

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 Massachusetts Sentencing Commission was established in 1994.¹ In 2014 a new Massachusetts Sentencing Commission was appointed by the governor,² but there was no change in the Commission's statutory mandate and structure.

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

The Commission consists of fifteen members, nine of whom are voting members, six of whom are non-voting members. The governor appoints the voting members and must designate one of the voting members as chair. The voting members of the Commission include:

- Three present district court, Boston municipal court, or superior court department judges – selected from a list of seven judges recommended by the chief justice of the trial court. Of these three members, one must be a district court or Boston municipal court judge and one must be a superior court judge.
- Two assistant district attorneys – selected from a list of seven assistant district attorneys recommended by the Massachusetts District Attorneys' Association.
- One assistant attorney general – selected from a list of three assistant attorneys general recommended by the attorney general.
- Two members of the Massachusetts Association of Criminal Defense Attorneys – selected from a list of five such members recommended by the Massachusetts Association of Criminal Defense Attorneys.
- One public defender – selected from a list of three public defenders recommended by the committee for public counsel services.

The non-voting members are:

- The commissioner of corrections, or designee;
- The commissioner of probation, or designee;
- The secretary of public safety, or designee;
- The chairman of the Massachusetts parole board, or designee;
- The president of the Massachusetts Sheriffs Association or designee; and
- A victim witness advocate selected by the victim witness board.

The chair and members of the Commission are subject to removal by the governor only for neglect of duty or malfeasance in office or for a showing of other good cause.

¹ An Act to Promote the Effective Management of the Criminal Justice System Through Truth-in Sentencing, 1993 Mass. Acts 1295 (1993).

² See Mass. Court System, *Massachusetts Sentencing Commission*, <http://www.mass.gov/courts/court-info/trial-court/sent-commission/> (last visited Aug. 13, 2019).

Voting members are appointed for staggered six-year terms and may not serve more than two full terms. The terms of non-voting members run concurrently with their term of public office.³

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

The Massachusetts Sentencing Commission is an independent commission within the judicial branch of the Commonwealth of Massachusetts.⁴

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

The Commission is permitted to employ a director and other staff “as are necessary in the execution of the functions of the commission,” but it is also required to utilize to the extent practicable the existing resources of the administrative office of the trial court.⁵ The work of the Commission is currently supported by the Department of Research and Planning within the Executive Office of the Trial Court. The Department of Research and Planning consists of a Director, Research Manager, two Research Analysts, an Executive Assistant, and student interns.⁶ None of these staff members are dedicated solely to the Commission.⁷

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

The primary mandate of the Massachusetts Sentencing Commission is to recommend sentencing policies and practices for the Commonwealth that:

- Justly punish offenders;
- Secure public safety by providing swift and sure responses to crime;
- Meet the stated purposes of sentencing, which include promoting respect for the law, deterrence, and incapacitation;
- Provide certainty and fairness in sentencing, avoiding unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct, while maintaining judicial discretion and sufficient flexibility to permit individualized sentences warranted by mitigating or aggravating factors;
- Promote truth in sentencing so that all parties involved in the criminal justice process are aware of the nature and length of the sentence and its basis;
- Ration correctional capacity and other criminal justice resources;
- Encourage the development and implementation of intermediate sanctions as a sentencing option in appropriate cases;
- Enhance the value of criminal sanctions and ensure that the criminal penalties imposed are the most appropriate;
- Make offenders accountable to the community for their criminal behavior; and

³ Mass. Gen. Laws ch. 211E, § 1(a) (2019).

⁴ *Id.*

⁵ Mass. Gen. Laws ch. 211E, § 1(e), (g) (2019).

⁶ Mass. Advisory Sentencing Guidelines 3 (2017) (“Commission Staff”).

⁷ Correspondence with Hon. Jack Lu, Mass. Sentencing Comm’n Chair (May 13, 2016).

