

Defects in indictment, Rule 7.  
Waiver of error, Rules 12(b)(2) and 30.

(June 25, 1948, ch. 645, 62 Stat. 846.)

### § 3742. Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)<sup>1</sup> than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11)<sup>1</sup> than the minimum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

- (1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and
- (2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

- (1) that portion of the record in the case that is designated as pertinent by either of the parties;

- (2) the presentence report; and
- (3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is outside the applicable guideline range, and
  - (A) the district court failed to provide the written statement of reasons required by section 3553(c);
  - (B) the sentence departs from the applicable guideline range based on a factor that—
    - (i) does not advance the objectives set forth in section 3553(a)(2); or
    - (ii) is not authorized under section 3553(b); or
    - (iii) is not justified by the facts of the case; or
  - (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
- (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

- (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
- (2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
  - (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

<sup>1</sup> See References in Text note below.

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term “guideline range” includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a “permissible” ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an “impermissible” ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

(Added Pub. L. 98-473, title II, §213(a), Oct. 12, 1984, 98 Stat. 2011; amended Pub. L. 99-646, §73(a), Nov. 10, 1986, 100 Stat. 3617; Pub. L. 100-182, §§4-6, Dec. 7, 1987, 101 Stat. 1266, 1267; Pub. L. 100-690, title VII, §7103(a), Nov. 18, 1988, 102 Stat. 4416; Pub. L. 101-647, title XXXV, §§3501, 3503, Nov. 29, 1990, 104 Stat. 4921; Pub. L. 101-650, title III, §321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 103-322, title XXXIII, §330002(k), Sept. 13, 1994, 108 Stat. 2140; Pub. L. 108-21, title IV, §401(d)-(f), Apr. 30, 2003, 117 Stat. 670, 671.)

## REFERENCES IN TEXT

Section 3563(b)(6) or (b)(11), referred to in subssecs. (a)(3) and (b)(3), was renumbered section 3563(b)(5) or (b)(10) by Pub. L. 104-132, title II, §203(2)(B), Apr. 24, 1996, 110 Stat. 1227.

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

## CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as added and amended by section 401(d)(2), (e) of Pub. L. 108-21, see Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

## AMENDMENTS

2003—Subsec. (e). Pub. L. 108-21, §401(d)(2), in concluding provisions, substituted “, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court’s application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court’s application of the guidelines to the facts” for “shall give due deference to the district court’s application of the guidelines to the facts”.

Subsec. (e)(3). Pub. L. 108-21, §401(d)(1), amended par. (3) generally. Prior to amendment, par. (3) read as follows: “is outside the applicable guideline range, and is unreasonable, having regard for—

“(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

“(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or”.

Subsec. (f). Pub. L. 108-21, §401(d)(3)(A), struck out “the sentence” before dash at end of introductory provisions.

Subsec. (f)(1). Pub. L. 108-21, §401(d)(3)(B), inserted “the sentence” before “was imposed”.

Subsec. (f)(2). Pub. L. 108-21, §401(d)(3)(C), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

“(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

“(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;”.

Subsec. (f)(3). Pub. L. 108-21, §401(d)(3)(D), inserted “the sentence” before “is not described”.

Subsecs. (g) to (i). Pub. L. 108-21, §401(e), added subsec. (g) and redesignated former subssecs. (g) and (h) as (h) and (i), respectively.

Subsec. (j). Pub. L. 108-21, §401(f), added subsec. (j).

1994—Subsec. (b). Pub. L. 103-322 struck out comma after “Government” in introductory provisions.

1990—Subsec. (b). Pub. L. 101-647, §3501, struck out “, with the personal approval of the Attorney General or the Solicitor General” after “The Government” in introductory provisions and inserted at end “The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.”

Subsec. (g). Pub. L. 101-647, §3503, inserted “(except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal)” after “and this section shall apply”.

1988—Subsec. (a)(2). Pub. L. 100-690, § 7103(a)(1), struck out “issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)” after “guidelines”.

Subsec. (a)(3). Pub. L. 100-690, § 7103(a)(2), added par. (3) and struck out former par. (3) which read as follows: “was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than—

“(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline; and

“(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or”.

