

Pulling over the United States Sentencing Guidelines: Defining “Arrest” Under Section 4A1.2(a)(2)

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ABSTRACT: The United States Sentencing Commission (“Commission”) created the United States Sentencing Guidelines (“Guidelines”) to bring uniformity and fairness to criminal sentencing in the United States. Since their inception and application by judges in 1987, the Guidelines have lacked a definition for “arrest” in section 4A1.2(a)(2). This absence of a definition developed a circuit split over whether traffic citations fall within the meaning of “arrest” for purposes of determining a defendant’s criminal history, and thus, his criminal sentence. This Note argues that the United States Supreme Court should adopt the Ninth Circuit’s approach to defining “arrest” in the context of section 4A1.2(a)(2), because this approach aligns with current Supreme Court precedent (particularly with relevant Fourth Amendment case law); reflects the goals and purposes of the Guidelines; and matches a defendant’s culpability, likelihood of recidivating, and sentence while decreasing sentencing disparity among similarly situated defendants.

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I. INTRODUCTION

Since the passage of the Sentencing Reform Act of 1984¹ and the creation of the United States Sentencing Commission (“Commission”), courts have used the United States Sentencing Guidelines (“Guidelines”)—either in a prescriptive or advisory capacity—to determine proper sentences for convicted defendants.² The Guidelines, upon their initial distribution in 1987, were the culmination of a variety of sentencing reform efforts in the decades prior and signaled a more unified view of the country’s goals and processes of sentencing.³

Congress left the word “arrest” in section 4A1.2(a)(2) of the Guidelines undefined, which is a term that is critical in determining a defendant’s criminal history score and the corresponding sentencing range. The United States Courts of Appeals began to address this ambiguity in the early 2000s; the Seventh Circuit, in *United States v. Morgan*, held that an “arrest” encompasses traffic citations.⁴ A few years later the Ninth Circuit, in *United States v. Leal-Felix*, held the exact opposite—that traffic citations and arrests are distinctly different things for purposes of determining a defendant’s prior criminal history score and sentence pursuant to the Guidelines.⁵

In recent years, the severity of criminal sentences imposed on offenders and the mismatch of an offender’s true culpability and risk of recidivism have resulted in criticism of judges’ discretion in sentencing and the Guidelines’ role in promoting this problem.⁶ In addition, other factors—such as equating arrests with traffic citations in sentencing decisions—exacerbate the sentence severity issue.

This Note argues that the United States Supreme Court should adopt the Ninth Circuit’s approach to defining “arrest” under section 4A1.2(a)(2) of the Guidelines (within the term “intervening arrest”), which does not equate a traffic citation to an arrest, and reject the Seventh Circuit’s definition, which equates the two terms. This Note also addresses several important concerns that the Seventh Circuit implicates in its approach. Part II discusses the history of sentencing reform efforts, the establishment of the Commission and the Guidelines, the operation of the Guidelines when sentencing defendants

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3586 (2012)).

2. See *infra* Part II.

3. See *infra* Part II.A.

4. *United States v. Morgan*, 354 F.3d 621, 623–24 (7th Cir. 2003).

5. *United States v. Leal-Felix*, 665 F.3d 1037, 1043–44 (9th Cir. 2011).

6. See *infra* Part IV.B; see also Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 78–80 (2012); Rachel Myers, *Extreme Sentencing*, ACLU (Aug. 13, 2012, 6:12 PM), <https://www.aclu.org/blog/extreme-sentencing> (describing examples of severe sentences being imposed in certain situations, including 45 years in prison for “[s]natching a purse off the arm of an elderly woman,” a 70-year sentence for stealing a tuna sandwich from Whole Foods, and “a 60-year sentence for selling \$40 worth of cocaine”).

(specifically section 4A1.2(a)(2)), and the advisory nature of the Guidelines. Part III presents the Seventh and Ninth Circuits' approaches to defining "arrest" under section 4A1.2(a)(2) of the Guidelines. Part IV argues that the Ninth Circuit's approach most closely comports with Supreme Court precedent and the Commission's goals, and that the Ninth Circuit's approach advances important policy considerations, such as matching an individual's level of culpability and likelihood of recidivism with the sentences imposed on him and reducing sentencing disparities between individuals in similar circumstances. This Note concludes by recommending uniform application of the Ninth Circuit's definition of "arrest" under section 4A1.2(a)(2) of the Guidelines.

II. HISTORY OF THE SENTENCING GUIDELINES AND THEIR APPLICATION

A. ORIGINS AND OPERATION OF THE FEDERAL SENTENCING GUIDELINES

While the Guidelines originate from the Sentencing Reform Act of 1984, Congress and legal scholars had recognized federal sentencing as an important reform topic since the first proposal of an official draft of the Model Penal Code ("MPC") was presented in 1962.⁷ This draft of the MPC "classif[ied] crimes in an orderly and consistent manner" and did so with reference to the significance of each crime.⁸ Additionally, the National Commission on Reform of Federal Criminal Laws (also known as the Brown Commission), which Congress established on the heels of its receipt of the proposed official draft of the MPC, further planted the seed of possible federal criminal code reform in the near future.⁹ Objectives of these early reform concepts included "grad[ation of] criminal offenses in . . . categories; . . . to bring together all sentencing provisions in a distinct part of the code that would set out . . . procedures and . . . punishments for each category of crime; . . . [and] to establish a proportional sentencing structure under which newly enacted penal statutes could be easily integrated."¹⁰

In the early 1970s, former United States District Judge for the Southern District of New York Marvin E. Frankel heavily advocated for sentencing reform and the establishment of sentencing guidelines.¹¹ Judge Frankel criticized judges' allowance of wide discretion in sentencing and the fact that judges were not required to "enunciate reasons" for their sentencing

7. Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 294 (1993); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 324 (2007).

8. Feinberg, *supra* note 7, at 294.

9. *Id.*

10. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1 (1987), <https://www.ncjrs.gov/pdffiles1/Digitization/106173NCJRS.pdf>.

11. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942 (1988).

decisions, which “made it difficult, if not impossible, to know whether judges imposed sentences as a result of careful deliberation and objective factors, or of whim and caprice.”¹² Judge Frankel’s reform philosophies¹³ sought the creation of a sentencing commission, which would be “responsible for studying sentencing, formulating laws and rules for the implementation of sentences, and ensuring that the rules are enforced effectively and objectively.”¹⁴ He believed that the commission should “determine which substantive considerations should enter into the sentencing determination and . . . develop procedural rules for the implementation of those considerations.”¹⁵ Congress finally seriously considered sentencing reform in 1975, when Senator Edward Kennedy of Massachusetts used the Yale Proposals¹⁶ as a springboard to propose “the establishment of a Federal Sentencing Commission to promulgate sentencing guidelines.”¹⁷

12. *Id.* at 1942–43.

13. Judge Frankel’s book, MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972), called for the creation of what would later become the United States Sentencing Commission, and advocated for a set of binding rules that courts would follow when sentencing occurred. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993).

14. Ogletree, *supra* note 11, at 1943. Judge Frankel advocated for a commission that included “judges, lawyers, criminologists, penologists, and others with some knowledge of prisons and sentencing.” *Id.* Today, the Commission is “an ongoing, independent agency within the judicial branch” that is made up of “seven voting members . . . appointed by the President and confirmed by the Senate.” U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 3 (n.d.), http://isb.uscc.gov/files/USCC_Overview.pdf. The seven-member Commission must be composed of “[a]t least three . . . federal judges and no more than four [members] may belong to the same political party.” *Id.*

Today, the Commission is composed of three current federal judges (Chief Judge Patti B. Saris of the District of Massachusetts, Judge Charles R. Breyer of the Northern District of California, and Judge William H. Pryor, Jr., of the United States Court of Appeals for the Eleventh Circuit) and three other members, including: Ms. Dabney Friedrich (former associate counsel to the President and counsel to the U.S. Senate Judiciary Committee), Ms. Rachel Barkow (Segal Family Professor of Regulatory Law and Policy at the New York University School of Law), and Mr. Jonathan J. Wroblewski (representing the Attorney General, Director of the Office of Policy and Legislation in the Criminal Division of the U.S. Department of Justice). *About the Commissioners*, U.S. SENTENCING COMM’N, <http://www.uscc.gov/about/commissioners/about-commissioners> (last visited Aug. 27, 2015).

15. Ogletree, *supra* note 11, at 1943.

16. The Yale proposals, “which [sought the] establishment of a federal sentencing commission,” were the basis for Senator Kennedy’s own legislative proposal and came from the “Yale sentencing seminar” in 1975. Stith & Koh, *supra* note 13, at 230. The proposals refer to a manuscript that the participants of the seminar created, which contained a “detailed proposal for the establishment of a sentencing commission empowered to promulgate sentencing ‘guidelines’ binding on federal sentencing judges.” *Id.*

17. Feinberg, *supra* note 7, at 295. Judge Frankel was recognized as “provid[ing] further momentum and justification for sentencing reform.” *Id.*; see also Stith & Koh, *supra* note 13, at 225 (citing S. 2966, 94th Cong. (1975)). For a discussion of other early reform efforts, see U.S. SENTENCING COMM’N, *supra* note 10, at 1.