- Evaluate the impact, if any, on correctional facility capacity of the discontinuation of sentence reductions for good conduct.⁸

In addition, the Commission has the power to serve as a clearinghouse of information on sentencing practices, and make recommendations to the legislature regarding crimes, sentencing, and correctional matters.⁹

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

Yes. The Massachusetts Sentencing Commission is tasked with rationing correctional capacity to afford sufficient correctional capacity to incarcerate violent offenders and to “prevent the prison population in the commonwealth from exceeding the capacity of the prisons.” The Commission is also tasked with annually evaluating the performance of that rationing and making appropriate remedial recommendations to the legislature.¹⁰

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?

Massachusetts conducts a yearly survey of sentencing practices, which “considers the nature of the sentence imposed following conviction, including sentences to probation or incarceration. . . [and reports] the length of sentences imposed when those sentences include a period of incarceration.”¹¹ The results of the surveys are posted on the Commission’s website, but have not been updated since 2014.¹²

Massachusetts General Laws c. 211E also requires all sentences to be recorded on a digital sentencing Statement, to measure statistics on race, ethnicity, and gender in sentencing. All sentencing statements are submitted to the Sentencing Commission. Judges, attorneys, and probation officers are also encouraged to keep similar records to track their own biases.

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The first set of sentencing guidelines were proposed by the Massachusetts Sentencing Commission on April 11, 1996, and were utilized by many judges, but were never ratified by the Massachusetts legislature.¹³ In 2017, the Commission significantly revised the advisory sentencing guidelines and these too have yet to be ratified by the legislature.¹⁴

⁸ Mass. Gen. Laws ch. 211E, § 2 (2019).

⁹ Mass. Gen. Laws ch. 211E, § 1(c)(7)–(8) (2019).

¹⁰ Mass. Gen. Laws ch. 211E, §§ 1(c)(8), 2(6)(C) (2019).

¹¹ See Mass. Court Sys., *Survey of Sentencing Practices*, <http://www.mass.gov/courts/court-info/trial-court/sent-commission/survey-of-sentencing-practices-generic.html> (last visited Aug. 13, 2019).

¹² *Id.*; e.g., Mass. Court Sys., Exec. Office of the Trial Court, *Survey of Sentencing Practices FY 2013* (2014), <http://www.mass.gov/courts/docs/admin/sentcomm/fy2013-survey-sentencing-practices.pdf>.

¹³ See Mass. Advisory Sentencing Guidelines 17 (2017).

¹⁴ Mass. Advisory Sentencing Guidelines 12–13 (2017) (District Attorneys Minority Report, critiquing implementing advisory guidelines without legislative approval).

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

Since 1996, the Commission has maintained a master crime list¹⁵ to be used in conjunction with the guidelines and has developed a version of the sentencing grid that includes mandatory drug sentences.¹⁶ The last published modifications to the guideline manual were in 2017.¹⁷

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

In theory, the Sentencing Commission would recommend guidelines to the legislature, and the guidelines would take effect (i.e. become legally binding) "only if enacted into law."¹⁸ The recommendations of the Commission's April 1996 report stated that, unless approved by the Legislature, "the policies and procedures contained in this Sentencing Guide [...] should be considered proposed policies and procedures."¹⁹ The 2017 revised version of the Advisory Sentencing Guidelines makes no mention of having acquired legislative approval and states that "the Commission intends to provide a starting point for consideration, and not a constraint on judicial discretion in fashioning an appropriate sentence."²⁰ A minority report written by several District Attorneys to members of the Sentencing Commission critiqued the commission's practice of disseminating the Guidelines without formal legislative review and oversight.²¹

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 enabling statute provides that the guidelines are to be used in "every criminal case,"²² which includes misdemeanors. However, the guidelines do not apply to offenses that are punishable by a fine only.²³

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

The Massachusetts Sentencing Guidelines are presented in a single grid, with 10 levels of offense severity.²⁴ Each offense is assigned a severity level in the master crime list.²⁵ Note that certain broad offenses like assault are "staircased" in terms of their severity level; in other words, they are assigned multiple severity levels and severity will be determined on the facts of the case, such as the value of property lost, degree of injury, etc.²⁶

¹⁵ See, e.g., Mass. Sentencing Comm'n, *Felony and Misdemeanor Master Crime List* (2018), <http://www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf>.

