

1. THE SENTENCING COMMISSION

Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

The District of Columbia Commission on Sentencing (“the Commission”) was established in 1998 and was originally called the *Advisory Commission on Sentencing*. The Commission first published the D.C. Voluntary Sentencing Guidelines (“the Guidelines”) as a pilot program in 2004. The Guidelines were permanently implemented in 2006. The Commission’s name was changed in 2006 to the “Sentencing and Criminal Code Revision Commission” when its mandate was expanded to examine the criminal code and make comprehensive recommendations that provide for a uniform and coherent body of law.¹ In 2016, the Criminal Code Reform Commission was created to develop recommendations for criminal code reform.² The D.C. Sentencing Commission today does not address criminal code reform.³

Q. Membership: who appoints them, for what terms, with what required qualifications?

The Commission consists of seventeen members: twelve voting members and five nonvoting members.

The twelve voting members include and are appointed as follows:

The Chief Judge of the Superior Court appoints:

- Three judges from the Superior Court of the District of Columbia;
- One member from the District of Columbia bar who specializes in the private practice of criminal defense in the District of Columbia;
- One member from the District of Columbia bar who *does not* specialize in the practice of criminal law; and
- One professional from an established organization devoted to research and analysis of sentencing issues and policies.

The Council of the District of Columbia appoints:

- One citizen of the District of Columbia;

The Mayor of the District of Columbia appoints:

- One citizen of the District of Columbia, subject to confirmation by the Council.

The following members, or their designees, serve by virtue of their office:

- The United States Attorney for the District of Columbia;
- The Director of the D.C. Public Defender Service;
- The Attorney General for the District of Columbia; and
- The Director of the Court Services and Offender Supervision Agency for the District of Columbia.

The nonvoting members are the following individuals or their designees:

¹ 1998 D.C. Laws 12-167 (Act 12-410) (establishing the commission); see also D.C. Code § 3-101 (2019); D.C. Sentencing and Criminal Code Revision Commission, *Sentencing and Criminal Code Revision Commission History and Timeline*, D.C.gov, <http://scdc.dc.gov/page/sentencing-and-criminal-code-revision-commission-history-and-timeline> (last visited June 6, 2019).

² D.C. Code § 3-151 (2019).

³ See D.C. Code § 3-101.

- The Director of the District of Columbia Department of Corrections;
- The Chief of the Metropolitan Police Department;
- The Director of the United States Bureau of Prisons;
- The Chairperson of the United States Parole Commission; and
- The Chairperson of the Council committee that has oversight of the Commission within its purview.

The voting members of the Commission elect a Chairperson. Certain members (the members of the D.C. Bar, the professional researcher, and the citizens) serve a term of three years and can be reappointed.⁴ The remaining Commission members serve until a new appointment is made. Many of these members serve *ex-officio* (e.g. the Attorney General for the District of Columbia); thus their commission term corresponds with their term in office.⁵

Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?

The Commission is an independent agency of the District of Columbia Government. If the Commission requires assistance, other D.C. governmental agencies are statutorily required to provide information to aid the Commission in fulfilling its mandate.⁶

Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

The Commission has a staff of six, including an Executive Director, a Data Management Specialist, a General Counsel, a Staff Assistant, a Research Analyst and a Statistician.⁷

Q. What is the commission's current statutory mandate?

The Commission has six primary duties:

- (1) promulgate, implement, and revise a system of voluntary guidelines for use in the Superior Court of the District of Columbia designed to achieve the goals of certainty, consistency, and adequacy of punishment;
- (2) publish and periodically update a manual containing instructions for applying the guidelines;
- (3) review and analyze sentencing data;
- (4) conduct focus groups, community outreach, training, and other activities to collect and disseminate information regarding the guidelines;
- (5) review and research sentencing policies and practices locally and nationally and make recommendations to increase the fairness and effectiveness of sentences; and
- (6) consult with other D.C., federal, and state agencies that are affected by or address sentencing issues.⁸

⁴ D.C. Code § 3-102(b) (2019).