1. Federal Sentencing Reform, Its Purpose, Its Policy Justifications, and the Creation of the Sentencing Commission and Guidelines

After several failed attempts to enact sentencing reform through the legislative process, Senator Strom Thurmond and Senator Paul Laxalt introduced Senate Bill 829 in 1983 as “comprehensive crime control legislation.”¹⁸ Senate Bill 829 was divided “into a number of separate legislative proposals,” and one of those parts “was S. 1762, the ‘Comprehensive Crime Control Act of 1983,’ which . . . contained a major section (Title II) entitled ‘Sentencing Reform.’”¹⁹ Senator Kennedy, at the same time that Senate Bill 829 was offered, proposed Senate Bill 668, which was “virtually identical to Title II of S[enate Bill] 1762.”²⁰ A mere eight days later, these legislative proposals, after being packaged with other legislation in the House of Representatives, were enacted when President Reagan signed them into law.²¹

Now known as “The Sentencing Reform Act of 1984” (“Reform Act”), this legislation created the Commission and is the second Title of the “Comprehensive Crime Control Act of 1984.”²² Pursuant to the Reform Act, courts must

impose sentences “which reflect the seriousness of the offense”; “promote respect for the law”; “provide just punishment for the offense”; “afford adequate deterrence to criminal conduct”; “protect the public from further crimes of the defendant”; and “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”²³

The new Commission had the authority to decide “under what circumstances an individual would be subject to imprisonment, a term of probation, a fine, or some combination of these sanctions” in order to carry out the goals Congress established for the Commission with the passage of the Reform Act.²⁴

Although the reasoning behind the need for sentencing reform prior to the Guidelines’ enactment varied widely,²⁵ the Reform Act’s underlying

18. U.S. SENTENCING COMM’N, *supra* note 10, at 6.

19. *Id.*

20. *Id.* at 6–7.

21. *Id.* at 7. For a discussion of the argument that cognitive bias contributed to bipartisan support of the sentencing reform bill, see David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1489–503 (2014).

22. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(2) (U.S. SENTENCING COMM’N 2014); U.S. SENTENCING COMM’N, *supra* note 14, at 1.

23. Ogletree, *supra* note 11, at 1946 (quoting 18 U.S.C. § 3553(a)(2) (2012)).

24. *Id.* (citing 18 U.S.C. § 3551(b)(1)–(3)).

25. See *supra* text accompanying note 10.

approach and the overall purpose of the reform was commonly believed to be “the need for legislative policy guidance to the judiciary relating to the purposes to be achieved in sentencing,” among other considerations.²⁶ For example, in 1988 Justice Breyer (then Circuit Judge for the United States Court of Appeals for the First Circuit) wrote that “Congress had two primary purposes” for enacting the Reform Act.²⁷ Justice Breyer explained that the first of these purposes was “honesty in sentencing”²⁸ and the second “was to reduce ‘unjustifiably wide’ sentencing disparity.”²⁹ According to the Commission, the main concern of the sentencing system that had been in place before the legislation’s enactment was “the apparent unwarranted disparity and inequality of treatment in sentencing of similar defendants who had committed similar crimes.”³⁰ Others saw “elimination of undue leniency in sentencing . . . [or] undue severity and an excessive reliance on imprisonment” as the appropriate objective of the sentencing reform.³¹

Today, the Commission recognizes three important factors as the focus of Congress’s reform efforts of the 1980s and its enactment of the Reform Act.³² Those factors are: (1) “to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system”; (2) to achieve “reasonable uniformity in sentencing by narrowing . . . disparity in sentences imposed for similar criminal offenses committed by similar offenders”; and (3) to implement “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”³³

The Guidelines were created by the Commission in 1987 “through an open process that involved as many interested individuals and groups as

26. U.S. SENTENCING COMM’N, *supra* note 10, at 7. For a selection of citations to statements of U.S. Senators and Representatives around the time of the legislation’s enactment in the early- and mid-1980s regarding different views held by those individuals about “the necessity, purposes, and content of sentencing reform legislation,” see *id.* at 7 & n.52.

27. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

28. *Id.* (“By ‘honesty,’ Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four.”).

29. *Id.* at 4–5 (noting that the concern regarding wide sentencing disparity could be evidenced by the variation in sentences imposed for offenders in “identical actual cases” in the Second Circuit—the sentences “could range from three years to twenty years imprisonment”).

30. U.S. SENTENCING COMM’N, *supra* note 10, at 8.

31. *Id.* at 7–8.

32. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENCING COMM’N 2014). The Commission consists of seven voting members, appointed by the President (and confirmed by the Senate), who serve six-year terms. U.S. SENTENCING COMM’N, *supra* note 14, at 3. The Commission’s main responsibilities include monitoring the Guidelines’ effects on the criminal justice system, suggesting modifications of the criminal laws and sentencing procedures, and maintaining research and development of sentencing issues. *Id.* at 1.

33. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENCING COMM’N 2014).

possible,” and the Commission developed this version through advisory and working groups, meetings, commission research, liaison with other federal agencies, related activities (including studies and prison visits), topical hearings, public hearings, and preliminary and revised drafts.³⁴ Ultimately, the Commission published the Guidelines on May 13, 1987 in accord with its congressional mandate.³⁵ The Commission currently maintains that the Guidelines are “a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.”³⁶

2. Sentencing Pursuant to the Guidelines

The Guidelines begin directing judges through the sentencing process in section 1B1.1 (Application Instructions).³⁷ First, the court determines the offense guidelines section applicable to the “offense of conviction” and determines the base offense level with regard to “appropriate specific offense characteristics.”³⁸ Additionally, judges incorporate adjustments relating to the “victim, role, and obstruction of justice”; judges then repeat these steps if an individual has “multiple counts of conviction.”³⁹ Next, the court makes adjustments for the individual’s “acceptance of responsibility.”⁴⁰ Finally, the court uses the defendant’s criminal record to determine the appropriate criminal history category,⁴¹ the guideline range “correspond[ing] to the offense level and criminal history category determined above,”⁴² and “the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.”⁴³ After this process, section 1B1.1(b) and (c) instruct judges to consider other factors that may warrant departure from the recommended sentencing range.⁴⁴

34. U.S. SENTENCING COMM’N, *supra* note 10, at 9; *see also, e.g., id.* at 9–11; Breyer, *supra* note 27, at 6; Ogletree, *supra* note 11, at 1948–51.

35. U.S. SENTENCING COMM’N, *supra* note 10, at 11. This edition of the Guidelines was initially distributed to “each Member of Congress, Article III Judge, United States Attorney, United States Magistrate, Federal Public Defender, Chief United States Probation Officer and federal probation office,” as well as to other “defense attorneys, researchers, victim advocates . . . [and] the Bureau of Prisons.” *Id.*

36. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENCING COMM’N 2014).

37. *Id.* § 1B1.1.

38. *Id.* § 1B1.1(a)(1)–(2).

39. *Id.* § 1B1.1(a)(3)–(4).

40. *Id.* § 1B1.1(a)(5). Chapter 3, Part E of the Guidelines lays out how to determine a defendant’s acceptance of responsibility. *Id.* § 3E1.1.

41. *Id.* § 1B1.1(a)(6); *see also infra* Part II.A.3.

42. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(7) (U.S. SENTENCING COMM’N 2014).

43. *Id.* § 1B1.1(a)(8).

44. *Id.* § 1B1.1(b)–(c).

In his discussion of the Guidelines in a law review article, Justice Breyer laid out a hypothetical situation involving a bank robber to illustrate the application of section 1B1.1 in a sentencing determination.⁴⁵ He explained that the court would first look up “the statute of conviction” (section 2B3.1 in this case, which is “Robbery”) and then would “[f]ind the ‘base offense level’ for Robbery (Level 18).”⁴⁶ Next, the court would “[d]etermine if any ‘adjustments’ . . . apply”⁴⁷ and then calculate criminal history score pursuant to section 4A1.1 (which, in this example, would “assign[] three points for one prior serious conviction”).⁴⁸ Finally, Justice Breyer explained how the offense level in the hypothetical (“23”) and the prior conviction points (three points) return a specific sentence range (51 to 63 months) when this information is applied to the sentencing table.⁴⁹ After completing these steps, Justice Breyer noted that the court either imposes the recommended sentence, “or, if the court finds unusual factors,” it will depart from the Guidelines and levy a different sentence.⁵⁰ The next two Subparts of this Note explore in greater depth the application of section 1B1.1, which relates to computing criminal history score and using the sentencing table to impose a sentence upon an individual.

3. Computing Criminal History Score: Chapter 4, Part A of the Guidelines

The sentencing table, located in Chapter 5, Part A, combines a defendant’s criminal history and their current offense level to arrive at a “[g]uideline [r]ange in months of imprisonment” that sentencing judges follow.⁵¹ Chapter 4, Part A of the Guidelines directs sentencing judges through the process of calculating criminal history score, which is the horizontal axis of the Guidelines’ sentencing table.⁵² The defendant’s offense

45. Breyer, *supra* note 27, at 6. Justice Breyer posited that the defendant had “one serious prior conviction” and that the defendant “rob[bed] a bank of \$40,000, while pointing a gun at the teller.” *Id.*

46. *Id.*

47. *Id.* These adjustments include those for “a vulnerable victim or an official victim, abduction of the victim, role in the offense, efforts to obstruct justice, acceptance of responsibility, and rules for multiple counts.” *Id.*

48. *Id.*

49. *Id.* at 7, 44.

50. *Id.* at 7. “The judge must then give reasons for departure, and the appellate courts may then review the ‘reasonableness’ of the resulting sentence.” *Id.* (footnotes omitted); *see also infra* notes 69–72 and accompanying text.

51. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. to Sentencing Table (U.S. SENTENCING COMM’N 2014).

