This summary of federal appellate case law addresses four topics: availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts that permit upward departure or raise the minimum sentence; and other important appellate sentencing decisions.

1. Availability of and General Standards for Appellate Review.

By statute, appeal of a sentence is available to both defendants and the government. Either party may appeal a sentence that was imposed in violation of the law, was imposed as the result of an incorrect application of the sentencing guidelines, or was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.[1]

After the *Booker*[2] decision, which rendered the guidelines advisory (discussed further below), appeals courts can review the reasonableness of all sentences, including those that fall within the guidelines range.[3] A review for reasonableness is conducted using a "deferential abuse of discretion" standard.[4] Despite the advisory nature of the guidelines, the Supreme Court has held that the guidelines are the "lodestone"[5] and "should be the starting point and the initial benchmark"[6] of federal sentencing.

Sentencing courts are permitted to tailor the sentence in light of the sentencing policy concerns stated in Section 3553(a) of the guidelines enabling statute.[7] That section, which was repeatedly cited in *Booker*, provides as follows:[8]

> **(a) Factors to be considered in imposing a sentence.** --The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
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> **(1)** The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** The need for the sentence imposed—
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> **(3)** The kinds of sentences available;
>
> **(4)** The kinds of sentence and the sentencing range established [by the Sentencing Commission for a given type of crime or violation of release];

[1] 18 U.S.C. § 3742 (2017).
[2] *U.S. v. Booker*, 543 U.S. 220 (2005).
[3] *See, e.g., Nelson v. U.S.,* 555 U.S. 350, 351 (2009); *Rita v. U.S.*, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"); *U.S. v. Perez-Perez*, 512 F.3d 514, 516 (9th Cir. 2008).
[4] *Gall v. U.S.*, 552 U.S. 38, 41 (2007); *Peugh v. United States*, 569 U.S. 530, 530 (2013).
[5] *Peugh*, 569 U.S. 530 at 544 , (2013).
[6] *Gall,* 552 U.S. at 49.
[7] *Kimbrough v. U.S.*, 552 U.S. 85, 101 (2007) (citing *Booker*, 543 U.S. at 245–246). *See also Booker*, 543 U.S. at 259–265.
[8] 28 U.S.C. § 3553(a) (2017). *See also Rita,* 551 U.S. at 350 (noting that the sentencing guidelines "reflect a rough approximation of the sentences that might achieve § 3553(a)'s objectives").

> **(5)** Any pertinent policy statement … issued by the Sentencing Commission [subject to any amendments made by an act of Congress] in effect on the date the defendant is sentenced.
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> **(6)** The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> **(7)** The need to provide restitution to any victims of the offense.

Appeal is still available where the district court has erred in calculating a range of punishment under the sentencing guidelines. Though sentencing is discretionary with the courts, judges must consult the guidelines and take them into account; a court that improperly calculates a defendant's Sentencing Guidelines range has thus committed a "significant procedural error."[9]

Williams v. U.S.[10] is an early (1992) case on guidelines appeal that is still important. The court held that if the sentencing court misapplies the guidelines, the reviewing court cannot simply affirm the sentence on an independent assessment that the sentence was reasonable. Rather, once the reviewing court decides that the guidelines have been misapplied, remand for resentencing is appropriate unless the reviewing court concludes on the record as a whole that the error was harmless. In this manner, the appeals process ensures that the sentencing court maintains sentencing discretion.[11]

For the sake of potential appellate review, sentencing judges must comply with the statutory requirement to "state in open court the reasons for the imposition of a particular sentence."[12] This explanation may be brief where the sentence is imposed within the advisory guidelines range unless a party argues for a departure or claims that the judgment behind a particular sentence is unsound. In *Rita v. U.S.*, for example, the judge's explanation that the court had considered Mr. Rita's military service, health issues, and vulnerability in prison but "simply found them insufficient to warrant" a downward departure from the guidelines range was sufficient.[13]

