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Am I Under Arrest? Why the U.S. Sentencing Guidelines Need a Strict Definition of What Constitutes an Intervening Arrest

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AM I UNDER ARREST? WHY THE U.S. SENTENCING GUIDELINES NEED A STRICT DEFINITION OF WHAT CONSTITUTES AN INTERVENING ARREST

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Abstract

Congress provided for the creation of the U.S. Sentencing Guidelines to promote fairness and produce proportional and uniform sentences. The Guidelines provide judges with a guideline range for sentencing based on a defendant's criminal history score and the offense level of the defendant's criminal conduct. A defendant's prior "intervening arrests" are considered in computing her criminal history score. But the current version of the Guidelines does not clearly define what constitutes an intervening arrest for the purposes of calculating an offender's score. Consequently, a split has developed between circuit courts as to whether a criminal traffic citation constitutes an intervening arrest when determining a defendant's criminal history score. This Note analyzes the different definitions of an intervening arrest within the circuit courts. It then outlines reasons why the U.S. Court of Appeals for the Ninth Circuit's definition of an intervening arrest should prevail. Finally, this Note proposes that the U.S. Sentencing Commission should revise the Guidelines to provide a clearer explanation of the term intervening arrest in order to resolve disagreement among the circuit courts and achieve greater fairness in sentencing.

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INTRODUCTION

An arrest can have a myriad of future effects on a defendant. Among the most problematic for a defendant is the effect of prior "intervening arrests" on his criminal sentence under the U.S. Sentencing Guidelines (Guidelines). Currently, the Guidelines do not clearly define the term intervening arrest for the purpose of calculating a defendant's criminal history score. The absence of a firm definition is particularly apparent when it comes to calculating a criminal history score for a defendant with prior criminal traffic citations. Does a traffic citation for driving with a suspended license qualify as an intervening arrest? Under the current state of the law, the answer depends on where the citation is issued.

The U.S. Court of Appeals for the Seventh Circuit treats the issuance of a criminal traffic citation as an intervening arrest under the Guidelines. The U.S. Court of Appeals for the Ninth Circuit, however, does not. Defining intervening arrest to include criminal traffic citations can lead to inflated criminal history scores, particularly for victims of racial profiling, pushing some defendants into a higher criminal history category. This can result in criminals with unequal culpability receiving the same punishment. Thus, it is essential to define the term intervening arrest to best reflect the purposes behind the Guidelines and in a way that allows judges the flexibility to take into account other important policy considerations.

This Note addresses whether criminal traffic citations should constitute intervening arrests for purposes of calculating a defendant's criminal history score under the Guidelines. Part I provides a comprehensive history of the Guidelines and offers an explanation of how to calculate a defendant's guideline range. This explanation includes a full discussion of section 4A1.2(a)(2) of the Guidelines, which depicts how criminal history scores are calculated. Part I then describes the consequences of having multiple, separate arrests and provides an illustration of these computations. Part II discusses the case law that has created the current circuit split. It begins with an examination of the

Seventh Circuit's holding in *United States v. Morgan*[1] that, for purposes of calculating a defendant's criminal history score, traffic citations constitute intervening arrests.[2] The Part then discusses the contrary Ninth Circuit holding in *United States v. Leal-Felix*[3] that traffic citations do not constitute intervening arrests under the Guidelines.[4] Part II concludes with a discussion of the U.S. District Court for the Middle District of Florida's decision in *United States v. Johnson*[5] agreeing with the Seventh Circuit's holding and noting that citations in general should be included in the definition of an intervening arrest.[6] Part III provides policy-based arguments for why the Ninth Circuit's interpretation of intervening arrest should prevail over that of the Seventh Circuit. Finally, Part IV proposes revising the Guidelines to provide a clearer explanation of the term intervening arrest in order to resolve the current split and to ensure that an offender's criminal history calculation reflects the purposes of the Guidelines. Adopting this revision will result in a fairer sentencing system by ensuring that offenders of similar culpability are punished with equal severity.

I. THE U.S. SENTENCING GUIDELINES

This Part begins by providing a history of the Guidelines, which includes an explanation of how and more importantly why Congress chose to implement a sentencing system. An analysis of the purposes behind the Guidelines demonstrates that the ambiguity of what constitutes an intervening arrest contradicts the very fairness and uniformity the Guidelines were intended to create. Additionally, this Part provides an explanation of how the Guidelines are used to calculate a defendant's sentencing range. An illustration is used to demonstrate the effect an intervening arrest can have on the calculation of a defendant's sentence thereby showing the importance of clearly defining whether traffic citations should be considered intervening arrests.

A. *History of the Guidelines*

Prior to the enactment of the Guidelines, federal judges had unfettered discretion in determining an offender's sentence.[7] Because most federal

1. 354 F.3d 621 (7th Cir. 2003).
2. *Id.* at 623–24.
3. 665 F.3d 1037 (9th Cir. 2011) (en banc).
4. *Id.* at 1044.
5. 876 F. Supp. 2d 1272 (M.D. Fla. 2012), *aff'd in part and dismissed in part*, 515 F. App'x 844 (11th Cir. 2013) (per curiam).
6. *Id.* at 1274–75.
7. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

criminal statutes provide only a maximum term of years for a given violation, judges had complete discretion to impose sentences for any number of months up to the statutory maximum.[8] This practice resulted in wide variations in sentences among offenders who committed the same violations. In an attempt to rectify this indeterminate sentencing, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984, which provided for the creation of the U.S. Sentencing Commission (Commission).[9]

The Commission is an independent agency of the judicial branch that Congress created to develop sentencing guidelines for the federal courts.[10] The Commission designed the Guidelines, which went into effect on November 1, 1987, to achieve three primary objectives: (1) to create a fair sentencing system that provided offenders certainty and honesty in sentencing; (2) to narrow the disparity in sentencing among similar offenders convicted of similar crimes; and (3) to establish a sentencing system that calculated a defendant's sentence in proportion to the severity of the individual's criminal conduct.[11]

Although the Commission originally styled the Guidelines as mandatory,[12] the U.S. Supreme Court in *United States v. Booker*[13] held that the mandatory Guidelines violated the Sixth Amendment right to trial by jury.[14] The Court excised the statutory provision that made the Guidelines mandatory, rendering them advisory only and thereby

8. *Id.*

9. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.); *id.* § 217(a) (creating the Commission); *see also* Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1629 (2014); Steven Nauman, Note, Brown v. Plata*: Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 863 (2013) ("In 1984, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984, creating the United States Sentencing Commission."); *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N 1, http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf (last visited Apr. 1, 2015); *The Beginning of the U.S. Sentencing Guidelines*, U.S. COURTS, http://www.uscourts.gov/news/TheThirdBranch/09-08-01/The_Beginning_of_the_U_S_Sentencing_Guidelines.aspx (last visited Apr. 1, 2015).

10. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2014); *The Beginning of the U.S. Sentencing Guidelines*, *supra* note 9; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 1; *see also* Jacy Owens, *A Progressive Response: Judicial Delegation of Authority to Federal Probation Officers*, 64 FLA. L. REV. 817, 823 (2012) (discussing the policy undergirding the Sentencing Reform Act).

11. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 1–2.

12. *See* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 4 (2013).

13. 543 U.S. 220 (2005).