52. U.S. SENTENCING COMM’N, CRIMINAL HISTORY PRIMER 1 (2014).

level⁵³ makes up the vertical axis of the table.⁵⁴ The criminal history score and the offense level are plotted in the sentencing table, and the resulting intersection corresponds to the sentence guideline range.⁵⁵ The remainder of this Subpart focuses on the criminal history score component of the grid.

The criminal history axis is separated into categories I through VI, with category I representing a “low” score and category VI representing a “high” score.⁵⁶ Section 4A1.1 of the Guidelines provides the procedure for calculating a defendant’s criminal history score, which entails assigning a specified number of points for prior sentences of different natures.⁵⁷ Section 4A1.2 is an integral part of the computation of criminal history score because it explains “definitions and instructions” relevant to assigning point totals to prior sentences under section 4A1.1.⁵⁸ Thus, the application of sections 4A1.1 and 4A1.2 must be completed together due to the way in which these two provisions interact to form a defendant’s criminal history score.⁵⁹

53. The offense level (vertical axis of the sentencing table) refers to the “base offense level” related to specific offenses, which are laid out in Chapter 2 of the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ch. 2, introductory cmt. (U.S. SENTENCING COMM’N 2014). For example, in section 2A2.2, “Aggravated Assault” is assigned a base offense level of “14” for purposes of computing a sentence with the sentencing table. *Id.* § 2A2.2. Each offense may have characteristics associated with it that can “adjust the offense level [for that specific offense] upward or downward.” *Id.* ch. 2, introductory cmt. Those characteristics are found in Chapter 2, Chapter 3 (Parts A, B, and C), Chapter 4 Part B, and Chapter 5 Part K. *Id.*

54. *Id.* ch. 5, pt. A; see also U.S. SENTENCING COMM’N, *supra* note 52, at 1 (describing the structure of the sentencing table).

55. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. to Sentencing Table (U.S. SENTENCING COMM’N 2014).

56. U.S. SENTENCING COMM’N, *supra* note 52, at 1.

57. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM’N 2014). The provision assigns the following point totals for certain types of sentences: three points for prior sentences of imprisonment greater than one year and one month; two points for prior sentences of imprisonment that are at least sixty days long (that are not included in subsection a); one point for other prior sentences not included in subsections (a) and (b), but not exceeding a total of four points. *Id.* § 4A1.1(a)–(c). Subsections (d) and (e) dictate the application of two points (subsection (d)) “if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status” and the application of one point “for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this subsection.” *Id.* § 4A1.1(d)–(e) (emphasis omitted).

58. *Id.* §§ 4A1.1 cmt., .2; see also *infra* Part II.A.4.

59. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt. (U.S. SENTENCING COMM’N 2014). Additionally, Chapter Four, Part A of the Guidelines describes application of “[u]pward and downward departures . . . where the defendant’s criminal history overstates or understates the seriousness of a defendant’s criminal record or the likelihood of recidivism.” U.S. SENTENCING COMM’N, *supra* note 52, at 15. Chapter Four, Part B of the Guidelines departs from the criminal history score calculation by providing for situations where a sentence may warrant enhancement because of the individual’s status as a “career’ offender[.]” U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM’N 2014).

4. Significance of Section 4A1.2(a)(2) in Computing a Defendant's Sentence

In order to compute criminal history score to determine a defendant's sentence, the judge must use "key definitions and specific instructions" of section 4A1.2.⁶⁰ Section 4A1.2(a)(1) defines "prior sentence" as one "previously imposed upon adjudication of guilt."⁶¹ Section 4A1.2(a)(2) then discusses the impact of a defendant having multiple prior sentences on the current sentencing determination.⁶² Additional prior sentences are crucial to sentence determination. In some circumstances, multiple prior sentences are counted as one sentence while in others they are counted as separate sentences; determining whether a defendant's prior sentences are combined or counted separately is important to sentence determination because separate prior sentences can result in a larger criminal history score under section 4A1.1 and thus a longer recommended sentence under the Guidelines.⁶³ Section 4A1.2(a)(2) also specifically states that when sentencing a defendant, "[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest."⁶⁴ Prior sentences are not consolidated if no intervening arrests exist, unless "(A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day."⁶⁵ It is the term "arrest" within the phrase "intervening arrest" that Congress failed to define, which caused the circuit split discussed in Part III of this Note.

B. TRANSITION FROM MANDATORY TO ADVISORY GUIDELINES

In 1989, in *Mistretta v. United States*, the United States Supreme Court explicated that the Guidelines "are mandatory and binding on all judges," not merely advisory.⁶⁶ The Court elaborated upon the mandatory nature of the Guidelines by explaining that 18 U.S.C. § 3553(a) states that the Guidelines

60. U.S. SENTENCING COMM'N, *supra* note 52, at 2.

61. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(1) (U.S. SENTENCING COMM'N 2014). A prior sentence under this provision must have been levied as a result of "adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Id.* *Nolo contendere* means "I do not wish to contend" in Latin. See *Nolo contendere*, BLACK'S LAW DICTIONARY (10th ed. 2014).

62. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (U.S. SENTENCING COMM'N 2014).

63. *Id.* §§ 4A1.1, .2(a)(2).

64. *Id.* § 4A1.2(a)(2). The provision explains that an intervening arrest is one in which "the defendant is arrested for the first offense prior to committing the second offense." *Id.*

65. *Id.*

66. *United States v. Booker*, 543 U.S. 220, 233 (2005) (citing the Court's statements in *Mistretta v. United States*, 488 U.S. 361, 367 (1989), which explained that the Sentencing Reform Act of 1984 made "the Sentencing Commission's guidelines binding on the courts" rather than "only advisory," which had been contemplated in a proposal that was ultimately rejected by the Judiciary Committee).

are but “one factor to be considered in imposing a sentence,”⁶⁷ but that § 3553(b) “directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases.”⁶⁸ However, in *United States v. Booker*, the Court determined that when an enhanced sentence is imposed by a sentencing judge pursuant to the Guidelines, based on a “determination of a fact . . . not found by the jury,” the Sixth Amendment is violated.⁶⁹ The Court’s holding was relevant to the mandatory nature of the Guidelines because “the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) [was found to be] incompatible with . . . [the Court’s] constitutional holding.”⁷⁰ Ultimately, the Court “severed and excised” the provision from the Reform Act, which made “the Guidelines effectively advisory.”⁷¹ After *Booker*, judges are required “to consider Guidelines ranges”; however, the sentencing judge is also able to consider “other statutory concerns” when determining the defendant’s sentence.⁷²

III. CIRCUITS DEVELOP DIFFERENT NOTIONS OF THE SCOPE OF “ARREST” FOR PURPOSES OF COMPUTING CRIMINAL HISTORY SCORE UNDER SECTION 4A1.2(A)(2)

When the Guidelines were created in 1984, Congress did not define the term “arrest” within the context of section 4A1.2, which instructs judges in computing criminal history score to determine a defendant’s sentence.⁷³ In particular, section 4A1.2(a)(2) refers to an “intervening arrest,” which is the determinative factor in deciding whether multiple prior sentences are counted as one or counted separately for the purpose of finding the defendant’s criminal history score.⁷⁴ Because “arrest” has not been defined within the Guidelines for purposes of this inquiry, courts have interpreted the

67. *Id.* at 233–34; *see also* 18 U.S.C. § 3553(a) (2012).

68. *Booker*, 543 U.S. at 234.

69. *Id.* at 245.

70. *Id.*

71. *Id.* The Court also severed and excised 18 U.S.C. § 3742(e) (2000 & Supp. IV 2004), which directed for de novo review on appeal when considering departures from the Guidelines’ sentencing ranges. *Id.* at 259. Ultimately, the Court concluded that within the statutory text existed an implied reasonableness standard of review for appellate review of judges’ departures from the Guidelines. *Id.* at 261–62.

72. *Id.* at 245–46. The Court noted that 18 U.S.C. § 3553(a) was relevant to its statement of the procedure that sentencing judges were to follow going forward. *Id.*

73. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (U.S. SENTENCING COMM’N 2014). Specifically, section 4A1.2 defines 16 different terms relevant to computing criminal history score. *Id.*

74. *Id.* § 4A1.2(a)(2); *see also supra* notes 62–64 and accompanying text.

term in different ways leading to different outcomes and consequences for defendants in different jurisdictions.⁷⁵

A. THE SEVENTH CIRCUIT APPROACH

The Seventh Circuit, in *United States v. Morgan*, relied on Supreme Court cases and the Commission's goals when it held that "a traffic stop is an 'arrest.'"⁷⁶ The court relied on *Whren v. United States*, a Fourth Amendment search and seizure case, and succinctly stated that "there is no ambiguity," and "[a] traffic stop is an 'arrest' in federal parlance."⁷⁷ Additionally, the court in *Morgan* stated, without elaborating upon the point, that "[c]alling the traffic stop an 'arrest' implements the Sentencing Commission's goal."⁷⁸ Ultimately, the court noted that the traffic stop at issue was a "simple arrest," rather than a "full custodial arrest,"⁷⁹ but also noted that this fact was not relevant to computing criminal history score pursuant to the Guidelines.⁸⁰ The court explained that the defendant had previously "received criminal history points on account of two convictions for continuing to drive after his license had been revoked" and that "his criminal history level and sentencing range" were heightened because of those points.⁸¹ Ultimately, the court held that the criminal history score computation for the defendant, done in order to calculate his sentence, had been determined correctly.⁸²

Subsequent to the Seventh Circuit's *Morgan* decision, other decisions—such as the Seventh Circuit's *United States v. Lacy*⁸³ and the Middle District of

75. Compare *United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011) (en banc), with *United States v. Morgan*, 354 F.3d 621 (7th Cir. 2003), *United States v. Johnson*, 876 F. Supp. 2d 1272 (M.D. Fla. 2012), and *United States v. Lacy*, 165 F. App'x 475 (7th Cir. 2006).