¹⁶ Mass. Sentencing Comm'n, *Placement of Mandatory Drug Offenders on the Sentencing Guideline Grid*, <http://www.mass.gov/courts/docs/admin/sentcomm/internet-drug-grid.pdf> (last visited Aug. 13, 2019).

¹⁷ Mass. Advisory Sentencing Guidelines (2017).

¹⁸ Mass. Gen. Laws ch. 211E, §3(a)(1) (2019).

¹⁹ See Mass. Sentencing Comm'n, *Sentencing Guide: Massachusetts Sentencing Guidelines* 3 (1998).

²⁰ Mass. Advisory Sentencing Guidelines 7 (2017).

²¹ Mass. Advisory Sentencing Guidelines 12-13, 17 (2017).

²² Mass. Gen. Laws ch. 211E, § 3(a)(2) (2019).

²³ Mass. Advisory Sentencing Guidelines 36 (2017).

²⁴ Mass. Advisory Sentencing Guidelines 47 (2017).

²⁵ Mass. Sentencing Comm'n, *Felony and Misdemeanor Master Crime List* (2018), <http://www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf>.

²⁶ Mass. Advisory Sentencing Guidelines 35 (2017).

Q. How is the presumptive sentence determined?

“The appropriate sentencing guidelines range for the offense/offender is determined by identifying the grid cell which represents the intersection of the offense seriousness level of the governing offense (vertical axis) and the classification of the criminal history (horizontal axis).” The cell will fall into one of four zones on the grid indicating whether the sentence should be incarceration, an intermediate sanction, discretionary dispositional alternatives, or no active supervision.²⁷

If the guidelines call for a sentence of incarceration, the range within the cell represents the maximum time that can be imposed. The judge can select a maximum sentence (“not more than” sentence) anywhere within the range, and the minimum term that must be served (“not less than” sentence) will automatically be two-thirds of the term pronounced by the court.²⁸

If the guidelines call for an intermediate sanction, that indicates that the judge should impose a non-incarceration sentence with some level of restriction such as probation, home confinement, or day reporting.²⁹

If the guidelines call for a discretionary sentence, then the judge can impose a sentence of incarceration or intermediate sanctions.³⁰

The guidelines also offer a fourth “no active supervision” zone in which offenders do not receive probation, incarceration, supervision, fines or fees.³¹

The length of a probation sentence is determined by the use of a validated risk assessment tool and takes into consideration the racial, socioeconomic, and ethnic biases that are inherent in such tools. Though judges have wide discretion in imposing probation conditions, it is recommended that they impose the minimum number they deem necessary to address the defendant’s criminogenic needs.³² The sentencing grid also provides suggested maximum probation terms for different offense levels: 3 years is suggested for offense levels 6-8, 2 years for offense levels 3-5, and 1 year for offense levels 1-2.³³ The 3 year cap on probation terms is one of the “Best Practice Principles for Individualized Evidence-Based Sentencing”.³⁴ Judges are also encouraged to use incentives and rewards “that reduce recidivism and promote positive outcomes,” including shortening or terminating probation, deleting or modifying probation conditions that no longer seem appropriate, and waiving costs or fees.³⁵

²⁷ Mass. Advisory Sentencing Guidelines 45 (2017).

²⁸ *Id.* at 23, 28–31.

²⁹ *Id.* at 45, 51.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 51.

³³ *Id.* at 45, 51. The presumptive sentence for offense level 0 is no probation or incarceration. Furthermore, the presumptive sentence for offense level 9 is life imprisonment, so no probation is suggested for that offense level.

³⁴ *Id.* at 102.

³⁵ *Id.* at 73.

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?

The Massachusetts sentencing grid has four distinct sentencing zones, which determine whether the presumptive sentence is for no active supervision, incarceration, an intermediate sanction, or a choice between supervision and incarceration. The Massachusetts Commission describes the zones as follows:

“No Active Supervision Zone

Cells in this zone carry no incarceration, probation, supervision, fees or fines.

Intermediate Sanction Zone

The sentencing guidelines grid contains a zone where only intermediate sanctions are within the guidelines (green zone). To impose a sentence of incarceration upon a defendant whose crime and criminal record fall within the intermediate sanction zone, a judge must depart from the guidelines.