14. *Id.* at 245.

permitting courts to calculate sentences in light of other concerns as well.[15] *Booker*, however, did direct the federal courts to consult the Guidelines and take them into account when sentencing.[16] Subsequently, in *Rita v. United States*,[17] the Court held that a court of appeals may apply a presumption of reasonableness to district court sentences within the guideline range.[18] Following *Booker* and *Rita*, the Court has continued to emphasize the importance of the Guidelines in recent sentencing-related cases.[19]

B. *Guideline Range*

The Guidelines provide federal judges with a suggested range of months for sentencing defendants—the guideline range.[20] Chapter Five, Part A of the Guidelines includes the Sentencing Table for calculating a defendant's guideline range based on both the defendant's offense level and the defendant's criminal history score.[21] This Section will explain how both of those scores are calculated to determine a defendant's guideline range.

1. Determining the Offense Level and Criminal History Score

To properly calculate a defendant's guideline range, the judge must first determine the defendant's offense level and criminal history score.[22] The Guidelines assign most federal crimes an offense level between one and forty-three based on the severity of the criminal conduct and the specific characteristics of the offense.[23] Thus, the judge obtains a defendant's offense level directly from the values provided in the Guidelines. Determining an individual's criminal history score, however,

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15. *Id.* at 245–46.

16. *Id.* at 264.

17. 551 U.S. 338 (2007).

18. *Id.* at 347; *see An Overview of the United States Sentencing Commission*, *supra* note 9, at 2.

19. *An Overview of the United States Sentencing Commission*, *supra* note 9, at 2; *see, e.g.*, Kimbrough v. United States, 552 U.S. 85, 91 (2007) (holding that although the Guidelines are advisory, district judges must "include the Guidelines range in the array of factors warranting consideration"); Gall v. United States, 552 U.S. 38, 49 (2007) (providing that the Guidelines "should be the starting point and initial benchmark" as a matter of administration and nationwide consistency).

20. *See An Overview of the United States Sentencing Commission*, *supra* note 9, at 2.

21. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2014). A copy of the Sentencing Table is appended to this Note.

22. *See id.*; *see also* Kathryn A. Kimball, Note, *Losing Our Soul: Judicial Discretion in Sentencing Child Pornography Offenders*, 63 FLA. L. REV. 1515, 1521 (2011).

23. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 2.

is less straightforward. Sections 4A1.1 and 4A1.2 of the Guidelines provide the instructions for computing a defendant's criminal history score.[24]

Section 4A1.1 of the Guidelines breaks down the number of points a defendant receives for any prior sentences.[25] For example, according to the Guidelines, three points are added to a defendant's criminal history score "for each prior sentence of imprisonment exceeding one year and one month."[26] Therefore, if a defendant served two years in prison for a prior offense, then the defendant would have a criminal history score of three. Section 4A1.2 of the Guidelines provides further instructions for computing a defendant's criminal history score when the defendant has multiple prior sentences. According to section 4A1.2(a)(2), if the defendant has multiple prior sentences, it is necessary to determine whether to count the sentences separately or as a single sentence.[27] Section 4A1.2(a)(2) explains that "[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an *intervening arrest*."[28] This occurs when "the defendant is arrested for the first offense prior to committing the second offense."[29] "If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day." [30] Any

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24. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2.
25. The breakdown pursuant to section 4A1.1 is as follows:

> The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
> (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
> (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
> (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
> (e) Add 1 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.
26. *Id.* § 4A1.2(a)(2).
27. *Id.*
28. *Id.* (emphasis added).
29. *Id.*
30. *Id.*

prior sentences covered by (A) or (B) are counted as a single sentence.[31] Based on these point determinations, the defendant is given a criminal history score and assigned to one of six criminal history categories.[32]

2. Calculating the Guideline Range

After determining a defendant's offense level and criminal history score, a judge uses these numbers to find the defendant's guideline range on the Sentencing Table provided in the Guidelines.[33] The point at which these two values intersect on the Sentencing Table determines the guideline range.[34] The Sentencing Table states guideline ranges in months of imprisonment, and the top of each range exceeds the bottom of the range by either six months or twenty-five percent, whichever is greater.[35] Federal judges must consult the Guidelines when imposing sentences, but judges have flexibility for sentencing offenders within the upper and lower boundaries of the guideline range.[36] Unless a judge determines that the Commission did not consider a factor that would result in a different sentence—one beyond the guideline range boundaries—the Commission advises judges to impose a sentence term within the guideline range.[37]

3. An Illustration

The following example illustrates the calculation of a defendant's guideline range: Suppose police arrest a defendant for Crime C. Prior to this arrest, the defendant served two sentences. Eight years ago, he was arrested for Crime A and then sentenced to thirty-six months in prison.[38] Shortly after his release, police arrested the defendant for Crime B,[39] and

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31. *Id.*

32. *See id.* at ch. 5, pt. A; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 2.

33. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (setting forth the Sentencing Table); *An Overview of the United States Sentencing Commission*, *supra* note 9, at 3. A copy of the Sentencing Table is appended to this Note.

34. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 3.

35. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A; *An Overview of the United States Sentencing Commission*, *supra* note 9, at 3.

36. *See An Overview of the United States Sentencing Commission*, *supra* note 9, at 3.

37. *See id.*

38. Assume Crime A has a base offense level of 20. A defendant with no prior sentences is assigned to criminal history category I. *See id.* at ch. 5, pt. A. According to the Sentencing Table, a defendant assigned to criminal history category I who committed a crime with an offense level of twenty is subject to a guideline range of thirty-three to forty-one months. *See id.* at ch. 5, pt. A. The federal court has the discretion to choose a sentence within that range. *Id.* at ch. 5, intro. cmt.

39. Assume Crime B also has an offense level of 20.

he spent forty-two months in prison for that offense.[40] Therefore, the defendant now has a criminal history score of six—three points for his prior sentence for Crime A and three points for his prior sentence for Crime B—because the length of each prior sentence exceeded one year and one month.[41] The defendant's arrest for Crime A was an intervening arrest because he was arrested for the offense prior to being arrested for Crime B. Thus, a judge would count the two offenses separately[42] and, based on the Sentencing Table, assign the defendant to criminal history category III.[43] The defendant's most recent arrest was for Crime C, which has a base offense level of fifteen. According to the Sentencing Table, a defendant who is assigned to criminal history category III and who committed a crime with an offense level of fifteen is subject to a guideline range of twenty-four to thirty months.[44]

Would the defendant's criminal history score be different if his only prior convictions were criminal traffic citations? Suppose that prior to his arrest for Crime C, police issued the defendant separate traffic citations for two different instances of driving with a suspended license. And assume police never took the defendant into custody. Would a judge consider the defendant's traffic citations intervening arrests? The Seventh and Ninth Circuits answer this question differently, in part because the Commission's failure to define the term intervening arrest in the Guidelines allows disagreement over the term's meaning. Part II of this Note discusses these circuits' interpretations of the term intervening arrest in reference to criminal traffic citations.