76. *Morgan*, 354 F.3d at 624.

77. *Id.* (citing *Whren v. United States*, 517 U.S. 806 (1996)). In *Whren*, the Supreme Court framed the question as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car . . . to enforce the traffic laws." *Whren*, 517 U.S. at 808. In his analysis, Justice Scalia explained that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and . . . limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Id.* at 809–10.

78. *Morgan*, 354 F.3d at 623.

79. *Id.* at 624. The court noted that a "full custodial arrest" would have been accomplished by *Morgan* being "taken to the stationhouse," which would have changed the nature of his arrest from a "street arrest" to a "full custodial arrest." *Id.*

80. *Id.*

81. *Id.* at 623.

82. *Id.* at 624. In holding this, the court rejected *Morgan*'s argument that "he was not 'arrested' . . . but was just 'stopped.'" *Id.* at 623. The court reasoned that "a defendant who commits a crime, is arrested for that offense, and then commits another crime is a recidivist whose criminal record should be tallied in full." *Id.*

83. *United States v. Lacy*, 165 F. App'x 475, 476–77 (7th Cir. 2006) (explaining that "three driving offenses were separated by intervening arrests, and thus by definition they are unrelated and must be counted separately" (citing *Morgan*, 354 F.3d at 623)).

Florida's *United States v. Johnson*⁸⁴—have followed *Morgan*'s reasoning in holding that traffic citations count as arrests when determining a defendant's sentence pursuant to the Guidelines.⁸⁵

B. THE NINTH CIRCUIT APPROACH

More recently, in 2011, the Ninth Circuit took the opposite position in its decision in *United States v. Leal-Felix*, holding that the district court had erred by deciding that the defendant “had been ‘arrested’ for purposes of the Sentencing Guidelines.”⁸⁶ Leal-Felix was a Mexican citizen who had been found in the United States after previously being “removed or deported,” which was violation of federal law.⁸⁷ Leal-Felix had previously been cited twice for “driving with a suspended license,”⁸⁸ and pursuant to section 4A1.2(a)(2) those citations were factored into his sentencing determination for his being in the United States after removal or deportation.⁸⁹ The lower court found that the previous sentences constituted “arrests” for purposes of section 4A1.2(a)(2) and calculated Leal-Felix's criminal history score to be “13 criminal history points, placing him in . . . category VI.”⁹⁰ The district court sentenced Leal-Felix to 21 months, which was “the low end of the Guidelines range for category VI.”⁹¹

The Ninth Circuit, sitting en banc, vacated Leal-Felix's sentence and remanded the case for resentencing.⁹² Recognizing the importance of the definition of “arrest” (within the term “intervening arrest” in section 4A1.2(a)(2) of the Guidelines) when calculating criminal history score, the court put much consideration into its determination that “arrest” does not

84. *United States v. Johnson*, 876 F. Supp. 2d 1272, 1274–75 (M.D. Fla. 2012) (agreeing “with the reasoning of the Seventh Circuit in *Morgan* and with Judge Rawlinson[’s dissent] in *Leal-Felix*” that criminal history score determinations should include citations as arrests for purposes of determining a defendant's sentence).

85. Judge Rawlinson's reasoning in her dissent in *United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011) (en banc) also followed the Seventh Circuit's reasoning in *Morgan*. *Id.* at 1046–47.

86. *Id.* at 1044.

87. *Id.* at 1039. Leal-Felix was charged with violating 8 U.S.C. § 1326(a) and § 1326(b)(2) (2012). *Id.*

88. *Id.* Leal-Felix received the citations on November 17 and 19, 1998, and corrected the dates of the original Presentence Report, which stated that both offenses had occurred, and were received, on November 17, 1998. *Id.* at 1039 n.1.

89. *Id.* at 1039–40. Leal-Felix, for the two citations, received two 36-month concurrent sentences of probation, “on the condition that he serve 180 days in . . . jail.” *Id.* at 1039.

90. *Id.*

91. *Id.*

92. *Id.* at 1044. Four judges concurred, while another judge submitted a dissenting opinion (which followed the Seventh Circuit's reasoning in *United States v. Morgan*, 354 F.3d 621 (7th Cir. 2003)). *Id.* at 1044–48. Before hearing the case en banc, the Ninth Circuit had originally affirmed the district court's decision—a divided panel agreed with the Seventh Circuit's analysis that “traffic violations” were considered “arrests” for purposes of the criminal history score computation. *Id.* at 1039.

encompass citations in this context.⁹³ Since the Commission had not defined “arrest,” the court resorted to taking its own measures to ascertain the term’s meaning.⁹⁴ The court also explained that, although California considers citations to be equivalent to arrests, it could not use “state law to determine the meaning of the Sentencing Guidelines,” and “what constitutes an arrest cannot vary between states . . . but must have ‘a uniform, natural definition.’”⁹⁵

Ultimately, the *Leal-Felix* court concluded that the definition of “arrest” does not include citations under section 4A1.2(a)(1),⁹⁶ supporting its conclusion with: (1) Supreme Court cases illustrating what an “arrest” entails;⁹⁷ (2) the common use, understanding, and dictionary definition of “arrest”;⁹⁸ and (3) the Guidelines as a whole.⁹⁹ The court also explained that the Seventh Circuit’s holding in *United States v. Morgan*, that “[a] traffic stop is an ‘arrest’ in federal parlance,” was in error because of its improper reliance upon *Whren v. United States*¹⁰⁰ and *Atwater v. City of Lago Vista*¹⁰¹ and its

93. *Id.* at 1040–44. The court demonstrated the importance of the definition of “intervening arrest” by explaining that under section 4A1.2(a)(1), “if a citation is equivalent to an arrest, then Leal-Felix’s two citations for driving with a suspended license must be counted separately,” whereas, “if a citation is not an intervening arrest [then Leal-Felix’s two] citations would be counted together.” *Id.* at 1040. The court recognized the consequence of this interpretation to be “a Guidelines [sentence] range of 21–27 months” if citations were equivalent to arrests, or “a Guidelines [sentence] range of 18–24 months” if citations were not arrests. *Id.*

94. *Id.*

95. *Id.* at 1040–41 (quoting *United States v. Martinez*, 232 F.3d 728, 732 (9th Cir. 2000)). The court emphasized that “[a] federal sentencing enhancement provision . . . is interpreted according to a uniform, national definition, not dependent upon the vagaries of state law.” *Id.* at 1040 (second alteration in original) (quoting *Martinez*, 232 F.3d at 732).

96. *Id.* at 1044 (defining “arrest” when using section 4A1.2(a)(1) to compute criminal history score and determine a Guidelines sentence range for the defendant).

97. *Id.* at 1041; see also *infra* Part IV.A.

98. *Id.* at 1041–42. The court discussed the definitions of “arrest” from *Webster’s Dictionary* and *Black’s Law Dictionary*, specifically that “arrest” meant “the taking or detainment (of a person) in custody by authority of law” and “[t]aking, under real or assumed authority, custody of another.” *Id.* at 1041 (citing *Arrest*, BLACK’S LAW DICTIONARY (6th ed. 1990); *Arrest*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 1993)).

99. *Id.* at 1043 (citing section 4A1.2 comment note 3 for the proposition that “citation[s], where the defendant is not taken into custody, would ordinarily mean both that the defendant presents little danger to the public and that the crime is less serious”). The court also explained that the dissent’s view, which was to include citations within the meaning of “arrest,” would equate “being charged with an offense” to being arrested, which would have the consequence of “every offense becom[ing] an ‘intervening arrest’” for purposes of section 4A1.2(a)(2). *Id.* at 1043–44. The court reached this conclusion by substituting “charge” for “arrest” in section 4A1.2(a)(2), which “render[s] the last two sentences of § 4A1.2(a)(2) meaningless, because there would never be a situation in which there was no intervening arrest.” *Id.* at 1044. Overall, the court remarked that this reading “would violate a fundamental rule of statutory construction.” *Id.* (citing *United States v. Ramirez-Sanchez*, 338 F.3d 977, 979 (9th Cir. 2003) for the proposition that “the Sentencing Guidelines should not be read in such a way that would render part of the Guidelines meaningless”).

100. *Whren v. United States*, 517 U.S. 806 (1996).

101. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

misreading of both cases.¹⁰² The court explained that the *Morgan* court failed to indicate “where in *Whren* it establishes that a traffic stop is an ‘arrest,’ likely because *Whren* does not address whether a traffic stop constitutes an arrest at all,” just that the stop was a reasonable “seizure.”¹⁰³ Additionally, the court noted that *Atwater* actually contradicted the *Morgan* court’s position that citations are equivalent to arrests, because in *Atwater*, the Supreme Court never “consider[ed] whether a citation is . . . [an] arrest,” and in fact, “it clearly differentiate[d] between *any* type of arrest and a citation.”¹⁰⁴ Finally, the court noted that the decreased culpability of offenders who are cited, rather than arrested,¹⁰⁵ and additional Supreme Court case law that “distinguish[es] an arrest from a citation” in “other contexts”¹⁰⁶ supported its holding that a citation does not fall within the scope of an “arrest” for purposes of computing criminal history score pursuant to the Guidelines.