Discretionary Zone

The middle zone (yellow zone) provides a broad range of dispositional alternatives. Both incarceration and intermediate sanctions are within applicable guidelines.

Incarceration Zone

For the most serious crimes and criminal histories (red zone), intermediate sanctions are not within the applicable guideline ranges. In order to impose an intermediate sanction, the sentencing judge must depart from the guidelines in these cells.³⁶

The applicable guidelines grid cell provides a range from which the judge selects the maximum term (Not More Than, or NMT). For sentences to state prison, the minimum (Not Less Than) term is set at two thirds of the maximum; however, sentencing judges and counsel are advised to take into consideration that current research indicates a minimum term calculated at two thirds of the maximum may result in a parole term that is longer than necessary.³⁷

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

The Massachusetts Sentencing Guidelines Grid includes a large discretionary zone in which judges may choose, without departing, between incarceration and various levels of intermediate sanctions, ranging from daily accountability to administrative probation.³⁸

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

The Guidelines are advisory and have not been approved by the state legislature. They are intended “to provide a starting point for consideration, and not a constraint on judicial discretion in fashioning an appropriate sentence.”³⁹

³⁶ Mass. Advisory Sentencing Guidelines 45 (2017).

³⁷ Mass. Advisory Sentencing Guidelines 9, 49 (2017).

³⁸ Mass. Advisory Sentencing Guidelines 47 (2017).

³⁹ Mass. Advisory Sentencing Guidelines 7 (2017).

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

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

The enabling statute provides that a judge may depart from the recommended guidelines sentence “on a finding that there exists one or more aggravating or mitigating circumstances that should result in a sentence different from the one otherwise prescribed by the guidelines.”⁴⁰ A departure sentence may be to a term outside the range of recommended custody terms; it may also involve imposition of “a sentence of incarceration where the guidelines prescribe intermediate sanctions only”, or imposition “of intermediate sanctions where the guidelines prescribe incarceration only.”⁴¹

If the guidelines were enacted into law, a sentencing judge would be required to set forth in writing the reasons for departure, stating “the facts, circumstances, evidence, opinions and any other matters considered,” and finding that one or more mitigating or aggravating circumstances exist.⁴² However, due to the advisory nature of the current guidelines, the Commission “disclaim[s] any intent to require sentencing judges to set forth their reasons in writing.”⁴³

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 Commission established non-exclusive aggravating and mitigating circumstances to guide the sentencing judge.⁴⁴ In determining whether a departure may be appropriate, the judge must consider evidence received during the proceedings, information in the pre-sentence report (if requested by the judge), and any other information the judge deems credible.⁴⁵

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

While the Sentencing Guidelines do not expressly address mitigations based on guilty pleas or acceptance of responsibility, the fourth listed mitigating circumstance is that “[t]he sentence was imposed in accordance with a jointly agreed recommendation.”⁴⁶ Such an agreement would usually be based on a guilty plea.⁴⁷

⁴⁰ Mass. Gen. Laws ch. 211E, § 3(a)(2) (2019).

⁴¹ Mass. Advisory Sentencing Guidelines 55 (2017).

⁴² Mass. Gen. Laws ch. 211E, § 3(a)(2), (h) (2019).

⁴³ Mass. Advisory Sentencing Guidelines 55 (2017).

⁴⁴ Mass. Advisory Sentencing Guidelines 55–57 (2017). (“Non-exclusive List of Mitigating and Aggravating Factors”).

⁴⁵ *Id.* at 55.

⁴⁶ Mass. Advisory Sentencing Guidelines 57 (2017).

⁴⁷ Mass. R. Crim. P. 12(d)(6) (2019).