II. THE CIRCUIT SPLIT

Courts have struggled to define the term intervening arrest for purposes of calculating a defendant's criminal history score under section 4A1.2(a)(2) of the Guidelines. Courts differ on whether motor vehicle stops constitute intervening arrests when defendants are detained for only a short period of time while being issued a traffic citation. This Part analyzes three cases that have interpreted the term intervening arrest and provides a full discussion of each court's holding. The relevant case law

40. For purposes of this illustration, the defendant was not on probation when he committed Crime B. Therefore, the defendant has a criminal history score of three for his prior sentence of thirty-six months. *Id.* § 4A1.1. The defendant is assigned to criminal history category II. *See id.* at ch. 5, pt. A. According to the Sentencing Table, a defendant assigned to criminal history category II who committed a crime with an offense level of twenty is subject to a guideline range of thirty-seven to forty-six months. *See id.* at ch. 5, pt. A. The federal court has the discretion to choose a sentence within that range. *Id.* at ch. 5, intro. cmt.

41. *See id.* § 4A1.1.

42. *See id.* § 4A1.2.

43. *See id.* at ch. 5, pt. A.

44. *See id.*

begins in 2003 with *United States v. Morgan*, in which the Seventh Circuit held that traffic citations were intervening arrests for purposes of calculating a defendant's criminal history score.[45] In 2011, a Ninth Circuit ruling created the current split. In *United States v. Leal-Felix*, the Ninth Circuit held that traffic citations did not constitute intervening arrests.[46] The most recent ruling addressing this issue is the 2012 case *United States v. Johnson*.[47] In *Johnson*, the Middle District of Florida sided with the Seventh Circuit in ruling that citations constitute intervening arrests for purposes of calculating a defendant's criminal history score, but the analysis in *Johnson* focused heavily on citations for drug possession, not traffic violations.[48]

A. *The Seventh Circuit:* United States v. Morgan

A jury convicted Zan Morgan of distributing crack cocaine.[49] At Morgan's sentencing hearing, the district court included two prior convictions for driving with a revoked driver's license in its calculation of his criminal history score.[50] The district court held that Morgan's two prior convictions were separated by an intervening arrest—Morgan's initial citation on May 5, 1999 and Morgan's second citation fifteen days later.[51] Including these prior convictions increased Morgan's criminal history score and therefore his guideline range.[52] The judge sentenced Morgan to a total of 154 months imprisonment.[53]

Morgan appealed to the Seventh Circuit on the grounds that the district court miscalculated his criminal history score because his prior offenses were "related" and should therefore have been counted only

45. 354 F.3d 621, 623–24 (7th Cir. 2003).

46. 665 F.3d 1037, 1044 (9th Cir. 2011) (en banc).

47. 876 F. Supp. 2d 1272 (M.D. Fla. 2012), *aff'd in part and dismissed in part*, 515 F. App'x 844 (11th Cir. 2013) (per curiam).

48. *See id.* at 1274–75.

49. *Morgan*, 354 F.3d at 622.

50. *Id.* at 623.

51. *Id.* In 2003, when Morgan was sentenced, section 4A1.2(a)(2) of the Guidelines read: "Prior sentences imposed in *unrelated* cases are to be counted separately. Prior sentences imposed in *related* cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c)." *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2) (2003) (emphasis added). For the purposes of calculating criminal history, "unrelated" was defined as those offenses separated by an intervening arrest. *Morgan*, 354 F.3d at 623 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, application note 3 (2003)). In 2007, this subdivision was replaced with the current provision. U.S. SENTENCING GUIDELINES MANUAL supp. app. c at 230–31 (2008) (explaining the 2007 amendment to the provision).

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

53. *Id.* at 622.

once.[54] Morgan argued that he was never arrested on May 5.[55] According to Morgan, he was only stopped and issued a citation to appear in court.[56] Morgan insisted that, pursuant to Application Note 3 to section 4A1.2, an intervening arrest requires that a person spend time in a jail cell.[57]

The Seventh Circuit, however, affirmed the district court's ruling and held that Morgan's criminal history was calculated correctly.[58] The Seventh Circuit noted that, regardless of the words used to describe Morgan's first offense, Morgan was still caught on two separate occasions driving with a revoked license.[59] The prosecutor did not draft his charges to multiply Morgan's convictions.[60] Instead, Morgan committed the first offense and then failed to obey the law by committing the offense again.[61] The Seventh Circuit opined that a defendant who is arrested for one crime and then commits another offense is a recidivist and should therefore receive an increased criminal history score.[62]

The court also noted that including traffic citations in the definition of intervening arrest furthers the goals of the Commission.[63] Additionally, the court held that "[a] traffic stop is an 'arrest' in federal parlance."[64] The court determined that, although the officer did not handcuff the defendant, the officer did stop Morgan and prevent him from leaving while the officer issued the citation.[65] According to the court, the officer could have performed a full custodial arrest by taking Morgan to the

54. *Id.* at 623.

55. *Id.*

56. *Id.*

57. *Id.* (referring to Application Note 3 to section 4A1.2 of the 2003 Guidelines). At the time of *United States v. Morgan*, Application Note 3 to section 4A1.2 provided as follows:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 application note 3 (2003)). In 2007, Note 3 was struck from the Application Notes and the term intervening arrest was moved to § 4A1.2(a)(2) of the Guidelines when the provision was amended. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (2007); *see supra* note 53.

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

59. *Id.* at 623.

60. *See id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 624 (citing Whren v. United States, 517 U.S. 806 (1996); United States v. Childs, 277 F.3d 947 (7th Cir. 2002) (en banc)).

65. *See id.* at 623–24.

station,[66] but the fact that the officer instead chose to perform a street arrest is irrelevant to the Guidelines' purposes.[67] The court reasoned that Application Note 3 uses the term intervening arrest instead of extended custody because "it is the apprehension followed by a new offense that identifies the recidivist."[68]

B. *The Ninth Circuit:* United States v. Leal-Felix

Israel Leal-Felix was a Mexican citizen who was deported from the United States "after pleading guilty to the aggravated felony of possessing a firearm by a convicted felon."[69] Following his deportation, Leal-Felix was charged with illegally reentering the country without consent to reapply for admission, in violation of 8 U.S.C. § 1326(a) and § 1326(b)(2).[70] He accepted a binding plea agreement, agreeing to plead guilty in exchange for a government recommendation that the judge sentence him at the lower end of the guideline range at a total offense level of nine.[71] Although Leal-Felix waived his right to appeal the sentence, "he reserved the right to appeal the calculation of his criminal history category."[72]

Included in Leal-Felix's criminal history were two traffic citations that he received two days apart for driving with a suspended license.[73] On January 19, 2000, Leal-Felix was sentenced for both citations, and he received "concurrent sentences of 36 months' probation on the condition that he served 180 days in county jail."[74] According to the presentence investigation report (PSIR) in 2009, Leal-Felix had fourteen criminal history points and should have been placed in criminal history category VI.[75] The judge determined his criminal history by counting the two

66. *Id.* at 624 ("Morgan could have been taken to the stationhouse, converting a street arrest to a full custodial arrest") (citing Atwater v. Lago Vista, 532 U.S. 318, 353–55 (2001)).

67. *Id.* at 624.