IV. THE SUPREME COURT SHOULD ADOPT THE NINTH CIRCUIT’S DEFINITION OF “ARREST” UNDER SECTION 4A1.2(A)(2)

A. THE NINTH CIRCUIT’S APPROACH ACCORDS WITH CURRENT SUPREME COURT CASE LAW THAT DISTINGUISHES ARRESTS FROM CITATIONS

In *United States v. Leal-Felix*, the Ninth Circuit explained that a few specific characteristics identify a “formal arrest” for “the purpose of the Sentencing Guidelines.”¹⁰⁷ The court cited three Supreme Court cases that exemplified the characteristics of a “formal arrest” that can be inferred from such precedent.¹⁰⁸ Part IV.A.1 begins the discussion and explanation of how Supreme Court case law distinguishes between “arrests” and “citations.” Part IV.A.2 then demonstrates how elements of an “arrest” (as it is commonly defined and understood) can be inferred from Supreme Court precedent.

1. Supreme Court Case Law Differentiates Between Citations and Arrests

In *Dunaway v. New York*, the Supreme Court, implicitly and explicitly, recognized a “traditional concept of an ‘arrest.’”¹⁰⁹ In *Dunaway*, the defendant was a suspect in a police investigation.¹¹⁰ The police found the defendant, took him into custody, and drove him to the police station where he was

102. *Leal-Felix*, 665 F.3d at 1042 (alteration in original) (citing *United States v. Morgan*, 354 F.3d 621, 624 (7th Cir. 2003)).

103. *Id.*

104. *Id.*

105. *Id.* at 1042–43.

106. *Id.* at 1043.

107. *Id.* at 1041.

108. *Id.*

109. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

110. *Id.* at 202–03.

questioned in an interrogation room.¹¹¹ The Court, while discussing seizures and the Fourth Amendment, explained that the Court in *Terry v. Ohio*¹¹² defined types of seizures by police officers that are “substantially less intrusive than arrests.”¹¹³ The *Dunaway* Court explained the significance of the *Terry* Court’s assertions in two ways: (1) that a “special category” of seizures was created that were “substantially less intrusive than arrests”; and (2) that subsequent cases applied *Terry*’s precedents in “*de minimis* intrusion” settings where a car was “lawfully detained for traffic violations.”¹¹⁴ The Ninth Circuit relied upon this precedent in *Leal-Felix*, which distinguishes between formal arrests and less intrusive means of seizure like citations, in explaining the elements of arrest which can be inferred from Supreme Court case law.

2. “Arrest” as Established by Fourth Amendment Supreme Court Precedent

In attempting to define “arrest” as the term is understood within the context of federal law, the Ninth Circuit in *United States v. Leal-Felix* also utilized Fourth Amendment Supreme Court cases to illustrate how the Court implicitly and explicitly makes distinctions between arrests and citations.¹¹⁵ Subparts IV.A.2.i to iii demonstrate how the clear differences between the common definition and understanding of “arrest”¹¹⁶ and “citation”¹¹⁷ align with the fact that elements of “arrest”—informing the individual they are under arrest, transporting the individual to the police station, and booking the individual in jail—can be inferred from *Leal-Felix* and Fourth Amendment Supreme Court precedent. Subpart IV.A.2.iv demonstrates how other aspects of Fourth Amendment precedent support and enhance the Ninth Circuit approach to defining “arrest” for purposes of computing criminal history score under the Guidelines.

i. Informing a Suspect That He or She Is Under Arrest

The first characteristic of an “arrest” that may be inferred from *Leal-Felix* and Supreme Court precedent, and that comports with the commonly understood definition of “arrest,” is illustrated by the facts of *Brendlin v.*

111. *Id.* at 203.

112. *Terry v. Ohio*, 392 U.S. 1 (1968).

113. *Dunaway*, 442 U.S. at 210.

114. *Id.* (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)).

115. *United States v. Leal-Felix*, 665 F.3d 1037, 1040–44 (9th Cir. 2011).

116. See *Arrest*, BLACK’S LAW DICTIONARY (4th Pocket ed. 1996) (defining arrest as “[t]he taking or keeping of a person in custody by legal authority”); see also *Arrest*, DICTIONARY.COM, <http://dictionary.reference.com/browse/arrest> (last visited Aug. 28, 2015) (defining arrest in the following ways: “to seize (a person) by legal authority or warrant; [to] take into custody” and “the taking of a person into legal custody, as by officers of the law”).

117. See *Citation*, BLACK’S LAW DICTIONARY (4th Pocket ed. 1996) (defining “citation” as “[a] police-issued order to appear before a judge on a given date to defend against a stated charge, such as a traffic violation”).

California.¹¹⁸ Brendlin, a passenger in a car that had been pulled over due to concerns about the validity of the car's registration tags,¹¹⁹ had been ordered at gunpoint to exit the car after an officer had seen Brendlin "briefly open and then close the passenger door of the [car]."¹²⁰ The officer subsequently informed Brendlin that he was under arrest.¹²¹ The officer found a "syringe cap on [Brendlin's] person" and also found "syringes and a plastic bag of a green leafy substance" on the driver's person.¹²² Finally, after the pat-down search that revealed the syringes and other substance, the police officer "formally arrested" the driver of the car.¹²³ The *Leal-Felix* court inferred that informing an individual that they were under arrest was an element of an "arrest" because one would not typically think of a "citation" as involving such a command.¹²⁴

ii. *Transporting the Suspect to the Police Station*

The second element of an arrest that can be inferred from Supreme Court precedent and that aligns with the popular understanding of an arrest is the "transport[ation of the suspect] to the police station," which the Court in *United States v. Robinson*¹²⁵ discussed as something that factors into the definition of "arrest."¹²⁶ Robinson, who had been found with heroin in the "left breast pocket" of his coat,¹²⁷ was convicted of "possession and facilitation of concealment of heroin."¹²⁸ While determining the legality of the search conducted upon Robinson, the Court discussed "the need to disarm the suspect" as one justification for police to have "the general authority to search incident to a lawful . . . arrest."¹²⁹ As part of that discussion, the Court noted that "danger to an officer is far greater . . . [during an] extended exposure which [results from] the taking of a suspect into custody and transporting

118. See *Leal-Felix*, 665 F.3d at 1041 (describing *Brendlin v. California*, 551 U.S. 249 (2007), as a case that reflects the first part of an arrest—"informing the suspect that he [or she] is under arrest").

119. *Brendlin*, 551 U.S. at 252.

120. *Id.* The police officer, before ordering Brendlin out of the car, had returned to his own car after believing that Brendlin—who he thought was "one of the Brendlin brothers"—may have been a person that the officer remembered "had dropped out of parole supervision." *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; see also *Leal-Felix*, 665 F.3d at 1041 n.2 (explaining that, in *Brendlin v. California*, "one suspect was declared 'under arrest;' another was 'formally arrested' after a pat-down revealed syringes and suspected drug paraphernalia").

124. See *Leal-Felix*, 665 F.3d. at 1041-44.

125. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

126. *Leal-Felix*, 665 F.3d at 1041 n.3 (citing *Robinson*, 414 U.S. at 234-35).

127. *Robinson*, 414 U.S. at 223.

128. *Id.* at 219.

129. *Id.* at 234.

[the suspect] to the police station.”¹³⁰ Ultimately, the *Leal-Felix* court identified *Robinson* for its discussion of the second inferred element of an “arrest” (as opposed to an element of a traffic citation) because of officers’ increased exposure to danger and greater responsibility related to their duty to take suspects into custody and to the police station.¹³¹

iii. Booking the Suspect into Jail

Finally, the facts of *Atwater v. City of Lago Vista* reflect the third inferred characteristic of an “arrest” that conforms with the common definition and understanding of an “arrest.”¹³² In *Atwater*, a police officer pulled over the defendant after the officer noticed her driving without her seatbelt fastened.¹³³ In addition to driving without having her seatbelt on, the defendant “was charged with . . . failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance.”¹³⁴ The Court noted that the police officer “handcuffed [the defendant], placed her in his squad car, and drove her to the local police station,” where she was booked into jail, and the booking officers “had her remove her shoes, jewelry, . . . eyeglasses, and empty her pockets.”¹³⁵ The booking officers also took her photograph, isolated her in a jail cell for a short time, and then took her in front of the magistrate.¹³⁶ Ultimately, the Ninth Circuit noted *Atwater* for its implicit recognition of the “formal arrest” process and the third element of an arrest—booking the individual into jail—because of the fact that the common understanding of an arrest, rather than that of a citation, encompasses such acts by police officers.¹³⁷

iv. Additional Aspects of Fourth Amendment Supreme Court Precedent Supporting the Ninth Circuit Approach

The Supreme Court’s decision in *Knowles v. Iowa* reinforces the first element of an “arrest”—informing the suspect that he or she is under arrest.¹³⁸ In *Knowles*, an officer “stopped . . . Knowles for speeding, but issued him a

130. *Id.* at 234–35; see also *Leal-Felix*, 665 F.3d. at 1041 n.3 (stating that the Court in *United States v. Robinson* described a “formal arrest [as] involv[ing] more danger to police because it involves ‘taking . . . a suspect into custody and transporting him to the police station’” (quoting *Robinson*, 414 U.S. at 234–35)).

131. See *Leal-Felix*, 665 F.3d. at 1041–44.

132. See *id.* at 1041 n.4 (explaining that *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), illustrates the third characteristic of an arrest).

133. *Atwater*, 532 U.S. at 324.