2. Standards and Allowable Grounds for Departure.

Under the guidelines, departures are changes from the final sentencing range "computed by examining the provisions of the guidelines themselves." Variances, on the other hand, are sentences above or below the otherwise properly calculated final sentencing range based on other statutory factors listed in 18 U.S.C. § 3553(a) such as the nature and circumstances of the offense.[14]

The sentencing guidelines are currently advisory. However, appellate courts recognize that "the Commission post-*Booker* continues to fill an important institutional role because it has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise. […][15] [D]istrict courts must still give 'respectful consideration' to the Guidelines."[16] Therefore, on appeal, the guidelines ranges (and the degree of departure from guidelines) must still be taken into account.[17]

However, the court in *Booker* was careful to avoid creating an "impermissible presumption of unreasonableness for sentences outside the Guidelines range" at the district court level. Thus, the deferential abuse of discretion standard of review does not require extraordinary circumstances to justify a

[9] *Molina-Martinez v. U.S.*, 136 S. Ct. 1338, 1345-46 (2016) (citing *Gall v. U.S.* 552 U.S. 38 (2007)).
[10] *Williams v. U.S.*, 503 U.S. 193 (1992).
[11] *Id*. at 203.
[12] *Rita*, 551 U.S. at 356 (citing 18 U.S.C. § 3553(c) (2017)).
[13] *Id.* at 358-59.
[14] *U.S. v. Rangel*, 697 F.3d 795, 801 (9th Cir. 2012) (citing *U.S. v. Cruz-Perez*, 567 F. 3d 1142, 1146 (9th Cir. 2009)). *See also Pepper v. United States*, 562 U.S. 476, n.12 (2011) (citing *Irizarry v. U.S.*, 553 U.S. 708, 714 (2008)).
[15] *Kimbrough v. U.S.*, 552 U.S. 85 at 109.
[16] *Id*. at 101 (citing *Booker*, 543 U.S. at 245-26).
[17] *See, e.g. Molina-Martinez*, 136 S. Ct. at 1345 (citing *Gall v. U.S.* 552 U.S. 38 (2007)).

sentence outside of the Guidelines range. Nor does this standard of review allow for upholding or invalidating a sentence based solely on the mathematical degree of departure from the guidelines.[18]

A corollary of the above rule is that while courts of appeal may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the guidelines, sentencing courts do not enjoy the benefit of a legal presumption that the guidelines sentence should apply.[19] In other words, "the court of appeals may, but is not required to, presume that a within-guidelines sentence is reasonable."[20]

Courts are now able to look at a wider variety of factors when imposing a sentence that is at variance with the guidelines. In *Pepper v. U.S.*, the defendant's original sentence was set aside on appeal, and the court examined what the proper resentencing procedure should be under the advisory guidelines. *Pepper* held that a district court judge could consider post-sentencing rehabilitation as a factor in granting a downward variance from a guideline sentence, though it is not listed as a statutory factor (i.e. under 18 U.S.C. § 3553(a)).[21]

Notice requirements for departure remain the same under the advisory guidelines, but are different for variances. *Irizarry v. U.S.* held that district courts are not required to give advance notice of a variance to the parties before imposing a sentence range now that the guidelines are not mandatory.[22] However, courts are still required to give prior notice of a departure sentence based on grounds not previously identified in the presentence report or in a party's prehearing submission.[23]

3. Constitutional Requirements for Proof of Facts that Permit Upward Departure

In 2004, *Blakely v. Washington* held that any fact considered by a court that increases the penalty for a crime beyond the upper limit of the recommended range, under Washington's statute-based sentencing guidelines, must be submitted to a jury and proved beyond a reasonable doubt.[24] This case extrapolated from the rule announced in the 2000 *Apprendi v. New Jersey*[25] decision, which held that "other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" had to be proved to the jury beyond a reasonable doubt to comply with the due process requirements of the Sixth Amendment. However, *Blakely* did not examine this issue in the context of guidelines, such as those applied in federal courts, that were promulgated by a commission rather than enacted into statutory law as was done in Washington.