68. *Id.*

69. United States v. Leal-Felix, 625 F.3d 1148, 1149 (9th Cir. 2010).

70. United States v. Leal-Felix, 665 F.3d 1037, 1039 (9th Cir. 2011) (en banc).

71. *Id.* An alien who illegally reenters the United States after deportation subsequent to a conviction for commission of an aggravated felony shall receive an increased sentence. *See* 8 U.S.C. § 1325 (2012). Under the Guidelines, illegal reentry into the United States has a base offense level of eight. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a) (2014). The offense level could be increased up to another sixteen levels if the defendant was previously deported after a conviction for a firearm offense. *Id.* § 2L1.2(b)(1)(A). Leal-Felix's binding plea agreement lowered his offense level to nine. His recommended guideline range would therefore depend on a calculation of his criminal history score.

72. *Leal-Felix*, 665 F.3d at 1039.

73. *Id.*

74. *Id.*

75. *Id.*

citations separately.[76] Therefore, Leal-Felix received two points for each citation for driving with a suspended license.[77]

At the sentencing hearing, "Leal-Felix objected to counting the second citation separately under Sentencing Guidelines § 4A1.2(a)(2), because the two violations were sentenced on the same day and were not separated by an intervening arrest."[78] Additionally, Leal-Felix contended that, because he was only given a citation for the first violation, the second violation should not be included at all in his criminal history score.[79] The district court rejected his argument and held that traffic citations are arrests under section 4A1.2(a)(2), and therefore, the first ticket for driving with a suspended license was an intervening arrest.[80] Applying this reasoning, the court calculated that Leal-Felix only had thirteen criminal history points but was still in criminal history category VI.[81] In August of 2009, adhering to the plea agreement, the judge sentenced Leal-Felix at the low end of the guideline range for category VI.[82] He was sentenced to twenty-one months in prison.[83]

Leal-Felix appealed this sentence.[84] A divided panel of the Ninth Circuit affirmed the district court's calculation of Leal-Felix's criminal history score.[85] In reaching its conclusion, the majority relied on the holding in *United States v. Morgan*.[86] Their decision declared, "We agree with the Seventh Circuit in *Morgan* that treatment of Leal-Felix's traffic violations as arrests comports with the Sentencing Guidelines."[87] Leal-Felix petitioned for a rehearing, which the court granted.[88]

On rehearing, the Ninth Circuit vacated Leal-Felix's sentence and remanded the case for resentencing.[89] The court, sitting en banc, held that the issuance of a traffic citation did not constitute an intervening arrest for purposes of the Guidelines.[90] The court noted that the holding of the

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* According to the Sentencing Table, a defendant assigned to criminal history category VI who committed a crime with an offense level of nine is subject to a guideline range of twenty-one to twenty-seven months. *See id.* at ch. 5, pt. A.
83. *Leal-Felix*, 665 F.3d at 1039.
84. *Id.*
85. *Id.*
86. *Id.*; *see also* United States v. Leal-Felix, 625 F.3d 1148, 1151 (9th Cir. 2010).
87. *Leal-Felix*, 625 F.3d at 1151 (agreeing with the reasoning in United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003)).
88. United States v. Leal-Felix, 641 F.3d 1141, 1141 (9th Cir. 2011) (en banc).
89. *Leal-Felix*, 665 F.3d at 1044.
90. *Id.*

case hinged on the definition of an intervening arrest.[91] If the court found that a citation was equivalent to an intervening arrest, then the sentencing judge would count Leal-Felix's two citations separately.[92] This procedure would add two points for each citation and therefore leave him in criminal history category VI.[93] The guideline range for category VI is twenty-one to twenty-seven months.[94] If, however, the court found that a citation is not an intervening arrest, then the sentencing judge would combine Leal-Felix's two citations.[95] In this case, the correct designation would be criminal history category V with a guideline range of eighteen to twenty-four months.[96] The court noted that the Guidelines do not define intervening arrest; therefore, the court had to interpret the term's meaning to resolve the appeal.[97]

The Ninth Circuit began its analysis by "applying normal rules of statutory interpretation."[98] The court noted that it was improper to look to state law to define the term intervening arrest and concluded that the term would be interpreted "according to a uniform, national definition, not dependent upon the vagaries of state law."[99] The court held that, under the Guidelines, an arrest is a "formal arrest."[100] "A formal arrest may be indicated by informing the suspect that he is under arrest, transporting the suspect to the police station, and/or booking the suspect into jail."[101] The court emphasized that such a definition was consistent with the common usage of the term, consistent with case law, and in line with the purposes of the Guidelines.[102]

The Ninth Circuit then addressed the Seventh Circuit's holding in *Morgan*—the only other circuit court opinion interpreting the term intervening arrest in the context of section 4A1.2(a)(2) of the Guidelines.[103] The Ninth Circuit declined to follow *Morgan*, concluding that the Seventh Circuit did not rely on appropriate authority.[104] The court concluded that *Morgan*'s reliance on *Whren v. United States*[105] and

91. *Id.* at 1040.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1041.
101. *Id.* (footnotes omitted).
102. *Id.*
103. *Id.*
104. *Id.*
105. 517 U.S. 806 (1996).

Atwater v. City of Lago Vista[106] was improper because neither case dealt with the issue of whether traffic citations constitute intervening arrests.[107] Additionally, the Ninth Circuit determined that Supreme Court case law supported the distinction between an arrest and a citation.[108]

The *Leal-Felix* court cited *Berkemer v. McCarty*,[109] in which a police officer pulled over the defendant, questioned him, and asked him to perform a field sobriety test.[110] The police officer then placed the defendant under arrest and drove him to jail for further questioning.[111] In *Berkemer*, "the Court clarified that custody is the distinguishing characteristic of an arrest."[112] Therefore, the Court determined that any statements made by the defendant prior to his arrest were not subject to exclusion for violating his *Miranda* rights because the defendant was not in custody.[113] The Court in *Berkemer* repeatedly analogized the concepts of being under arrest and being in custody.[114] The Ninth Circuit also cited *Knowles v. Iowa*,[115] in which the Supreme Court distinguished between a traffic stop and an arrest.[116] In *Knowles*, the Court noted that the police officer chose to issue the defendant a citation *rather than arrest* the defendant.[117]

The Ninth Circuit also noted that the Guidelines as a whole suggest that traffic citations are not intervening arrests.[118] The court reasoned that the purpose of the criminal history score is to approximate "the seriousness of the defendant's criminal history and the danger that the defendant presents to the public."[119] A defendant who receives a traffic

106. 532 U.S. 318 (2001).

107. *Leal-Felix*, 665 F.3d at 1042. The Court in *Whren* held that a traffic stop constitutes a seizure and therefore an officer must have probable cause to render the stop reasonable. 517 U.S. at 809–10. In *Atwater*, the Court did not address the question of whether the defendant was "arrested." 532 U.S. at 324. The defendant was clearly arrested because she was handcuffed, taken to the police station, and placed in a jail cell. *Id.* Therefore, the *Atwater* Court had no reason to take up this question.

108. *Leal-Felix*, 665 F.3d at 1043.

109. 468 U.S. 420 (1984).

110. *Id.* at 423; *see Leal-Felix*, 665 F.3d at 1043 (citing *Berkemer*, 468 U.S. 420).

111. *Berkemer*, 468 U.S.at 423.

112. *Leal-Felix*, 665 F.3d at 1043 (citing *Berkemer*, 468 U.S. 420); *see also Berkemer*, 468 U.S. at 434, 441–42.

113. *Berkemer*, 468 U.S. at 442.

114. *Id.* 429–32, 434, 440–42.