⁵ D.C. Code § 3-102 (2019).

⁶ D.C. Code §§ 3-101(a), 3-108 (2019); *see also* D.C. Code § 1-603.01(13) (2017) (defining "independent agency").

⁷ D.C. Comm'n on Sentencing, *Commission Members and Staff*, D.C.gov, <http://scdc.dc.gov/page/commission-members-and-staff> (last visited June 6, 2019).

⁸ D.C. Code § 3-101 (2019).

Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

Pursuant to a statutory mandate, any recommended changes by the Commission must take “existing correctional and supervisory resources” into account and must be accompanied by a correctional population impact assessment. The commission must not recommend the changes unless it has determined that the costs “would be commensurate with the benefits to criminal justice administration, without regard to the identity of the particular governmental body responsible for financing the correctional facilities or services at issue.”⁹

Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

Part of the Commission’s statutory mandate is to “[r]eview and analyze pertinent sentencing data . . .”¹⁰ As a result, the Commission publishes annual reports presenting conclusions from sentencing data collected the prior year. The data used in these annual reports is made available by request to interested agencies, organizations, and individuals.¹¹

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The Guidelines went into effect June 14, 2004.¹²

Q. In recent years, have they been modified at least once a year?

The Guidelines have been updated yearly since first being published in 2004. Typical changes to the manual include: (1) adding new offenses to the appropriate grid and assigning a severity level; (2) adjusting crime severity levels and criminal history scoring rules to reflect recent statutes and case law; and (3) revising and rearranging the manual to improve clarity.¹³

Q. Do the commission’s recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

The Guidelines do not require legislative approval. However, the Commission is required to notify the Council of the District of Columbia (“the Council”) before making changes to the basic structure of the guidelines.¹⁴ Additionally, the Commission is required to file a report with the Council each year that “contains an analysis of the sentences imposed” and “describes any substantive changes made to the guidelines during the preceding year.”¹⁵

⁹ D.C. Code § 3-106 (2019). Since 1997, all D.C. prison sentences are served in prisons run and paid for by the Federal Bureau of Prisons under the 1997 National Capital Revitalization and Self-Government Improvement Act of 1997, H.R. 1963, 105th Cong. (1997).

¹⁰ D.C. Code § 3-101(b)(3) (2019).

¹¹ D.C. Sentencing Comm’n, *2018 Annual Report* 8-9 (Apr. 2019), <https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Final%202016%20Annual%20Report%20%204-24-17.pdf>.

¹² See D.C. Voluntary Sentencing Guidelines Manual § 1.3 (2018).

¹³ D.C. Voluntary Sentencing Guidelines Manual app. J-1 to J-29 (2016) (summarizing all guideline amendments since 2004). See also D.C. Voluntary Sentencing Guidelines Manual app. I-1 to I-3 (2018) (summarizing all guideline amendments since 2017).

¹⁴ D.C. Code § 3-105 (2019).

¹⁵ D.C. Code § 3-104(d) (2019).

Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

The Guidelines apply to “felony convictions where verdicts or pleas were entered after June 14, 2004.”¹⁶

Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

The Guidelines are presented in two grids: the “Master Grid” and the “Drug Grid.” The Drug Grid contains four levels of severity, representing various felony drug crimes. All other felonies are represented on the Master Grid, which contains nine severity levels.¹⁷

Q. How is the presumptive sentence determined?

The presumptive sentence range is determined by finding the cell that is the intersection between the offender’s criminal history score and the severity level of the present offense. First, the offense severity is determined by referencing Appendix C of the Guidelines manual and finding the “offense(s) of conviction.” In Appendix C, the offense of conviction will correspond to an offense severity level (vertical axis) on either the Master Grid or Drug Grid.¹⁸

Second, an offender’s criminal history score is calculated. The criminal history score will correspond to one of five columns along the horizontal axis of the applicable grid. The cell that represents the intersection between the criminal history score and offense severity will contain a presumptive prison range in months.¹⁹