134. *Id.*

135. *Id.*

136. *Id.*

137. See *Leal-Felix*, 665 F.3d. at 1041–44.

138. *Knowles v. Iowa*, 525 U.S. 113 (1998).

citation rather than arresting him,”¹³⁹ and also “conducted a full search of the car” without either Knowles’ consent or probable cause.¹⁴⁰ The Court held (in the context of the Fourth Amendment) that while arrests allow officers the ability to “conduct a full field search,” issuing citations does not “authorize[] the officer . . . to conduct a full search of the car.”¹⁴¹ The Court’s holding is relevant to the distinction between “arrests” and “citations” because it further illustrates how these two different events receive significantly different treatment in settings such as Fourth Amendment searches.

The sharp distinction between traffic citations and arrests as they relate to searches¹⁴² for purposes of the Fourth Amendment emphasizes the appropriateness of the inference of the first element of an “arrest” as articulated by the Ninth Circuit. This distinction in search cases further clarifies the difference between traffic citations and arrests—namely that citations and arrests involve starkly different consequences for the individuals being stopped and the officers issuing the citation or arrest. Not only must an individual be informed that he or she is under arrest, but any search after the officer has decided to cite or arrest the individual is a violation of that individual’s constitutional rights.¹⁴³ Overall, these elements of Fourth Amendment precedent strengthen the notion that a distinction between citations and arrests exists. This, in turn, supports the Ninth Circuit’s approach, which does not equate citations with arrests for criminal history score computation pursuant to the Guidelines.

Additionally, not only is the second element of an “arrest”—“transporting the suspect to the police station”¹⁴⁴—supported by a larger degree of danger to police officers (as compared to a traffic citation) because of the increased exposure to suspects who are taken into custody and taken to the police station, but it is also reinforced by the Supreme Court’s discussion of detention and seizure in the context of the Fourth Amendment. *Brendlin v. California*, a case decided on Fourth Amendment grounds, involved a

139. *Id.* at 114. The Court noted that under Iowa law Knowles could have been arrested. *Id.* at 115 (noting that “Iowa peace officers having cause to believe that a person has violated any traffic . . . law may arrest the person” or issue a citation (citing IOWA CODE ANN. § 321.485(1)(a) (West 1997))).

140. *Id.* at 114–15. The officers, as a result of their search, “found . . . marijuana and a ‘pot pipe.’” *Id.* at 114. Knowles was subsequently arrested. *Id.*

141. *Id.* at 114, 118.

142. See Lewis R. Katz, “Lonesome Road”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1451 (2013). Professor Katz explained that “[p]olice may not search a motorist incident to issuance of a traffic citation.” *Id.* Further, he noted that a search cannot occur “[e]ven if the offense could result in a custodial arrest, [as it did in Knowles, because] once a police officer decides to issue a citation instead of making an arrest, no search is permissible.” *Id.* (citing *Knowles*, 525 U.S. at 114).

143. Katz explained that “[t]he decision to make an arrest for [a] driving offense [is] in the officer’s discretion,” and that if the arrest is “incident to the search rather than a search incident to an arrest,” then a constitutional violation has occurred. *Id.* at 1453.

144. *United States v. Leal-Felix*, 665 F.3d 1037, 1041 (9th Cir. 2011) (en banc).

challenge by the petitioner to his being subject to “an unconstitutional seizure” due to a “lack[] [of] probable cause or reasonable suspicion to make the traffic stop.”¹⁴⁵ Although the Court acknowledged that a Fourth Amendment seizure can result from a traffic stop (not just from an arrest), it also implied that a key difference exists between the two means: “a traffic stop entails a seizure of the driver ‘even though the purpose of the stop is limited and the resulting detention quite brief,’”¹⁴⁶ whereas an arrest traditionally does not include “brief, on-the-spot stop[s] on the street.”¹⁴⁷

Thus, the Supreme Court suggests that a traffic stop, during which an individual may be issued a traffic citation, is inherently different from an arrest, which entails a longer detention and a different purpose for detaining the individual. These differences align with the Ninth Circuit’s description of the second element of an “arrest.” Transporting the suspect to the police station involves not only increased danger to police officers, but also consists of a longer detention period and a different purpose for detaining the individual because they were arrested and not merely cited.

Finally, from the sharp distinction between traffic citations and arrests in Fourth Amendment precedent, it necessarily follows that the third element of an “arrest”—“booking the suspect into jail”¹⁴⁸—only further solidifies the Ninth Circuit’s approach as properly defining “traffic citations” differently than “arrests.” Although in *Leal-Felix* the Ninth Circuit denoted this element as an “and/or” element (indicating that it is not necessary for this element to be present in order to establish that an arrest has occurred),¹⁴⁹ booking a suspect into jail—an element that could logically only be associated with the common understanding of an arrest and not with the understanding of a citation—only further establishes the differences between traffic citations and arrests in the context of both the Fourth Amendment and the Guidelines when computing criminal history score. Even the Seventh Circuit has acknowledged this much to be true.¹⁵⁰

145. *Brendlin v. California*, 551 U.S. 249, 253 (2007).

146. *Id.* at 255 (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

147. *See Dunaway v. New York*, 442 U.S. 200, 209 (1979).

148. *Leal-Felix*, 665 F.3d at 1041.

149. *Id.*

150. In *United States v. Morgan*, the court explained that “Morgan could have been taken to the stationhouse, converting a street arrest to a full custodial arrest.” *United States v. Morgan*, 354 F.3d 621, 624 (7th Cir. 2003) (discussing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), a case which the Ninth Circuit discussed in connection with the same proposition the Seventh Circuit was making). Although the Seventh Circuit’s use of “street arrest” and “full custodial arrest” somewhat mischaracterizes the nature of the traffic citations at issue in this circuit split, the court virtually acknowledged the stark distinctions that exist between traffic citations (a temporary restraint to an individual) and arrests (when an individual is subject to a “formal arrest” as explained by the Ninth Circuit in *Leal-Felix*).

3. The Seventh Circuit's Approach Fails to Account for Supreme Court Precedent That Distinguishes Between "Traffic Citations" and "Arrests"

The Seventh Circuit's approach to defining arrests for purposes of computing criminal history score, as seen in *Morgan*¹⁵¹ and Judge Rawlinson's dissent in *Leal-Felix*,¹⁵² not only ignores the Supreme Court precedent discussed in Subpart IV.A.2, but also misinterprets other Supreme Court case law that the Ninth Circuit relied on to define "arrest."¹⁵³ This Subpart explores the Seventh Circuit's reasoning and establishes why the Supreme Court should follow the Ninth Circuit's approach instead.

First, the Seventh Circuit, in *Morgan*, simply held that "[a] traffic stop is an 'arrest' in federal parlance," and cited two Supreme Court cases¹⁵⁴ and one Seventh Circuit case as support.¹⁵⁵ Most notably, the court cited *Whren v. United States* for this proposition, a case that merely involved the issue of whether a traffic stop is a *seizure* under the Fourth Amendment.¹⁵⁶ However, as the Ninth Circuit discussed in *Leal-Felix*, "*Whren* does not address whether a traffic stop constitutes an arrest at all," and thus, does not help determine whether a traffic citation is an arrest for purposes of the Guidelines.¹⁵⁷ *Whren*, setting aside the fact that it does not explicitly address whether a traffic stop is an arrest, fails to even imply that the question can be resolved one way or the other. Unlike the Fourth Amendment case law in Subpart IV.A.1 that exemplifies the differences between a traffic citation and an arrest, *Whren* is simply irrelevant to resolving the question of whether an arrest encompasses a traffic citation for purposes of the Guidelines.

Additionally, Judge Rawlinson's dissent in *Leal-Felix* asserted that Fourth Amendment analysis and case law (for example) does not compel finding that traffic citations and arrests are different in the context of the Guidelines.¹⁵⁸ Specifically, Judge Rawlinson misinterpreted the usefulness of *Whren*, much in the same way that the Seventh Circuit did in *Morgan*,¹⁵⁹ and also discussed

151. See *supra* Part III.A.

152. See *Leal-Felix*, 665 F.3d at 1046–48 (Rawlinson, J., dissenting).

153. See *supra* Part IV.A.1.

154. *Morgan*, 354 F.3d at 624. The Seventh Circuit cited *Whren v. United States*, 517 U.S. 806 (1996) and *California v. Hodari D.*, 499 U.S. 621 (1991) for a proposition analogous too, but slightly different than, its own. *Id.*

155. *Id.* (citing *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (en banc)).

156. *Whren*, 517 U.S. at 808; see also *Leal-Felix*, 665 F.3d at 1042 (explaining that *Whren* "held that a traffic stop is a 'seizure' and therefore must be reasonable").

157. *Leal-Felix*, 665 F.3d at 1042.

158. *Id.* at 1048 (Rawlinson, J., dissenting). Judge Rawlinson also offered recidivism concerns and the creation of an "unnecessary circuit split" as reasons for taking the Seventh Circuit's view. *Id.* at 1046–48. Those factors are discussed in Subparts IV.B and IV.C.