Subsec. (a)(4). Pub. L. 100-690, § 7103(a)(4), added par. (4) and struck out former par. (4) which read as follows: “was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is plainly unreasonable or greater than the sentence specified in a plea agreement under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.”

Subsec. (b). Pub. L. 100-690, § 7103(a)(5), inserted “, with the personal approval of the Attorney General or the Solicitor General,” after “The Government” in introductory provisions, and struck out concluding provisions which read as follows: “and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.”

Subsec. (b)(2). Pub. L. 100-690, § 7103(a)(1), struck out “issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)” after “guidelines”.

Subsec. (b)(3). Pub. L. 100-690, § 7103(a)(3), added par. (3) and struck out former par. (3) which read as follows: “was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than—

“(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline; and

“(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or”.

Subsec. (b)(4). Pub. L. 100-690, § 7103(a)(5)(A), added par. (4) and struck out former par. (4) which read as follows: “was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is plainly unreasonable or less than the sentence specified in a plea agreement under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure;”.

Subsec. (c). Pub. L. 100-690, § 7103(a)(8), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 100-690, § 7103(a)(8), redesignated former subsec. (c) as (d). Former subsec. (d) redesignated (e).

Pub. L. 100-690, § 7103(a)(6), (7), substituted “applicable guideline range” for “range of the applicable sentencing guideline” in par. (3) and inserted “and shall give due deference to the district court’s application of the guidelines to the facts” after “are clearly erroneous” in concluding provisions.

Subsec. (e). Pub. L. 100-690, § 7103(a)(8), redesignated former subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(2). Pub. L. 100-690, § 7103(a)(6), substituted “applicable guideline range” for “range of the applicable sentencing guideline”.

Subsecs. (f), (g). Pub. L. 100-690, § 7103(a)(8), redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

Subsec. (h). Pub. L. 100-690, § 7103(a)(9), added subsec. (h).

1987—Subsec. (a)(4). Pub. L. 100-182, § 5(1), substituted “and is plainly unreasonable or greater than the sentence specified in a plea agreement under” for “and is greater than the sentence specified in a plea agreement, if any, under”.

Subsec. (b)(4). Pub. L. 100-182, § 5(2), substituted “and is plainly unreasonable or less than the sentence specified in a plea agreement under” for “and is less than the sentence specified in a plea agreement, if any, under”.

Subsec. (d)(4). Pub. L. 100-182, § 5(3), added par. (4).

Subsec. (e)(2). Pub. L. 100-182, § 5(4), inserted “or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable” in introductory provisions.

Subsec. (e)(2)(A), (B). Pub. L. 100-182, § 5(5), substituted “and” for “the court shall” before “remand”.

Subsec. (e)(3). Pub. L. 100-182, § 6, amended par. (3) generally. Prior to amendment, par. (3) read as follows: “was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.”

Subsec. (f). Pub. L. 100-182, § 4, added subsec. (f).

1986—Subsec. (e)(1). Pub. L. 99-646, § 73(a)(1), substituted provision directing the court to remand the case for further sentencing proceedings with such instructions as the court considers appropriate, for provision directing the court to remand the case for further sentencing proceedings or correct the sentence.

Subsec. (e)(2)(A). Pub. L. 99-646, § 73(a)(2), substituted provision directing the court to remand the case for further sentencing proceedings with such instructions as the court considers appropriate for provision directing the court to remand the case for imposition of a lesser sentence, remand the case for further sentencing proceedings, or impose a lesser sentence.

Subsec. (e)(2)(B). Pub. L. 99-646, § 73(a)(2), substituted provision directing the court to remand the case for further sentencing proceedings with such instructions as the court considers appropriate, for provision directing the court to remand the case for imposition of a greater sentence, remand the case for further sentencing proceedings, or impose a greater sentence.

#### CHANGE OF NAME

Words “Magistrate Judge” and “United States magistrate judge” substituted for “Magistrate” and “United States magistrate”, respectively, in subsec. (g) pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

#### 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

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.

### CHAPTER 237—CRIME VICTIMS’ RIGHTS

Sec.

3771. Crime victims’ rights.

#### PRIOR PROVISIONS

A prior chapter 237, consisting of sections 3771 and 3772, related to criminal procedure, prior to repeal by Pub. L. 100-702, title IV, §§ 404(a), 407, Nov. 19, 1988, 102