Next, any relevant statutory sentencing enhancements from Appendix H (e.g. bias related crime) are applied to increase the upper limit on the presumptive prison range. For example, a bias-related crime increases the upper limit by 1.5 times, thus a presumptive range of 36-84 months would become 36-126 months.²⁰

The court may impose any sentence within the presumptive range and the sentence will be deemed a “compliant sentence.” If a sentence is “compliant,” the court is not required to provide an explanation for why the sentence was imposed.²¹

Q. Is the choice among types of sentences regulated by a “disposition” or other prison in/out line? Are “out” sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

Both the Master and Drug Grids have three different disposition types. Depending on the specific grid cell, different disposition types are available.²² Disposition groups define what types of sentences a judge can impose:

¹⁶ D.C. Voluntary Sentencing Guidelines Manual § 1.3 (2018).

¹⁷ *Id.* at § 1.2.2, app. A, B.

¹⁸ *Id.* at § 2.1, app. C.

¹⁹ *Id.* at § 1.2.2, app. A, B (Master and Drug Grids).

²⁰ *Id.* § Chapter 4, app. H.

²¹ *Id.* § 7.3 (“A sentence is compliant if it is one of the options permitted in the appropriate box”).

²² *Id.* at app. A-1, B-1.

(1) prison or compliant long split (white/no shading): This group represents the most severe offenses and/or extensive criminal histories. In these cases, the judge may impose an executed sentence (served in jail or prison); or, in the alternative, impose a sentence that is partly executed (served in jail or prison) and partly suspended (served on probation). A compliant long split sentence must include an executed portion served in jail or prison that is still within the presumptive range of punishment. For example, if the guideline suggested term of punishment ranges from 36 to 84 months, an inmate must serve at least 36 months in prison before probation can begin or the sentence will be considered a departure.²³

(2) prison, compliant long split, or short split (dark gray shading): This group represents slightly less severe offenses and/or less extensive criminal histories. In these cases, the judge may impose any of the options in the first group (prison or long split sentence) or impose a short split sentence. The short split sentence is partly executed (served in jail or prison) for six months or less, and partly suspended (served on probation) for the remainder of the term.²⁴

(3) prison, compliant long split, short split, or probation (light gray shading): This group represents the least severe offenses and/or least extensive criminal histories. In these cases, the judge may impose an executed sentence (in prison or jail) or a short split sentence (described above). The judge may also impose a sentence that is entirely suspended (entirely served on probation).²⁵

Note that by statute, the term of probation may not exceed five years in any compliant long split, short split, or probationary sentence.²⁶

Q. Are there border boxes or other categories permitting multiple sentence types?

The light gray cells recommend four dispositions: prison, compliant long split, short split, or probation. The dark gray cells recommend three dispositions: prison, compliant long split or short split. Finally, the white cells recommend two dispositions: prison or compliant long split. The majority of cells on the Master Grid are white and the majority of cells on the Drug Grid are light gray. The court may choose any disposition option within a cell and the sentence will be compliant.²⁷

In choosing which type of sentence to impose, the court may not consider a defendant's or victim's "race, gender, marital status, ethnic origin, religious affiliation, or sexual orientation."²⁸ It may consider any other appropriate factor using any information that it could have taken into consideration before the introduction of the Guidelines.²⁹

Q. Are the guidelines purely advisory, or are they legally binding?

The Guidelines are purely advisory and are not binding on judges.³⁰

²³ *Id.* § 3.5.

²⁴ *Id.* § 3.4.

²⁵ *Id.* § 3.3.

²⁶ D.C. Stat. § 16-710(b) (2019).

²⁷ D.C. Voluntary Sentencing Guidelines Manual app. A-1, B-1 (2018); *id.* § 7.3.

²⁸ *Id.* § 3.1.

²⁹ *Id.* § 3.2.