115. 525 U.S. 113 (1998).

116. *Id.* at 117; *see Leal-Felix*, 665 F.3d at 1043 (citing *Knowles*, 525 U.S. 113).

117. *Knowles*, 525 U.S. at 114 ("An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him").

118. *Leal-Felix*, 665 F.3d at 1043.

119. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 application note 3 (2003)) (internal quotation marks omitted).

citation and is not taken into custody presents little danger to society and has committed a less serious crime than a defendant who is taken into custody.[120] Furthermore, the court noted that "[t]he Sentencing Guidelines generally exclude from the criminal history calculation sentences imposed for driving with a suspended license, further indicating the Commission's judgment that such offenses are relatively minor."[121]

The Ninth Circuit reasoned that interpreting the term intervening arrest to include traffic citations would mean that being arrested is equivalent to being charged with an offense.[122] Substituting the word "charge" for the word "arrest" would lead to every offense being an intervening arrest and would render the last two sentences of section 4A1.2(a)(2) obsolete.[123] Additionally, the court noted that in cases in which the criminal history score underrepresents the danger of the defendant or the seriousness of the crime, the district court can use its discretion to apply an upward departure from the guideline range instead of considering all citations as arrests.[124] Finally, the court reasoned that the term intervening arrest lacks a clear definition and thus, under the rule of lenity, the court must interpret the term in Leal-Felix's favor.[125] Therefore, the Ninth Circuit concluded that traffic citations should not constitute intervening arrests.[126]

Judge Mary McKeown concurred in the opinion but "wr[o]te separately to highlight the most compelling reason for concluding that a traffic citation is not an arrest for the purposes of the Sentencing Guidelines: the common understanding of the term arrest does not include being pulled over and ticketed for a traffic violation."[127] Judge McKeown noted that a well-known principle of statutory construction is that words, unless otherwise defined, will be interpreted using their common meaning.[128] She reasoned that the average driver does not perceive their detention during a traffic stop, when the officer is running their driver's license and issuing the ticket, as being in custody or under arrest.[129]

Judge Johnnie Rawlinson dissented in *Leal-Felix* and argued that "the majority . . . improperly import[ed] Fourth Amendment analysis into

120. *Id.*
121. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1)).
122. *Id.*
123. *Id.* at 1044.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* (McKeown, J., concurring).
128. *Id.* at 1044–45 (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).
129. *Id.* at 1046.

calculation of a sentence under the Sentencing Guidelines."[130] She noted that the purpose of the case was to define the term "arrest" in order to assess *Leal-Felix*'s recidivism and calculate his criminal history score, not to determine whether there was a constitutional violation.[131] Yet she noted that all of the case law in the majority's opinion pertained to the term arrest in the context of constitutional violations.[132] Judge Rawlinson concluded that there is no Supreme Court case law to support the majority's position and that the Supreme Court has "specifically cautioned against the approach taken by the majority."[133] She concluded that the Seventh Circuit's broad definition of intervening arrest is more in line with the principles of sentencing.[134] She argued that "[t]reating a traffic citation as a non-event seriously undermines the recidivism consideration of the guidelines and understates the criminal history of repeat offenders."[135]

C. *The Middle District of Florida:* United States v. Johnson

With its ruling in *Johnson*, the Middle District of Florida is the most recent court to weigh in on the current split—but the court's holding focuses mainly on citations for drug offenses, not traffic citations, as intervening arrests. Defendant Franklin Johnson was charged with four counts of distributing cocaine or crack cocaine.[136] Johnson was also charged with two counts of being a felon in possession of a firearm.[137] Johnson entered into a plea agreement in which he agreed to plead guilty to one of the felon-in-possession counts.[138] In exchange for his guilty plea, all of the remaining counts were dismissed.[139] According to the plea agreement, Johnson could not challenge his sentence on the grounds that the district court incorrectly calculated his guideline range.[140] The

130. *Id.* at 1046 (Rawlinson, J., dissenting).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1048.

136. United States v. Johnson, 515 F. App'x 844, 846 (11th Cir. 2013) (per curiam). "[I]t shall be unlawful for any person knowingly or intentionally [to] . . . distribute . . . a controlled substance." 21 U.S.C. § 841(a)(1) (2012).

137. *Johnson*, 515 F. App'x at 846. "It shall be unlawful for any person . . . who has been convicted in any court [of a] crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g) (2012).

138. *Johnson*, 515 F. App'x at 846.

139. *Id.*

140. *Id.* at 848.

agreement, however, did provide three exceptions.[141] Johnson could challenge the sentence if: (1) it exceeded the guideline range determined by the district court, (2) it exceeded the statutory maximum, or (3) if it violated the Eighth Amendment.[142]

According to Johnson's PSIR, under Guidelines section 2K2.1(a)(1), Johnson was assigned a base offense level of twenty-six.[143] Under Guidelines section 2K2.1(b)(6)(B) he was subject to a four-level increase "for possessing a firearm in connection with a felony drug trafficking offense and a three-level reduction for acceptance of responsibility, yielding an adjusted offense level of 27."[144] The PSIR also indicated that Johnson had fifteen criminal history points for his eighteen prior convictions.[145] Thus, the PSIR placed Johnson in criminal history category VI.[146]

Included in Johnson's prior convictions were four prior sentences that were all imposed on the same day.[147] On June 6, 1999, Johnson was arrested for driving with a suspended license.[148] On October 19, 1999, Johnson was issued a citation for unlawful possession of a controlled substance.[149] Then, on October 25, 1999, he received a citation for driving with a suspended license.[150] Finally, Johnson was taken into custody on December 19, 1999, for driving under the influence.[151] On

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141. *Id.*

142. *Id.*

143. *Id.* Section 2K2.1(a)(1) of the Guidelines provides:

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

U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(1) (2014).

144. *Johnson*, 515 F. App'x at 846; *see* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(6)(B) (providing that a four-level increase is appropriate if the defendant "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense"); *id* § 3E1.1 (explaining the offense level reduction for accepting responsibility and assisting authorities).

145. *Johnson*, 515 F. App'x at 846.

146. *Id.*

147. United States v. Johnson, 876 F. Supp. 2d 1272, 1274 (M.D. Fla. 2012), *aff'd in part and dismissed in part*, 515 F. App'x 844.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

June 26, 2000, Johnson was sentenced for all four offenses.[152] He received one year of probation for his first offense of driving with a suspended license and was sentenced to sixty days in jail for the remaining three offenses.[153]

Johnson objected to the individual inclusion of all four of his prior offenses in the calculation of his criminal history score.[154] He argued that, because the second and third offenses resulted in citations rather than arrests, they should not be counted separately under section 4A1.2 of the Guidelines.[155] As previously noted, under that section, if a defendant is sentenced for all of his offenses on the same day, the offenses are counted as a single prior offense unless there is an intervening arrest.[156] In applying section 4A1.2, the district court addressed the issue of whether "the citations issued by law enforcement officers for the second and third offenses should be counted as intervening arrests—and therefore separate offenses—in calculating Mr. Johnson's criminal history category."[157]