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

There do not appear to be any limits on durational departures, other than statutory minimum and maximum penalties.⁴⁸

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

The Sentencing Guidelines allow for departure as to sentence type in any case.⁴⁹

4. PRISON RELEASE DISCRETION

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

The Massachusetts Parole Board has broad discretion on whether to parole prisoners.⁵⁰ Offenders sentenced to state prison become eligible for parole after serving the minimum term of their sentence,⁵¹ and offenders sentenced to houses of correction become eligible for parole after serving one-half of their maximum sentence.⁵² The minimum and maximum terms of a sentence are set by the court.⁵³

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

Massachusetts enacted a “truth in sentencing law” in 1993. This law changed the way in which the time an offender must serve is calculated before becoming eligible for parole. The law also eliminated statutory “good time,” the Reformatory sentence, and suspended sentences to the state prison. Finally, the law made it possible for judges to impose state prison sentences on offenders with sentences of under 2.5 years.⁵⁴

Prior to the law, the Massachusetts Parole Board had discretion to parole offenders sentenced to state prison after the offender served one-third or two-thirds of the minimum term of a sentence. This discretion was narrowed, and now every offender sentenced to state prison must serve at least the minimum term of a sentence in order to be eligible for parole. Offenders sentenced to one of the houses of correction were

⁴⁸ It is important to distinguish a true mandatory minimum prison term (which the sentence must in all cases equal or exceed) from statutory minimum terms specified for some offenses which do not require incarceration. In these cases, the minimum term only applies when the judge chooses to impose incarceration, and even then, a sentence below the minimum is permitted. Moreover, if that sentence is within the applicable guidelines range it is not deemed to be a departure; and if the statutory minimum falls above the guidelines range, imposition of that minimum term is likewise not deemed a departure. See, e.g., Mass. Advisory Sentencing Guidelines 59 (2017).

⁴⁹ Mass. Gen. Laws ch. 211E, § 3(h) (2019); Mass. Advisory Sentencing Guidelines 143 (2017).

⁵⁰ Mass. Gen. Laws ch. 127, § 133A (2019).

⁵¹ *Id.* Exceptions include the following: “prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater”; “prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder”; and “prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction.”

⁵² 120 Mass. Code Regs 200.02(1) (2018).

⁵³ Mass. Gen. Laws ch. 279, § 24 (2019) (indeterminate sentencing).

⁵⁴ Mass. Sentencing Comm’n, *Truth in Sentencing Reform in Massachusetts* at v-ix (Oct. 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/193406.pdf>.

not subject to the parole requirements of the 1993 statute; however, the elimination of good time lengthened average house of correction sentences.⁵⁵

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 recommended prison durations specified on the Massachusetts Guidelines grid, and any sentence chosen from within those ranges or by departure, represent the maximum (Not More Than – NMT) prison term. The minimum (Not Less Than – NLT) prison term will then “automatically be set at two-thirds of the maximum sentence.”⁵⁶

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

The period of parole supervision is for the “unexpired term of [the offender’s] sentence,” except for certain offenders subject to life-time parole supervision.⁵⁷ In Massachusetts, it is a common practice for judges to impose post-prison supervision in the form of “from & after” probation through the use of a split sentence to the house of correction or a probation sentence on a second charge.⁵⁸

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

Prisoners may participate in educational or vocational programs to earn a reduction of up to ten days per month.⁵⁹ This type of deduction is used to reduce both the minimum and maximum terms of a sentence.⁶⁰

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

There are no exceptional prison release mechanisms other than parole or pardon by the governor.⁶¹

5. RELATIONSHIP TO CRIMINAL LAWS

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

The Guidelines did not replace any previous statutory maxima.⁶²

⁵⁵ *Id.*; 1993 Mass. Acts 1295, 1305 (partially codified as Mass. Gen. Laws ch. 211E). See also Mass. Gen. Laws ch. 279, § 24 (2019). There was no change in parole eligibility for those serving house of correction sentences; these offenders’ eligibility is determined through Board regulations. 120 Mass. Code Regs 200.02 (2019).

⁵⁶ Mass. Advisory Sentencing Guidelines 46–47 (2017).

⁵⁷ Mass. Gen. Laws ch. 127, §§ 133A (parole), 152 (executive pardons).

⁵⁸ Correspondence with Linda K. Holt, Director of Research and Planning, Mass. Exec. Office of the Trial Court (May 12, 2016). See also Mass. Gen. Laws ch. 279, § 8A (2019).

⁵⁹ Mass. Gen. Laws ch. 127, § 129D. For programs requiring six months of participation, an additional reduction of ten days may be awarded upon completion. *Id.*

⁶⁰ *Burno v. Comm’r of Corr.*, 503 N.E.2d 16 (1987) (“Deductions under § 129D serve not only to reduce the term of imprisonment by deduction from the maximum term of sentence, but also to bring parole eligibility nearer by deduction from the prisoner’s minimum term.”).