³⁰ D.C. Code § 3-105(a) (2019) ("The voluntary sentencing guidelines promulgated by the Commission shall not be binding on judges.").

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

Q. What is the overall/general standard for departure?

There are three ways for the court to sentence outside the presumptive range within a given cell:

1. Accept binding plea agreement;³¹
2. Follow the departure procedures in the Guidelines; or
3. Choose not to use the guidelines.

If the court decides to follow the Guideline departure procedures, it should state on the record “substantial and compelling” reasons for departing from the presumptive range.³²

Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

The Guidelines provide a list of eleven aggravating factors and ten mitigating factors to be considered in departures. Both the aggravating and mitigating factor lists include a “catchall” factor for any “substantial and compelling basis” that is “comparable in gravity” to the other factors.³³ The guidelines prohibit using “[g]oing to trial” as an aggravating factor or “entry of a guilty plea” as a mitigating factor.³⁴ In addition, the court cannot consider a “defendant’s nor a victim’s race, gender, marital status, ethnic origin, religious affiliation, or sexual orientation” when making sentencing decisions.³⁵

Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

There are two enumerated mitigating factors that relate to accepting responsibility or assisting law enforcement. Mitigating Factor #2 allows mitigation for “compensat[ing] or mak[ing] a good faith effort to compensate the victim(s) . . .” Additionally, Mitigating Factor #7 allows mitigation for providing “substantial assistance to law enforcement in the detection or prosecution of other offenders . . .” Using the *entry* of guilty plea as a mitigating factor is expressly prohibited.³⁶ This does not mean that a court cannot accept a plea with an agreed downward departure; but the court may not create a sentencing incentive to plead.³⁷

Q. Are there limits on the degree of durational (length-of-custody) departure?

In general, a court may impose a sentence that is shorter or longer than suggested by the Guidelines if that court finds a “substantial and compelling” basis to do so. The sentence must still be within the minimum and/or maximum punishment length prescribed by statute.

³¹ D.C. R. Crim. P. 11(c)(1)(C).

³² See D.C. Voluntary Sentencing Guidelines Manual § 5.2.1 (2018).

³³ *Id.* §§ 5.2.2–3.

³⁴ *Id.*

³⁵ *Id.* § 3.1.

³⁶ *Id.* § 5.2.3.

³⁷ *Id.* §§ 5.2.3, 7.3 (explaining that a compliant sentence includes “a sentence or sentencing range *agreed to and accepted* under Rule 11(c)(1)(c).” (emphasis added)).

There are two special rules permitting but also limiting durational departures when sentencing a person for multiple current offenses:³⁸

First, if a judge decides that imposing the recommended concurrent sentence in a case would result in a sentence that is “so lenient in relation to the seriousness of the offense and the history of the defendant that it would result in manifest injustice” (Aggravating Factor #10), the judge may depart upwards.³⁹

Second, if a judge decides that applying the recommended consecutive sentence in a case would result in a sentence that is “so excessive in relation to the seriousness of the offense and the history of the defendant that it would result in manifest injustice” (Mitigating Factor #9), the judge may depart downwards. An upward departure relying solely upon Mitigating Factor #9 may not result in a sentence shorter than if the sentences were run concurrently.⁴⁰

Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

The Guidelines use the same procedure for dispositional and durational departures. Thus, when the court imposes a disposition outside that recommended by the relevant cell, it must provide “a substantial and compelling basis” for departing from that recommendation.⁴¹ If this procedure is followed, the court is free to impose any disposition not prohibited by statute and the resulting sentence will be compliant with the guidelines.⁴²

4. PRISON RELEASE DISCRETION

Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

The Sentencing Reform Amendment Act of 2000 established determinate sentencing and eliminated parole for all offenses “committed on or after August 5, 2000.”⁴³

Q. Does the state have a “truth in sentencing” law, limiting the extent of early release?

A sentence of imprisonment under the guidelines is for a definite term, and the individual must serve the term specified in the sentence. An offender can earn good time credit towards the sentence but cannot reduce his or her time served by more than approximately 15% of the total sentence imposed.⁴⁴ In addition, a prisoner who successfully completes a substance abuse treatment program in accordance with 18 U.S.C. § 3261(e)(2) may receive an additional one year reduction to his or her sentence.⁴⁵

³⁸ *Id.* § 5.2.4.