The district court addressed the Seventh Circuit's holding in *Morgan* and the Ninth Circuit's holding in *Leal-Felix*.[158] In discussing the circuit split, the court noted that *Morgan* and *Leal-Felix* "dealt only with whether citations for driving license violations should be included in the criminal history score."[159] In contrast, *Johnson* not only involved a citation for driving with a suspended license but it also involved a citation for unlawful possession of a controlled substance.[160] Under Florida law, driving with a suspended license is at least a second-degree misdemeanor punishable by sixty days incarceration.[161] Unlawful possession of a controlled substance is a first-degree misdemeanor punishable by a maximum sentence of one year in jail.[162] The court noted that, unlike driving offenses, which are commonly charged with a citation, drug-related offenses are rarely charged with citations.[163] "In fact this case is the first time the Court has been made aware of this practice—one that apparently is within the discretion of Daytona Beach police officers."[164]

The district court, following the Seventh Circuit in *Morgan* and Judge

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 1273.
156. *Supra* notes 30–31 and accompanying text.
157. *Johnson*, 876 F. Supp. 2d at 1273.
158. *Id.*
159. *Id.* at 1275.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

Rawlinson's dissent in *Leal-Felix*, held that the citations were arrests for purposes of calculating a criminal history score.[165] The court reasoned that "not scoring offenses initiated by citation is an affront to the credibility of the Guidelines to the extent they were enacted to encourage imposition of similar sentences for similarly situated defendants."[166] The court held that it was illogical that a defendant convicted in Daytona Beach would have a lower criminal history score because the officer chose to issue a citation, while a defendant convicted of the same offense in Cocoa Beach would have more points included in his criminal history score because the officer chose to arrest him.[167] If citations are not included in a defendant's criminal history score, then determining whether an offense will result in points "might turn not just on the policies of various municipal police departments but also perhaps on the whim of the officer who apprehends the defendant."[168] The court noted that the policy behind section 4A1.2 was to ensure uniformity of sentences for similar offenses committed by similar defendants.[169] Therefore, in the court's eyes, ignoring citations in calculating an offender's criminal history score failed to serve that policy.[170]

Johnson appealed the district court's ruling and contended that the court miscalculated his criminal history score by counting several of his prior convictions as separate offenses.[171] The U.S. Court of Appeals for the Eleventh Circuit dismissed Johnson's claim because the appeal of his criminal history score did not fall within any of the exceptions of the appeal waiver; therefore, he was barred from bringing the argument.[172]

III. ARGUMENTS SUPPORTING THE NINTH CIRCUIT'S DEFINITION

The ruling in *Johnson* does not actually weigh in on the current circuit split because *Johnson* is clearly distinguishable from both *Morgan* and *Leal-Felix*. The split between the Seventh and the Ninth Circuits pertains to whether *traffic* citations should be considered intervening arrests in calculating a defendant's criminal history score.[173] Although the court's ruling in *Johnson* involved a traffic citation, its analysis focused on whether a citation for a controlled substance offense should be considered

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. United States v. Johnson, 515 F. App'x 844, 848 (11th Cir. 2013) (per curiam).
172. *Id.* at 849; *see supra* note 140–42 and accompanying text.
173. *See* United States v. Leal-Felix, 665 F.3d 1037, 1040 (9th Cir. 2011) (en banc); United States v. Morgan, 354 F.3d 621, 623 (7th Cir. 2003).

an intervening arrest in calculating the defendant's criminal history score.[174] The court in *Johnson* explicitly made the distinction between its facts and the facts in *Morgan* and *Leal-Felix*.[175] The court concluded that a citation for a controlled substance offense is an intervening arrest, yet it did not thoroughly address the citation for driving with a suspended license.

While the *Johnson* court did make general statements about why citations should be considered arrests for purposes of calculating a defendant's criminal history score, it did not specifically address any arguments about why traffic citations in particular should be considered intervening arrests. However, the court did explain why the citation for a controlled substance offense was an intervening arrest. The court's failure to address arguments pertaining to whether traffic citations should be considered intervening arrests adds little strength to the Seventh Circuit's position. Instead, the court's holding is a more general argument about why *every* offense involving a citation should be included in a defendant's criminal history. Because the current circuit split is based solely on whether traffic citations should be considered intervening arrests, the court in *Johnson* does little to resolve this argument.

Aside from the lack of authority in favor of the Seventh Circuit's argument, the Ninth Circuit's definition of an intervening arrest should prevail because "the majority's reasoning exemplifies the common law methodological approach that best furthers the purpose of the Guidelines."[176] This common law approach allows the court to consider important policy factors[177] and provides a "broader body of judicial precedents as the 'comprehensive body' that judges should reference in reading undefined terms."[178] Under this approach, judges have more flexibility to consider other factors such as "relevant case law, canons of construction, and policy considerations" when interpreting undefined

174. *Johnson*, 876 F. Supp. 2d at 1275.

175. *Id.* ("The facts of this case differ slightly from those in *Morgan* and *Leal-Felix*, both of which dealt only with whether citations for driving license violations should be included in the criminal history score.").

176. Recent Cases, *Criminal Law—Sentencing Guidelines—Ninth Circuit Holds That Traffic Citation Is Not an "Intervening Arrest" Under Section 4A1.2(A)(2) of the Guidelines*—United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011) (en banc)*, 125 HARV. L. REV. 2157, 2157 (2012) [hereinafter *Harvard Recent Case*].

177. *Id.* at 2157, 2161.

178. *Id.* at 2162 (quoting William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001)). This is in contrast with civil code approach where judges need only look to the text the Guidelines drafters prepared and reason by analogy to other provisions to find the correct definition of an intervening arrest. *Id.*; *see* Eskridge & Ferejohn, *supra*, at 1218.

terms in the Guidelines.[179] Additionally, explicit statements in the Guidelines make clear the appropriateness of applying a common law approach.[180] According to the legislative history of the Guidelines, the Commission did not expect judges to apply the Guidelines mechanically.[181] Instead, a judge must consider all relevant factors before imposing a sentence.[182] "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."[183]

Under a common law approach, the Ninth Circuit recognized the Guidelines' failure to define the term intervening arrest and sought to interpret the meaning within a broader context.[184] The court addressed the ambiguity of the term through a combination of common law sources including case law, statutory interpretation, common understanding, an analysis of the purposes behind the Guidelines, and an application of the rule of lenity.[185] Based on this analysis, the court held that there was no justification for defining intervening arrest to include traffic citations.[186] "The majority's approach outlines a proper method that fully embraces judges' discretion in sentencing and ultimately leads to an appropriate, proportional sentence reflecting the real threat of the individual defendant."[187] The Ninth Circuit's application of the common law approach involved an analysis of many factors relevant to sentencing and defined the term intervening arrest in a way that best reflected the purposes of the Guidelines.

In addition to the factors the Ninth Circuit considered, the common

179. *Harvard Recent Case*, *supra* note 176, at 2162; *see also* Mark R. Conrad, *Interpreting Hong Kong's Basic Law: A Case for Cases*, 23 UCLA PAC. BASIN L.J. 1, 3 (2005) ("[W]hereas the civil law tradition typically vests authority to interpret the law with the legislature, the common law tradition places that power—sometimes 'emphatically'—in the judiciary." (footnote omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 45 (2007) ("Yet it is the common law tradition that is considered 'judge centered,' providing greater discretionary power to the judiciary."); Eskridge & Ferejohn, *supra* note 178, at 1218 ("Gaps in the common law are filled by a process of reasoning by analogy, figuring out how a new problem is akin to, and different from, prior judicial determinations.").

