarreal's sentence and REMAND the case to the district court with instructions to resentence Villarreal without consideration of the ACCA.”

United States v. Sosebee

59 F.4th 151 (5th Cir. 2023)

Texas robbery by threat is a violent felony, while Texas robbery by injury is not a violent felony.

See also, U.S. v. Garrett, 24 F.4th 485 (5th Cir. 2022) and *U.S. v. Powell*, 78 F.4th 203 (5th Cir. 2023)

United States v. Kelley

40 F.4th 276 (5th Cir. 2022)

Texas assault on a public servant (22.02(b)(1)) is not a crime of violence under §4B1.2 because the indivisible offense can be committed recklessly.



United States v. Clark

49 F.4th 889 (5th Cir. 2022)

Texas Aggravated assault by threat of bodily injury (22.01(a)(2)) is a violent felony under the ACCA.

Texas Aggravated assault by bodily injury (22.01(a)(1)) is not a violent felony because it can be committed with a *mens rea* of recklessness.

Supervised Release and Revocation



United States v. Villaneueva-Cardenas

59 F.4th 759 (5th Cir. 2023)

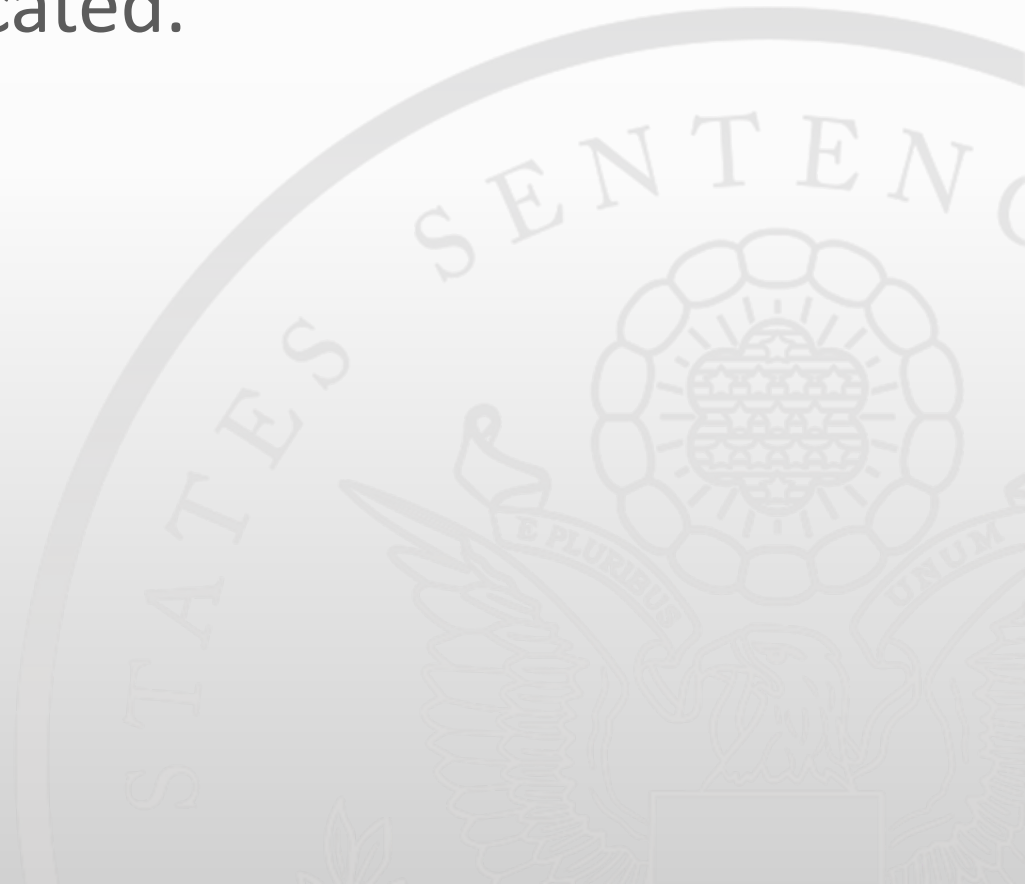
A court cannot order a defendant to self-deport as a condition of supervised release.



United States v. Martinez

47 F.4th 364 (5th Cir. 2022)

A court must identify where the standard conditions of supervised release he is imposing is located.



United States v. Greer

59 F.4th 158 (5th Cir. 2023)

A district court cannot impose multiple terms of imprisonment, concurrent or consecutive, upon revoking a single term of supervised release.





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