³⁹ *Id.* § 5.2.4.

⁴⁰ *Id.*

⁴¹ *Id.* § 5.2.4.

⁴² *Id.* §§ 5.2.1, 7.7.

⁴³ Sentencing Reform Amendment Act of 2000, D.C. Code § 24-403.01 (2019); see D.C. Voluntary Sentencing Guidelines Manual § 8.4 (2018).

⁴⁴ D.C. Code § 24-403.01(d) (2019) (referencing 18 U.S.C. § 3624(b), which allows a prisoner to earn up to 54 days per year of “good time” credit).

⁴⁵ D.C. Code § 24-403.01(d-1)(1) (referencing 18 U.S.C. § 3624(e)(2)).

Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

The Guidelines recommend a range, in months, that the imposed sentence should fall within (e.g. 90 to 180 months). Within this range, the court imposes a sentence of an exact term of months.⁴⁶ However, depending on the disposition, some or all of this imposed sentence may be served outside of jail or prison. The Guidelines set the minimum and maximum terms of incarceration differently for different dispositions:

- For incarceration-only sentences, the minimum sentence is the full term imposed minus any good time earned. The maximum sentence is simply the full term.⁴⁷

With the three types of suspended sentences listed below, revocation of probation could lead to a period of incarceration of up to the remaining term imposed.⁴⁸ However, at the outset:

- For compliant long split sentences, the incarceration portion of the sentence must be at least the minimum term that is recommended under the Guidelines (for example, 90 months if the guidelines recommend 90 to 180 months). The maximum term of incarceration, set by the court, could be any length up to one day shorter than the maximum Guideline sentence.⁴⁹
- For short split sentences, much, but not all, of the incarceration term is suspended. Under the Guidelines, the minimum term of incarceration set by the court may be as little as one day. The maximum term of incarceration is always six months.⁵⁰
- For probation only sentences, the entire term of incarceration is suspended.⁵¹

Q. Is the period of post-prison supervision independent of any unserved prison term?

The period of supervised release, which is independent of prison time served and probation, is controlled by statute. All offenders sentenced to imprisonment must also be sentenced to a period of supervised release. For prison sentences longer than one year, the court must impose either five or three years of supervised release, depending on the maximum prison term authorized for the offense. Whereas, if the court imposes a sentence of one year or less, the period of supervised release *cannot exceed* either five or three years, depending on the maximum prison term authorized for the offense. The length of time an offender may be imprisoned upon revocation of supervised release is also restricted by statute.⁵²

Q. What good-time credits do prisoners earn? Is program participation considered?

An offender serving a prison term of more than one year (that is not a life sentence) may receive a reduction of up to 54 days each year (~15% reduction) from his or her total sentence. This reduction is granted to

⁴⁶ D.C. Code § 24-403.01(c).

⁴⁷ *Id.* at (c)–(d); D.C. Voluntary Sentencing Guidelines Manual app. G-1 to G-2 (2018). There is no paroling authority in Washington D.C.

⁴⁸ D.C. Code § 24-304 (2019); *see also* D.C. Voluntary Sentencing Guidelines Manual § 3.8 (2018). The term of probation is not taken into account when calculating the remaining sentence length.

⁴⁹ D.C. Voluntary Sentencing Guidelines Manual § 3.5 (2018).

⁵⁰ *Id.* § 3.4.

⁵¹ *Id.* § 3.3.