180. *See Harvard Recent Case*, *supra* note 176, at 2162; *see also* S. REP. NO. 98-225, at 52 (1983).

181. *See* S. REP. NO. 98-225, at 52.

182. *See id.*

183. *See id.*

184. *See* United States v. Leal-Felix, 665 F.3d 1037, 1040–44 (9th Cir. 2011) (en banc); *Harvard Recent Case*, *supra* note 176, at 2163.

185. *See Leal-Felix*, 665 F.3d at 1041–44; *Harvard Recent Case*, *supra* note 176, at 2163.

186. *Harvard Recent Case, supra* note 176, at 2163.

187. *See id.*

law approach also allows courts to take into account other relevant policy considerations that the court in *Leal-Felix* did not address. First, interpreting the term intervening arrest to include traffic citations "would result in criminals with unlike culpability or violence in their criminal histories being punished with equal severity."[188] Yet, proportionality in sentencing is among the Guidelines' objectives. Congress sought to create a system that would impose different sentences for crimes of differing severity.[189] Yet, allowing traffic citations to count as intervening arrests when computing a defendant's criminal history score could result in scores that do not accurately reflect an individual's culpability.[190] Under the Seventh Circuit's reading of the Guidelines, Leal-Felix "could have received the same number of criminal history points for his two traffic citations as another defendant who committed an aggravated assault and robbery that resulted in a single sentence of several years."[191] Such an outcome would be at odds with the Guidelines' objectives because two defendants with clearly unequal levels of culpability would receive the same sentence.[192]

Additionally, including traffic citations in the definition of intervening arrests could preclude defendants from safety-valve relief.[193] Applying the reasoning in *Morgan* could result in pushing offenders into the next criminal history category, therefore disqualifying the offender from the safety valve of a mandatory minimum.[194] Congress created the safety-valve provision of the Guidelines to allow judges to sentence first-time drug offenders to sentences under the Guidelines rather than imposing mandatory minimum sentences.[195] Only those defendants who are less culpable—those who do not have more than one criminal history point—qualify for sentences below the statutory minimum.[196] Thus, interpreting intervening arrests to include criminal traffic citations could inflate a defendant's criminal history score and therefore preclude the individual from the safety-valve provision.

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188. *See id.* at 2164.

189. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2014) (setting forth the "basic approach" to the Sentencing Guidelines and the "their underlying rationale").

190. *See Leal-Felix*, 665 F.3d at 1042 ("[O]ne who is subjected only to a momentary detention and later reoffends is less culpable than the defendant who is subjected to the greater deterrence of an arrest . . . .").

191. *See Harvard Recent Case*, *supra* note 176, at 2164–65.

192. *Id.*

193. *Id.* at 2164.

194. *Id.*

195. *See id.* at 2164 n.69; 28A C.J.S. *Drugs and Narcotics* § 493 (2008); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2014).

196. *See* 28A C.J.S. *Drugs and Narcotics* § 493; U.S. SENTENCING GUIDELINES MANUAL § 5C1.2.

For example, under the holding in *Morgan*, if a defendant was pulled over on two separate occasions, issued two traffic citations, and sentenced concurrently for both offenses, then the individual would have two criminal history points.[197] Thus, the individual would be precluded from safety-valve eligibility.[198] In contrast, under the holding in *Leal-Felix*, the same defendant would only have one criminal history point and thus still be eligible for safety-valve relief.[199] Should the fact that someone received two traffic citations prevent them from safety-valve eligibility? Do two paper citations really make their recipient more culpable, or is someone who has only received citations exactly the type of defendant the safety-valve provision was intended to protect?

Finally, interpreting intervening arrests to include traffic citations could result in inflated criminal history scores for minorities due to racial profiling.[200] A widely acknowledged phenomenon known as "Driving While Black/Brown" describes "the race-based suspicion of black and Latino motorists and the resulting pretextual traffic stops."[201] This racial profiling can cause inflated numbers of traffic citations and therefore lead to inflated criminal history scores for minority drivers, resulting in higher sentences for these groups.[202] The Ninth Circuit's holding in *Leal-Felix* would help avoid the issue of racial disparity in calculating criminal history scores because drivers' criminal history scores would not be increased due to the issuance of criminal traffic citations. For these reasons, the Ninth Circuit's definition of an intervening arrest should prevail over the Seventh Circuit's. The holding in *Leal-Felix* better reflects the purposes of the Guidelines and allows greater flexibility for judges to take into account important policy considerations.

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197. *See* Steve Kalar, *Case O' The Week: Ninth, En Banc, Gets Its "Citations" Right*—Leal-Felix *and Sentencing Guidelines*, NINTH CIRCUIT BLOG (Dec. 3, 2011, 9:01 AM), http://circuit9.blogspot.com/2011/12/case-o-week-ninth-en-banc-gets-its.html.

198. *Id.*

199. *Id.*

200. *See Harvard Recent Case*, *supra* note 176, at 2165–66.

201. *See Harvard Recent Case*, *supra* note 176, at 2165; David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265 (1999); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 2–5 (2005); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999).

202. *See Harvard Recent Case*, *supra* note 176, at 2165–66; Harris, *supra* note 201, at 304–05 ("Driving while black can have grave consequences not just immediately, when drivers may be at best irritated and at worst arrested or abused, but in the long term, as a minor criminal record builds over time to the point that it comes back to haunt a defendant by enhancing considerably the sentence in some future proceeding. This is simply less likely to happen to whites." (internal quotation marks omitted)).

IV. PROPOSAL

Among the responsibilities of the Commission is the duty to evaluate the effects of the Guidelines and to recommend appropriate Guidelines modifications to Congress.[203] The current version of the Guidelines explains that an offense is an intervening arrest if the defendant is arrested for the offense and thereafter commits another offense.[204] Yet, the Guidelines explanation of an intervening arrest does not address whether traffic citations constitute intervening arrests. This ambiguity has resulted in the current circuit split. A simple revision of section 4A1.2 of Guidelines to include a statement about traffic citations could resolve the split and ensure that an offender's criminal history calculation reflects the purposes of the Guidelines. The Commission would need to craft a statement establishing that traffic citations do not constitute intervening arrests for purposes of calculating a defendant's criminal history score. This statement could be added to the current explanation in the Guidelines to provide a clearer definition of what constitutes an intervening arrest.

In agreeing with the Ninth Circuit's holding, this Note is not arguing that *all* citations should be excluded in calculating a defendant's criminal history score. The split and the previous arguments pertain only to whether criminal traffic citations should be considered intervening arrests for purposes of calculating an individual's criminal history score. Other citations, such as the drug-related citation in *Johnson*, are beyond the scope of this Note. Therefore, the revision to the Guidelines should specifically negate traffic citations as intervening arrests. The addition of a simple statement—"The issuance of a written traffic citation is not an intervening arrest"—would clear up any ambiguity for judges in calculating an offender's score. Under this new definition, an offender's criminal traffic citation would not be counted separately; therefore, the defendant would have a lower criminal history score and could ultimately be assigned to a lower criminal history category.