⁶¹ Mass. Gen. Laws ch. 127, §§ 133A, 133D, 152 (2019).

⁶² See Mass. Advisory Sentencing Guidelines 7–8 (2017).

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?

For some crimes subject to a mandatory-minimum statute, the guidelines sentencing range is that minimum prison term up to the statutory maximum, regardless of criminal history; for other crimes, some of the guidelines ranges include sentences below an applicable mandatory minimum.⁶³ The Commission has stated that it “does not endorse the use of mandatory minimum sentences” as a matter of criminal justice policy.⁶⁴ Moreover, in an early version of the guidelines the Commission recommended, pursuant to a provision in the guidelines enabling statute, that judges should have a limited power to depart below drug-crime and some OUI mandatory minimums.⁶⁵ Nevertheless, unless and until the guidelines are enacted into law by the legislature and that departure power is restored to the guidelines, judges have no authority to impose a sentence below an applicable mandatory minimum.⁶⁶

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

The guidelines bar judges from imposing a sentence below an applicable statutory mandatory minimum.⁶⁷

6. CRIMINAL HISTORY SCORING

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

Massachusetts places offenders into one of five categories, based upon the number of prior convictions and their level of severity:⁶⁸

A: No/Minor Record

- No prior convictions of any kind; or
- One to five prior convictions in any combination for offenses in levels 1 or 2.

B: Moderate Record

- Six or more prior convictions in any combination for offenses in levels 1 or 2; or
- One or two prior convictions in any combination for offenses levels 3 or 4.

C: Serious Record

- Three to five prior convictions in any combination for offenses in levels 3 or 4; or
- One prior conviction for offenses in levels 5 or 6.

D: Violent or Repetitive Record

- Six or more prior convictions in any combination for offenses in levels 3, 4, 5, or 6; or

⁶³ Massachusetts Sentencing Commission, *Report to the General Court* (April 10, 1996), at 21-24; Mass. Advisory Sentencing Guidelines 59-60 (2017).

⁶⁴ Mass. Advisory Sentencing Guidelines 59.

⁶⁵ Massachusetts Sentencing Commission, *Massachusetts Sentencing Guidelines* (February 1998), at 19, 21.

⁶⁶ Mass. Advisory Sentencing Guidelines 59-60.

⁶⁷ Mass. Advisory Sentencing Guidelines 59-60. The guidelines enabling statute grants the Commission authority to recommend sentences below a mandatory minimum, Mass. Gen. Laws ch. 211E § 3(c),(e) (2019), and an early version of the guidelines gave judges limited power to do so in drug and some OUI cases. Massachusetts Sentencing Commission, *Massachusetts Sentencing Guidelines* (February 1998), at 19, 21. But that provision was later removed from the guidelines, apparently because the guidelines have not been enacted into law by the legislature.

⁶⁸ Mass. Advisory Sentencing Guidelines 39 (2017).

- Two or more prior convictions in any combination for offenses in levels 5 or 9; or
- One prior conviction for offenses in levels 7 through 9.

E: Serious Violent Record

- Two or more prior convictions in any combination for offenses in level 7 through 9.⁶⁹

A “staircased” offense has multiple levels of offense seriousness on the sentencing grid because it covers a broad range of behavior (e.g. assault and battery) and will be sentenced depending on the specific conduct in the case. For the purposes of a criminal history score, the offense is assumed to have the lowest seriousness level assigned to it. Also, as is discussed below, there is a rebuttable presumption that several offenses arraigned on the same day arose from the same criminal conviction.⁷⁰

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?

There are gap and decay provisions for both adult and juvenile convictions. All adult convictions are erased 8 years after the arraignment date and do not count as part of the criminal history score unless the offender was under correctional custody or supervision and the court orders a departure for that reason. However, crimes that are at a level 6 or above do not wash out if the current offense is also at a level 6 or above. Juvenile adjudications for misdemeanors are not counted; prior adjudications for felonies are counted but must be reduced by two levels. In addition, if the juvenile offense resulted in an adult sentence, it will be treated in the same manner as adult conviction.⁷¹

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)?