⁵² D.C. Code § 24-403.01(b) (2019).

offenders who displayed “exemplary compliance with institutional disciplinary regulations” during the year in consideration.⁵³ Also, a substance abuse treatment program is available to nonviolent offenders, which provides a reduction in an offender’s sentence for successful completion. Successful completion of the program can reduce an offender’s sentence up to one year, but not more.⁵⁴

Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?

There are no exceptional “second-look” release mechanisms.⁵⁵

5. RELATIONSHIP TO CRIMINAL LAWS

Q. Did the guidelines replace some or all previous statutory maxima?

The Guidelines do not replace any statutory maxima.⁵⁶

Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The guidelines distinguish between two types of minimums: mandatory and statutory. The crucial difference between these two minimums is whether the court has the option to suspend the imposed sentence. A “mandatory minimum term” is one that “must be imposed and cannot be suspended.” Whereas, a “statutory minimum term . . . is one that must be imposed but can be suspended.”⁵⁷ For example, if an offense has a statutory minimum of one year, the court may impose a sentence of one year and suspend all or part of the sentence; in contrast, a mandatory minimum would require the offender to serve the one-year prison term.

Both mandatory and statutory minimums supersede the guidelines, thus “[a]n imposed sentence cannot be lower than the [mandatory or statutory] minimum even if lower sentences are otherwise available in the appropriate box.”⁵⁸ Nearly all of the statutory minimums are built into the guideline grids.⁵⁹ Appendix C in the guidelines lists the mandatory and statutory minimums for every offense the guidelines cover.

Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

There are no exceptions permitting departure from the “mandatory minimum terms” and “statutory minimum terms,” described above.⁶⁰ However, for offenses that have statutory minimums the court “may be able to suspend all or part” of the prison sentence, “depending on the applicable sentencing [guidelines] box.”⁶¹ This option is not available if an offense has a mandatory minimum.⁶²

⁵³ 18 U.S.C. § 3624(b) (2019); D.C. Code § 24-403.01(d).

⁵⁴ 18 U.S.C. § 3621(e)(2) (2019); D.C. Code § 24-403.01(d).

⁵⁵ See generally D.C. Voluntary Sentencing Guidelines Manual (2018).

⁵⁶ See D.C. Voluntary Sentencing Guidelines Manual § 3.7 (2018).

⁵⁷ *Id.* § 3.6.

⁵⁸ *Id.*

⁵⁹ *Id.* (“Most statutory minimums are either below or within the prison range in the lowest possible box for that offense and criminal history score, so that these statutory minimums do not conflict with Guidelines prison ranges”).

⁶⁰ See, e.g., D.C. Code § 22-4502 (2019) (mandatory minimum for committing a crime while armed); D.C. Code § 22-3303 (2017) (statutory minimum for grave robbing).

⁶¹ D.C. Voluntary Sentencing Guidelines Manual § 3.6 (2018).

⁶² *Id.*

6. CRIMINAL HISTORY SCORING

Q. What are the major components of the criminal history score?

An offender's criminal history score depends on six factors:

1. Number of prior convictions and juvenile adjudications;
2. Whether the prior conviction or adjudication was a felony or misdemeanor;
3. The Offense Severity Group of each prior felony conviction or adjudication;
4. The number of events encompassed in a single prior case;
5. Whether the prior offense was a criminal conviction or a juvenile adjudication; and
6. The date on which a sentence or disposition was entered or the date on which a sentence was completed relative to the commission of the crime in the instant case.⁶³

Factor One

A prior conviction or juvenile adjudication for purposes of scoring an offender's criminal history is any adult conviction or juvenile adjudication which is not part of the present case and was sentenced "before the day of sentencing in the instant case."⁶⁴