159. *Id.* at 1047. Judge Rawlinson discussed an isolated phrase from *Whren*, "traffic violation-arrest," suggesting that a distinction cannot be made between a traffic citation and an arrest. *Id.* (quoting *Whren*, 517 U.S. at 813). However, as noted previously, *Whren* does not address this

two other Supreme Court cases as evidence of why the Seventh Circuit's approach is correct.¹⁶⁰ Although Judge Rawlinson noted that Fourth Amendment case law was not helpful to the analysis, *Berkemer v. McCarty* and *Dunaway v. New York*—both Fourth Amendment cases—were cited in support of the Seventh Circuit's view.¹⁶¹ In fact, the majority in *Leal-Felix* pointed out the flawed reliance on *Dunaway*—namely that the case involved a defendant who was subject to “a quintessential formal arrest under [the Ninth Circuit's] definition.”¹⁶² Not only does this misplaced reliance on Supreme Court case law discount the viability of the Seventh Circuit's approach, but *Berkemer* and *Dunaway* actually support and enhance the reliability of the Ninth Circuit's approach to defining an “arrest.”

B. THE NINTH CIRCUIT'S APPROACH BEST EFFECTUATES THE SENTENCING COMMISSION'S GOALS AND ADVANCES IMPORTANT POLICY CONSIDERATIONS

In addition to Fourth Amendment Supreme Court case law, important policy considerations support the Supreme Court's adoption of the Ninth Circuit's reasoning in *Leal-Felix* when determining if a citation is an arrest in the context of the Guidelines. This Subpart demonstrates how the Ninth Circuit's approach furthers the Commission's goals by taking decreased culpability and lower rates of recidivism into account when sentencing individuals pursuant to the Guidelines.

1. Relationship Between Recidivism and Lower Culpability of Offenders

In *Leal-Felix*, the court explained that because *Leal-Felix*'s two previous citations for “driving with a suspended license” were not “separated by an

question and certainly does not lend any help in determining whether a traffic stop is an arrest within the context of the Guidelines.

160. *Id.* at 1047–48 (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Dunaway v. New York*, 442 U.S. 200 (1979)).

161. *Id.* Judge Rawlinson cited *Berkemer* for its discussion of why individuals subject to a traffic stop would not “feel free either to disobey [an officer] or to leave the scene of a traffic stop without being told they might do so” and for its statement that “stopping an automobile and detaining its occupants constitute[s] a seizure within the meaning of the Fourth Amendment.” *Id.* at 1047 (quoting *Berkemer*, 468 U.S. at 437–38). However, these assertions do not change the fact that notable differences exist between traffic citations and arrests, as exemplified by Supreme Court Fourth Amendment precedent. Not only does the fact that an individual is less likely to disobey an officer once they are subject to a traffic stop and that a traffic stop is a “seizure” not account for the inherent differences between traffic citations and arrests, but Judge Rawlinson's characterization of *Berkemer* actually supported the Ninth Circuit view. *Id.* (“[T]he Supreme Court struggled with the application of *Miranda* in the context of a traffic stop [as compared to in the context of an arrest].”).

162. *Id.* at 1041 n.5. *Dunaway v. New York* involved “a defendant who had been seized by the police, transported to a police station in a police car, and placed in an interrogation room.” *Id.* Under the Ninth Circuit's view, which is supported by other Fourth Amendment case law, the “seizure” of the defendant involves all the elements of an “arrest.”

intervening arrest,” at his sentencing hearing¹⁶³ the court determined that Leal-Felix had a criminal history score of “13,” and he was sentenced to 21 months.¹⁶⁴ However, the court noted the differences between counting citations as arrests and not counting them as arrests; if deemed arrests, citations would “add[] two points for each [citation, and] would place [Leal-Felix] in criminal history category VI, with a Guidelines range of 21–27 months.”¹⁶⁵ However, if deemed different from arrests, “citations would be counted together and [Leal-Felix] would be included in criminal history category V, with a Guidelines range of 18–24 months.”¹⁶⁶ Treating citations in these different manners illustrates the significant consequences this determination has upon an individual’s recommended sentence under the Guidelines.

Additionally, this difference can be observed in other scenarios that involve different types of crimes that warrant different levels of punishment. For instance, considering offenses at varying locations within the sentencing table can demonstrate the importance of not classifying traffic citations as arrests for purposes of computing criminal history score. Consider Justice Breyer’s example where a sentence range, pursuant to the Guidelines, is being determined for an individual who has been charged with robbery and has “one serious prior conviction.”¹⁶⁷ Justice Breyer explained that the individual’s criminal history score consisted of three points for the individual’s prior serious conviction, pursuant to section 4A1.1 of the Guidelines.¹⁶⁸ Thus, the individual had “an offense level of ‘23’”¹⁶⁹ and a three point criminal history score that corresponded to “a [sentence] range of [51] to [63] months in prison.”¹⁷⁰

A slight change in the facts of Justice Breyer’s example displays the significance of defining “arrests” for purposes of the Guidelines. Consider that the individual in the example, in addition to his prior serious conviction, also had a prior traffic citation for driving with a suspended license—similar

163. *Id.* at 1039. The court explained that “Leal-Felix was charged with violating 8 U.S.C § 1326(a) and § 1326(b)(2), because he was found in the United States after having been removed or deported from the United States and without permission to reapply for admission following removal or deportation [which] occurred after a conviction for an aggravated felony.” *Id.*

164. *Id.*

165. *Id.* at 1040.

166. *Id.*

167. Breyer, *supra* note 27, at 6. In this example, the individual robbed \$40,000 from a bank and pointed a gun at one of the bank tellers. *Id.* These factors, in the aggregate, added five levels to the individual’s offense level, which is the vertical axis of the sentencing table. *Id.*; see also *supra* Part II.A.3.

168. Breyer, *supra* note 27, at 6.

169. *Id.* at 6–7. The offense level consisted of a base level of 18 for robbery and five additional levels, for a total offense level of 23. *Id.*

170. *Id.* at 7.

to the defendants in *Leal-Felix* and *Morgan*.¹⁷¹ Following the Seventh Circuit's approach in this situation, the individual's prior traffic citation (counted as an "arrest") and prior serious conviction would result in the individual having an "intervening arrest" for criminal history score computation.¹⁷² An intervening arrest would add criminal history points to the individual's criminal history score, which would bump him up from criminal history category II to category III on the horizontal axis of the sentencing table.¹⁷³ This increase in criminal history category changes the individual's recommended sentence from 51 to 63 months to 57 to 71 months.¹⁷⁴

The sizable increase in recommended sentence when traffic citations are considered to be equivalent to arrests, as evidenced by the modification of Justice Breyer's example, demonstrates how the Seventh Circuit's approach does not effectuate the Commission's goals—while the Ninth Circuit's approach does—because the individual's level of culpability does not match his recommended sentence and the corresponding likelihood that he will become a recidivist. Recidivism¹⁷⁵ rates increase as an individual's criminal history category and criminal history points increase;¹⁷⁶ thus, sentencing someone pursuant to a higher criminal history category and points (like in Justice Breyer's modified example) likely mischaracterizes the individual as being even more prone to be convicted of a new crime, simply because a traffic citation was included within the computation of the individual's criminal history score. Determining that an individual is more likely to recidivate because of a traffic citation does not comport with the Guidelines' goal of a "fair sentencing system," nor does it "narrow[] . . . disparity in sentences imposed for similar criminal offenses committed by similar

171. *Leal-Felix*, 665 F.3d at 1039 ("Leal-Felix's criminal history included two citations for driving with a suspended license."); *United States v. Morgan*, 354 F.3d 621, 623 (7th Cir. 2003) ("Morgan received criminal history points on account of two convictions for continuing to drive after his license had been revoked.")

172. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (U.S. SENTENCING COMM'N 2014).

173. *Id.* ch. 5, pt. A.

174. *Id.*

175. See U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4 (2004) (defining recidivism as "a re-conviction for a new offense; a re-arrest with no conviction disposition information available on the post-release criminal history record; or a supervision revocation (probation or post prison supervision)").

176. *Id.* at 6–8. In a study published in 2004, the Commission showed how "[r]ecidivism risk increases with each" criminal history category and how "[r]ecidivism rates for number of criminal history points also follow the upward positive linear slope trend seen with the recidivism rates of the [criminal history categories]. In general, as the number of criminal history points increases, the risk of recidivating within two years increases." *Id.* The study took a "random sample of 6,092 U.S. citizens who were sentenced under the [Guidelines]" and measured recidivism by noting whether any of the study's three recidivism definitions were satisfied by an individual "during the offender's initial two years back in the community." *Id.* at 3–4; see also *supra* note 175 (stating the three definitions of recidivism the Commission used for purposes of the study).

offenders” or implement “proportionality in sentencing,”¹⁷⁷ because the recidivism likelihood is unfairly and unnecessarily skewed against the individual and their culpability is considered to be higher than it actually is.¹⁷⁸

2. The Ninth Circuit’s Approach Promotes Reduction of Sentencing Disparity Between Similar Offenders

The Ninth Circuit’s approach to defining “arrests” under section 4A1.2 when determining sentences is also consistent with the Commission’s goal of seeking “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”¹⁷⁹ The Seventh Circuit’s approach frustrates this goal because individuals who have committed similar crimes, but who have similar but slightly different criminal histories, will be subject to different recommended sentences solely because one of the individual’s criminal histories included a traffic citation.

In 2012, a study that surveyed roughly 370,000 cases decided by 885 judges acknowledged just how wide sentencing disparity is, even after almost 30 years since the passage of the Reform Act.¹⁸⁰ The study highlighted certain areas of criminal law—such as drug and white collar crimes¹⁸¹—and showed that extensive sentencing disparities exist throughout the United States.¹⁸²

177. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (U.S. SENTENCING COMM’N 2014). Nor is it in line with the Commission’s congressional mandate of “‘impos[ing] sentences which reflect the seriousness of the offense’; . . . ‘provid[ing] just punishment for the offense’; [and] ‘afford[ing] adequate deterrence to criminal conduct.’” Ogletree, *supra* note 11, at 1946 (citing 18 U.S.C. § 3553(a)(2) (2012)). The traffic citations, because of their inherent differences from arrests, overstate the gravity of the offense, result in unjust punishment to the individual, and provide more deterrence than is necessary for the individual when the Seventh Circuit’s approach is utilized for sentencing determinations. *See supra* Part IV.A.3.