A court may choose to treat multiple convictions with different arraignment dates as the same criminal conduct for the purpose of criminal history placement if the court is satisfied that the convictions represent the same criminal conduct. Similarly, the presumption that several offenses arraigned on the same date arose from the same criminal conduct is rebuttable if the court believes that each conviction represents separate criminal conduct.⁷²

Two mitigating factors are related to criminal history. The first is that “the defendant’s criminal history category overstates the seriousness of the defendant’s prior record.” The second is that “the defendant’s residence in a poor or minority area with deep police penetration causes overstatement of the seriousness of the criminal record.”⁷³ The latter factor is part of an effort within the Commission to curb racial biases in sentencing.⁷⁴

⁶⁹ *Id.*

⁷⁰ *Id.* at 39.

⁷¹ *Id.* at 40–41.

⁷² *Id.* at 39.

⁷³ *Id.* at 57.

⁷⁴ *See Id.* at 31 (bias check practices).

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 choice between concurrent and consecutive sentences is discretionary. But as summarized below, the Sentencing Commission has imposed guidelines for the proper length and disposition of sentences for the second and any additional offenses beyond the “base” sentence for the “governing” (most serious) offense.

If a defendant has been convicted of two or more crimes arising out of the same conduct, a concurrent or consecutive sentence for the additional crimes that falls within or below the guidelines range is not considered a departure. In addition, if there is a single victim (or no victim) and the court imposes consecutive sentences, the total for all of the sentences should not exceed the upper limit of the guidelines range for the governing offense.

If a defendant has been convicted of two or more crimes not arising out of the same conduct, or the defendant is currently serving a sentence for another criminal offense, a concurrent or consecutive sentence for the additional crimes that falls within the guidelines range is not considered a departure.⁷⁵

The commission of repeated offenses against the same victims is recognized as an aggravating circumstance which may justify such a departure.⁷⁶

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

When imposing consecutive sentences for multiple offenses arising out of the same conduct, criminal history may be considered with regard to each sentence, but this is not required.⁷⁷

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

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

There is no appellate review of the application of or departure from the guidelines.⁷⁸

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

The advisory guidelines are written merely to “provide a starting point for consideration, and not a constraint on discretion in fashioning an appropriate sentence.”⁷⁹ If approved by the legislature, the guidelines would require judges to provide reasons for departure in writing, and appellate review would be available for

⁷⁵ Mass. Advisory Sentencing Guidelines 70-72 (2017).

⁷⁶ *Id.* at 34 (fig. 4).

⁷⁷ Mass. Advisory Sentencing Guidelines 72 (2017).

⁷⁸ If the legislature were to adopt guidelines, a formal process for appeal would be created. See Mass. Gen. Laws ch. 211E, § 4 (2019) (providing a right of appeal under certain circumstances, including “an incorrect application of the sentencing guidelines” and “the departure upward from the applicable guideline range was an abuse of discretion.”).

⁷⁹ Mass. Advisory Sentencing Guidelines 7 (2017); see also *Com. v. Henriquez*, 780 N.E.2d 118, 123 (2002) (“The sentence itself, although exceeding the guidelines, which are, of course, not mandatory, did not exceed the ‘permissible statutory limits.’”).

departures (under an abuse of discretion standard); defendants would also have the right to appeal alleged incorrect applications of the guidelines. In the revised 2017 guidelines the Commission states that it has “promulgated these Guidelines disclaiming any intent to require sentencing judges to set forth their reasons in writing.” Nevertheless, the Commission recognizes “that Best Practices counsel that a sentencing rationale which is clearly explained benefits the parties, the victims, the community, and the public.”⁸⁰

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

When multiple offenses arise out of the same criminal conduct, a concurrent or consecutive sentence for an additional offense (not the governing, most-serious offense) that falls below the guidelines range is not considered a departure.⁸¹

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

There are no deviations that require particularly strong or minimal justification.

⁸⁰ *Id.* at 8, 55, 78.

⁸¹ Mass. Advisory Sentencing Guidelines 70-71 (2017).