Factors Two and Three

The number of points added to an offender's criminal history score due to a prior conviction or adjudication depends on the offense severity group that the prior offense falls within. *Solely* for purposes of scoring criminal history, offenses are grouped into five levels of severity: (1) Master Groups 1–5; (2) Master Groups 6–7 and Drug Group 1; (3) Master Groups 8–9 and Drug Groups 2–3; (4) Drug Group 4; and (5) Misdemeanors (90+ days). These criminal history groups relate to where the prior offense would fall on the Master or Drug Grids if it were the present offense. For example, Assault with a deadly weapon is in Group 6 on the Master Grid, thus it would be in criminal history group two (Master Groups 6–7 and Drug Group 1) for purposes of scoring an offender's criminal history. Once the criminal history group is known, then one of two criminal history grids are used to determine how many points that prior conviction or adjudication adds to the total criminal history score. One criminal history grid is for "Prior Convictions and Adjudications Other Than Accessory" and the other is for "Prior Accessory After the Fact Convictions and Adjudications." Both the grids have the five criminal history groups as the vertical axis and the following columns on the horizontal axis: (1) Not Lapsed Adult Conviction; (2) Not Lapsed Juvenile Adjudication; and (3) Lapsed and Revived Adult Felony Conviction. Generally, non-lapsed adult convictions are awarded more points than juvenile adjudications or adult convictions that have lapsed and been revived. Similarly, the criminal history groups that relate to more serious prior offenses (e.g. murder) award more points than those relating to less serious offenses (e.g. any misdemeanor).⁶⁵

Factor Four

If multiple convictions arise out of a single event, then only the most serious conviction is scored.⁶⁶

⁶³ D.C. Voluntary Sentencing Guidelines Manual § 2.2 (2018).

⁶⁴ *Id.* § 2.2.1.

⁶⁵ *Id.* § 2.2.2.

⁶⁶ *Id.* § 2.2.5.

Factors Five and Six

Prior adult convictions count for purposes of criminal history scoring if the “time between the completion of the sentence for the prior conviction and the commission of the instant offense is 10 years or less.” If a sentence was completed more than ten years before the present offense, then it has “lapsed” and *might* be scored. All lapsed felony convictions are “revived” and scored if *any* “prior felony conviction or any part of its sentence . . . occurred within the ten-year window preceding the commission of the instant offense . . .”⁶⁷ Misdemeanors also lapse after ten years, however, lapsed misdemeanors can neither be revived nor revive other convictions.⁶⁸ Similarly, juvenile adjudications, which lapse after five years from the date of adjudication or release from a secure facility (whichever is later), cannot be revived. Because of the five-year lapse period and juvenile courts losing jurisdiction over individuals above the age of 21, no juvenile adjudications are counted if the present offense was committed while the offender is 26 years of age or older.⁶⁹

Q. Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

Felonies and misdemeanors lapse ten years after completion of the sentence. However, felonies that lapse can be “revived” if *any other* felony conviction or a portion of its sentence falls within the ten-year period relative to the present offense. In other words, if at least one prior felony conviction is not lapsed at the time of the commission of the present offense, then all of the prior felony convictions can be “revived” (i.e. no longer lapsed status). Prior misdemeanors cannot be revived and they cannot revive other lapsed convictions. Juvenile adjudications lapse after five years and can never be revived.⁷⁰

Q. Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

The total points added from prior misdemeanors cannot add more than one point to an offender’s total criminal history score. Similarly, minor juvenile adjudications are capped at one and a half points, although there is an exception that allows courts to go above this cap if the offender has more than one of the most serious juvenile adjudications (1.5pt adjudications) on his or her relevant record. The criminal history scoring limitations (e.g. lapsing, caps) are only applicable when the court is selecting the appropriate cell on the guidelines grid. Once the court selects the appropriate cell, it may still “consider unscored convictions and adjudications in choosing the appropriate sentence” within that cell.⁷¹

7. MULTIPLE CURRENT OFFENSES

Q. Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

The guidelines recommend consecutive sentencing of multiple crimes of violence, which includes: multiple victims in multiple events, multiple victims in one event, or one victim in multiple events for offenses

⁶⁷ *Id.* § 2.2.3.

⁶⁸ *Id.*

⁶⁹ *Id.* § 2.2.4.

⁷⁰ *Id.* §§ 2.2.3–4.