While this proposal does remedy many of the issues discussed in Part III, it does not completely resolve the current split because the decisions of police officers can still impact a defendant's criminal history score. Once a police officer pulls over a traffic offender, the officer has unfettered discretion to issue a citation or place the individual under arrest.[205] Therefore, even incorporating this proposal into the Guidelines

203. *An Overview of the United States Sentencing Commission*, *supra* note 9, at 1.

204. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2.

205. Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 326 (2012) (noting that present standards "allow police officers to exercise an enormous amount of discretion in performing traffic stops"); Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 428 (2003).

does not resolve the issue of parity where defendants have committed the same crime, have the same culpability, and should have the same criminal history score, but one defendant is arrested and the other is only issued a citation. Is a defendant who is arrested for driving with a suspended license more culpable than an individual who is issued a citation for driving with a suspended license? Is it fair to increase one defendant's criminal history score because the police officer chose to place the defendant in handcuffs rather than issue a traffic citation? Adding this Part's proposal to the Guidelines would still leave these significant questions unanswered.

The court in *Johnson* could have addressed these questions had the defendant made these arguments. In Johnson, the defendant was arrested for driving with a suspended license and then months later issued a citation when he was caught driving with a suspended license again. However, the defendant in *Johnson* only argued against the calculation of his traffic citation for driving with a suspended license and not against his arrest for driving with a suspended license. Most likely the defendant did not make this argument because little question exists as to whether an individual who is placed in handcuffs and taken to the police station has been arrested. Yet, because police have such discretion, even incorporating a clearer definition for an intervening arrest could result in assigning two defendants with the exact same criminal history different scores. One of the primary purposes of the Guidelines is to ensure that criminals of similar culpability receive similar sentences,[206] but even this Note's proposed solution could fail to achieve that purpose.

While police discretion prevents this proposal from being a perfect solution, it is important to remember the importance of officer discretion and to keep in mind that such discretion allows the police to consider important factors such as criminal history scores when choosing whether to issue a traffic citation or place someone under arrest. Police discretion is essential to law enforcement operations.[207] This discretion allows officers to "meet individual situations with judgment and intelligence, and to choose their responses so that the ultimate result will make sense."[208] While police officers do have the discretion to issue a traffic citation or perform a formal arrest, police officers exercise that discretion wisely.[209] Ultimately, officers are accountable for each of the citations they issue, they have a responsibility to appear in court to defend their

206. *An Overview of the United States Sentencing Commission*, *supra* note 9, at 1.

207. Arthur G. Sharp, *Discretion Is Valor in Traffic Stops*, HENDON MEDIA GRP., http://www.hendonpub.com/resources/article_archive/results/details?id=4004 (last visited Apr. 1, 2015).

208. Harris, *supra* note 201, at 302.

209. Sharp, *supra* note 207.

decisions, and the issuance of a citation can affect both the officer's and their department's reputations.[210] For these reasons, officers take their discretion very seriously. Officers are aware of the repercussions that an arrest has on an individual's criminal history, and they can take that into account when choosing whether to issue a traffic citation or put the offender in handcuffs.[211]

Many critics contend that officers abuse their discretion in ways that further sentencing disparity. Critics of police discretion argue that "[t]here are varying factors that may influence police decision making that have nothing to do with the motorist['s] . . . conduct."[212] Police officers are often influenced by quotas or by the demeanor, age, race, or political affiliation of the offender.[213] Such discretion allows officers to pick and choose whom to pull over, whom to issue citations, and whom to place under arrest. These are decisions officers often make for reasons not related to culpability or uniformity in sentencing. Some critics argue that police discretion leads to disparate treatment,[214] which can extend to sentencing. Police officers may abuse their discretion by considering irrelevant factors when choosing to issue a citation or place the offender under formal arrest, and police officers could use their discretion to negatively affect a defendant's criminal history score and, in turn, the defendant's guideline range. According to these critics, including a definition for intervening arrest in the Guidelines could still result in criminal history scores that do not reflect a defendant's culpability.

Although the critics of police discretion do raise valid concerns, their arguments fail to consider the importance of police discretion in law enforcement and fail to consider the positive effects police discretion can have on sentencing. There is no doubt that varying factors can influence officers when they choose whether to issue a traffic citation or place the offender under formal arrest. And while critics of police discretion contend that inappropriate factors can influence officers, factors such as criminal sentencing or the defendant's culpability can also influence the officers. Police discretion allows officers to consider the calculation of a motorist's criminal history score before deciding whether to arrest the individual. As long as police officers consider sentencing repercussions

210. *Id.*

211. *See, e.g.*, *Civil Citations a Way to Keep Juveniles out of System*, DAYTONA BEACH NEWS-J. (Aug. 10, 2013), http://www.news-journalonline.com/article/20130810/opinion/130809460 (discussing state encouragement of civil citations rather than arrests for juveniles who commit misdemeanors to keep them out of the system and to avoid affecting their criminal history).

212. Lichtenberg, *supra* note 205, at 442.

213. *Id.* at 439–42.

214. SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 28 (2d ed. 2008), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

when making decisions, this Note's proposal is still a viable solution to address the current circuit split. A bright-line rule is necessary to resolve the current split and ensure uniformity in future sentencing, and this Note's proposal adequately resolves the issues discussed earlier in Part III. Although police discretion leaves room for some inconsistencies in sentencing, this discretion is vital to law enforcement, and, therefore, police must be able to decide whether to issue a traffic citation or perform an arrest—a decision that should be made with criminal history scores in mind.

CONCLUSION

While this Note's proposal may not completely solve the problem of sentencing disparity, because of officer discretion, it at least addresses the unresolved split between the Seventh and Ninth Circuits. The Seventh Circuit's definition of an intervening arrest leaves little room for courts to consider important factors and policy arguments relevant to sentencing, and this could result in inflated criminal history scores for minorities due to racial profiling. Additionally, the Seventh Circuit's holding in *Morgan* does not reflect one of the primary objectives of the Guidelines—uniformity in sentencing. The Seventh Circuit's definition could result in defendants with dissimilar culpability being punished with equal severity. In contrast, the Ninth Circuit's common law approach addresses all of these issues and provides courts with broader authority to define the term intervening arrest in a way that best reflects the purposes of the Guidelines. Therefore, although the Ninth Circuit's definition is not a perfect solution, it is certainly preferable to the Seventh Circuit's interpretation.

In conclusion, amending the Guidelines to add the statement—"The issuance of a written traffic citation is not an intervening arrest"—would resolve the current split and address a number of policy considerations that the Seventh Circuit failed to take into account. This revision would result in more uniform sentences among offenders with similar culpability, one of the primary goals of the Guidelines. In addition to aligning with the intent of the Guidelines, this Note's proposal resolves the sentencing disparity issues that result from police officers racially profiling motorists. The proposal also eliminates the problem of precluding defendants from safety-valve relief, defendants who the safety-valve provision was intended to protect. Ultimately, this revision helps create a fairer sentencing system that calculates a defendant's sentence based on the severity of her conduct. While including the proposal still leaves some questions unanswered because of the necessity of police discretion, this discretion is a much-needed part of law enforcement, and allows officers to consider factors relevant to sentencing when making decisions. Therefore, this Note's proposed

solution coupled with appropriate police discretion, which takes into account the effects of officers' decisions on a defendant's criminal history score, resolves the current split and remedies many of the issues raised in Part III.

APPENDIX[215]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

215. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2014).