178. For example, in the modified Justice Breyer illustration, the individual is considered roughly ten percent more likely to recidivate based on criminal history category and roughly five percent to ten percent more likely to recidivate based on criminal history points, which is inconsistent with the individual’s actual recidivism risk since traffic citations are inherently different than arrests. U.S. SENTENCING COMM’N, *supra* note 175, at 6–7. Additionally, because of the distinctions between traffic citations and arrests, the higher recommended sentence does not match the individual’s actual level of culpability for the committed offense; rather, he has been judged to have a higher degree of blameworthiness based on the presence of an “intervening arrest” in his criminal history, even though that determination was based on a traffic citation that does not entail the qualities of an arrest. *See supra* Part IV.A.2.

179. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (U.S. SENTENCING COMM’N 2014).

180. Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html?pagewanted=all&_r=0 (citing *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, TRAC REPS. (Mar. 5, 2012), <http://www.trac.syr.edu/tracreports/judge/274>).

181. *Id.*

182. For instance, the study highlighted five U.S. Districts that were considered to be “illustrative” of the sentencing disparity that is prevalent when judges are sentencing offenders for drug-related or white-collar criminal offenses. *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, *supra* note 180. The study singled out the median sentences given out by judges

Although much of this sentencing disparity results from judges' discretion to deviate from the Guidelines' recommended sentence range,¹⁸³ this disparity can begin to be resolved by adopting the Ninth Circuit's definition of "arrest" for purposes of sentencing pursuant to the Guidelines.

As the modified version of Justice Breyer's example illustrated, if a traffic citation is included in the sentencing decision as the equivalent of an "arrest," then increased criminal history categories and points result.¹⁸⁴ This increase, although small in terms of the sentencing table, has very large consequences for the resulting sentencing range that is produced.¹⁸⁵ Unnecessarily severe sentences—such as in the case of sentencing ranges that equate traffic citations with arrests under section 4A1.2(a)(2)—are recognized as a "serious criticism of the guidelines."¹⁸⁶ Professor Frank Bowman recognized that "[i]ncarcerative sentences are imposed far more often than they were before the guidelines, and the length of imposed sentences has nearly tripled."¹⁸⁷ Professor Bowman discussed how the severity of sentences (for instance, in drug cases) and the presence of judicial discretion—which remained after the Guidelines' creation—exacerbates the problem of harsher sentences being

in the Northern District of Texas, the Eastern District of Virginia, the Minnesota District Court, the District of Columbia federal court, and the Northern District of Illinois for the illustration. *Id.* In Texas, the median sentences ranged from 60 months per judge, all the way up to 160 months, with the judges' median sentences being "quite varied" overall throughout the district. *Id.* In Virginia, the low end of the sentencing range was 30 months and the high end was 120 months. *Id.* In Minnesota, the judges showed more similar sentencing ranges, although a disparity still existed, with the low end of the range being 52 months and the high end being 64 months. *Id.* In districts with only a small number of judges sentencing ranges were in "more agreement," however the study explained that wide disparity still existed in these districts, such as in the District of Columbia federal court, where the low-end median was 27 months and the high end was 77 months. *Id.* Finally, for comparison to other types of crime, the study showed that in the Northern District of Illinois, white-collar crimes have similar sentencing disparities to those of drug offenses, with the low end of the range being no prison time and the high end being 39 months. *Id.*

183. Secret, *supra* note 180.

184. See *supra* Part IV.B.1.

185. See *supra* Part IV.B.1 (describing that the inclusion of one additional traffic citation within an individual's criminal history results in a higher criminal history category (III instead of II) and adds additional points to the current total of three, which increases the individual's recommended sentencing range from 51 to 63 months to 57 to 71 months).

186. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005). Professor Bowman noted that the main concerns with the criticisms of the Guidelines is "that they are too harsh, that federal law requires imposition of prison sentences . . . for terms that are too long." *Id.* He also explained that the "severity . . . of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before." *Id.*

187. *Id.* Professor Bowman elaborated that "the mean sentence imposed by judges for all federal crimes" had seen steady increases from 1984 (the time of the passage of the Reform Act) to 1990, and again from 1990 to 1993. *Id.* at 1328 n.65. The measured increases were mean sentences of "24 months to 46 months" and then 46 months "to 66.9 months." *Id.* (citing U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT 61 fig.F (1996), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1995/annf_95.pdf).

imposed on individuals.¹⁸⁸ These problems are made even worse when traffic citations are considered to be arrests in sentencing determinations, because sentences are more severe than they would have been had the citation not been included in the determination, and the individual's culpability is likely overstated.

3. Departure from the Sentencing Guidelines

Finally, a word must be said about judges' discretion when sentencing individuals, particularly through "departure power."¹⁸⁹ The Guidelines devote an entire section of Chapter 5 to judges' ability to depart from recommended sentences,¹⁹⁰ and the Commission also explains that courts are "permit[ted] . . . to depart from a guideline-specified sentence [upon] find[ing] 'an aggravating or mitigating circumstance . . . not adequately taken into consideration by [the Guidelines].'"¹⁹¹ However, it also notes that "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case" and it cites policy considerations for this departure power.¹⁹²

Despite the restrictions that various sections of Chapter 5, Part K put on judges' ability to exercise their departure power,¹⁹³ and the Commission's belief that judges will not normally exercise their discretion to depart from the Guidelines,¹⁹⁴ the evidence of individual judges' median sentences imposed¹⁹⁵ and the mean sentence imposed nationwide¹⁹⁶ indicates that judges are using their departure power often (which can have positive and negative effects). While some may argue that this discretion can ameliorate the effects of severe sentences, often this discretion has the effect of widening the gap of length of sentences imposed from judge to judge and increasing

188. *Id.* at 1328–34.

189. *Id.* at 1334–35.

190. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. K (U.S. SENTENCING COMM'N 2014). The Commission instructs courts to "consider whether a departure is warranted" when "an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm" is present. *Id.* ch. 1, pt. A(1)(4)(b). The Commission also lists a number of sections in Chapter 5, Part K that contain "factors that the court cannot take into account as grounds for departure." *Id.*

191. *Id.* (quoting 18 U.S.C. § 3553(b) (2012)).

192. *Id.* (explaining two policy considerations, the first being that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision" and the second being "that despite the courts' legal freedom to depart from the guidelines, they will not do so very often").

193. *See id.* (listing at least five sections of Chapter 5 of the Guidelines that restrict judges' ability to depart from recommended sentencing ranges).

194. *Id.*

195. *See supra* notes 181–83 and accompanying text.

196. *See supra* note 182 and accompanying text.

the severity of sentences imposed on defendants.¹⁹⁷ The Ninth Circuit's approach, although it will not ultimately solve this discretionary power problem, will at least not contribute to the severity of sentences currently imposed.

Others may argue that judges' discretionary power could mitigate the effects of the Seventh Circuit's approach to equating traffic citations with arrests. However, independent judgment would not correct the severity of sentences being imposed and the disparity between each offender—in fact, in many instances judicial discretion could exacerbate the problem.¹⁹⁸ Ultimately, judicial discretion cannot be relied on to serve as a balance against the effects that a traffic citation may have on an individual's criminal history category and offense level. The severity and disparity of sentences among similarly situated individuals that has existed since the Guidelines' creation is evidence enough that judicial discretion would not offset the adverse effects of the Seventh Circuit's approach.¹⁹⁹

V. CONCLUSION

When the Commission created the Guidelines in 1987, the term “arrest” in section 4A1.2(a)(2) was left undefined. The Commission has maintained that it is devoted to creating Guidelines that impose fair and uniform sentences on deserving offenders, but the lack of guidance for judges nationwide when determining a defendant's prior criminal history during a sentencing determination pursuant to the Guidelines has created a circuit split over the definition of “arrest.” The lack of a specific standard for courts to follow resulted in varying application of the “intervening arrest” consideration in section 4A1.2(a)(2) of the Guidelines and has exacerbated problems involved with criminal sentencing that reach far beyond the determination of a defendant's criminal history. Thus, the Supreme Court and the circuit courts of appeal should adopt the Ninth Circuit's approach to defining “arrest” because the Ninth Circuit's definition most effectively combats the sentencing-related concerns that are so prevalent in the United States today.

197. See *supra* notes 181–84, 190–91 and accompanying text.

198. For example, return once more to the modified version of Justice Breyer's example of the sentencing procedure under the Guidelines. The individual being sentenced in that case had his recommended sentence increased from 51 to 63 months to 57 to 71 months simply because he had a traffic citation included in his prior criminal history, which gave him an “intervening arrest” under section 4A1.2(a)(2). See *supra* notes 168–74 and accompanying text. If discretionary power were to be used to sentence the offender at the lower level of his recommended range, he could be sentenced at 57 months. However, as is often the case, his sentence would end up being unduly severe because of judicial discretion (and because his traffic citation was equated with an arrest in the sentencing determination), with a sentence being at the high end of his recommended range (63 months), or in some cases even higher. See *supra* Part IV.B.2–3.

199. See *supra* Part IV.B.2–3.