⁷¹ *Id.* § 2.2.2.

sentenced on the same day. A consecutive sentence is also required if the offense was committed while the offender was under sentence, and/or if the consecutive sentence is mandated by statute.⁷²

The guidelines recommend concurrent sentencing for offenses that are part of the same event if the offenses are not crimes of violence and/or the concurrent sentence is mandated by statute.⁷³ The court has discretion to sentence all other offenses either consecutively or concurrently.⁷⁴ Apart from the guidelines, statute provides that sentences by default will be consecutive, “unless the court imposing such sentence expressly provides otherwise”⁷⁵

Q. In consecutive sentencing, how is the offender’s criminal history taken into account?

In calculating the criminal history score, a prior conviction is any conviction for which judgment was entered *before the day of sentencing* in the instant case and involved conduct separate from the criminal event being sentenced. “Sentences or dispositions that are entered on the same day as the sentencing in the case at issue or that arise out of the same event are not prior convictions/adjudications.”⁷⁶ Thus, courts imposing a consecutive sentence must determine its aggregate length using the appropriate criminal history scores (that only reflect past convictions and separate events) and unique offense gravity scores for each conviction within the consecutive sentence.

8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Because the guidelines are advisory and do “not create any legally enforceable rights in any party” they do not create a basis for an appeal.⁷⁷

Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

If the court elects to follow the Guidelines, then it must state on the record its reason for departing from the guideline-recommend sentence.⁷⁸ The Commission reports on sentencing practices annually, including cases involving departures.⁷⁹

⁷² D.C. Voluntary Sentencing Guidelines Manual § 6.1 (2018). “Only one crime of violence per victim per event needs to be sentenced consecutively to the others. Everything else can be either consecutive or concurrent.” *Id.*

⁷³ *Id.* § 6.2.

⁷⁴ *Id.* §§ 6.3.

⁷⁵ D.C. Code § 23-112 (2019). *See also* D.C. Code § 22-3203 (2019). Certain theft related crimes must be sentenced concurrently.

⁷⁶ D.C. Voluntary Sentencing Guidelines Manual § 2.2.1 (2018).

⁷⁷ D.C. Code § 3-105 (2019); *see Speaks v. United States*, 959 A.2d 712, 719 (D.C. 2008) (“[T]he Voluntary Sentencing Guidelines are entirely voluntary, and judges are free to apply or ignore them as they see fit without interference by this Court.” (citation omitted)).

⁷⁸ D.C. Voluntary Sentencing Guidelines Manual § 5.2.1 (2018).

⁷⁹ *See, e.g.*, D.C. Sentencing Comm’n, 2018 Annual Report 10 (Apr. 2019),

https://scdc.dc.gov/sites/default/files/dc/sites/scdc/page_content/attachments/Sentencing%20Commission%202018%20Annual%20Report.pdf

Q. Are some deviations from the guidelines not deemed departures?

Any sentence outside the presumptive range is deemed a departure,⁸⁰ not including sentences made without using the guidelines⁸¹ and sentences resulting from plea bargains.⁸² However, if the presumptive range is expanded pursuant to a statutory enhancement, a sentence falling within the expanded range is not a departure.⁸³

Q. Do some deviations require especially strong justification? Or minimal justification?

So long as the court has a “substantial and compelling basis” any legal sentence may be imposed.⁸⁴ The amount of justification does not change depending on the degree of departure from the presumptive range in the guidelines.⁸⁵

⁸⁰ See D.C. Voluntary Sentencing Guidelines Manual § 5.2.1 (2018).

⁸¹ See D.C. Voluntary Sentencing Guidelines Manual § 1.1 ¶ 5 (2018).

⁸² See D.C. Voluntary Sentencing Guidelines Manual § 9.14 (2018).

⁸³ *Id.* § 7.3.

⁸⁴ *Id.* § 5.2.4.

⁸⁵ See *id.* §§ 5.2.4 - .5.