But one year later, in *U.S. v. Booker,*[26] the court held that for Sixth Amendment purposes there is no difference between statutory and non-statutory (commission-promulgated) guidelines, *provided*, as was true for the federal sentencing guidelines at the time, that the guidelines are mandatory and have the force and effect of law. Thus, as in *Blakely*, any fact that increased the recommended penalty under the mandatory federal guidelines ought to have been submitted to a jury and proved beyond a reasonable doubt.[27]

The final sections of the *Booker* decision considered what portions of the federal sentencing statute had to be excised to make the rest of the statute constitutionally valid. First, the court held that the provision that made the sentencing guidelines mandatory and binding on judges was invalid. A constitutional violation occurred when a judge *had to* increase the severity of a sentence based on facts that were not proved to a

[18] *Gall v. U.S.*, 552 U.S. 38, 47 (2007).
[19] *Rita v. U.S.*, 551 U.S. 338, 351 (2007).
[20] *Peugh v. U.S.*, 569 U.S. 530, 537 (2013).
[21] *U.S. v. Pepper*, 562 U.S. 476, 490–491 (2011). *But see Tapia v. U.S., text* at note 39 *infra*, holding that sentencing courts may not cite rehabilitation as a basis for imposing or lengthening a prison sentence.
[22] *Irizarry v. U.S.*, 553 U.S. 708, 714 (2008).
[23] *See* F.R.Crim.P. 32(h), codifying and extending *Burns v. United States*, 501 U.S. 129, 138-39 (1991).
[24] *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)).
[25] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[26] *U.S. v. Booker*, 543 U.S. 220 (2005).
[27] *Id*. at 233–235.

jury beyond a reasonable doubt. However, if a judge retained discretion in sentencing, this issue was "avoided entirely." Second, the court held that appeals courts should not be bound by some of the limitations on the scope of their review and could consider whether *any* sentence, whether conforming to the guidelines or not, was reasonable. By invalidating portions of the federal sentencing statute and rendering the guidelines advisory, the Supreme Court eliminated the constitutional infirmities that existed within the former sentencing scheme.[28]

4. Constitutional Requirements for Proof of Facts That Increase the Minimum Sentence

In 2013, in *Alleyne v. U.S.*, the court held that the requirements of jury trial and proof beyond reasonable doubt, under *Apprendi* and *Blakely*, *supra*, also apply to any fact that, if established, invokes or increases a mandatory minimum sentence.[29] This overruled *Harris v. U.S.*,[30] which had held that these procedural requirements only apply to facts that increase the highest allowable penalty. The court in *Alleyne* reasoned that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are akin to elements of the crime, and thus are subject to comparable standards of proof.[31] The court's reference to "facts that increase the prescribed range of penalties" would seem to apply not just to facts triggering a mandatory minimum statute, as in *Alleyne*, but also facts that raise the floor of the presumptive guidelines range; indeed, some lower courts have extended *Alleyne* in this manner.[32]

5. Other Important Sentencing Decisions

Other important federal sentencing decisions related to the guidelines include the following:

Legality of the U.S. Sentencing Commission. *Mistretta v. U.S.* (1989) held that the Sentencing Reform Act, which established the Sentencing Commission, did not violate the doctrine of separation of powers. The petitioners in *Mistretta* claimed that in granting sentencing authority to the Commission, Congress had impermissibly delegated too much legislative discretion to the judicial branch. However, the court held that this delegation was not inappropriate; nor was the active participation of federal judges, along with non-judges, on the Commission.[33]

Role of the U.S. Sentencing Commission. In *Braxton v. U.S.* (1991), the court held that one of the Commission's key roles is to eliminate conflicts over the statutory interpretation of the guidelines. This includes making whatever clarifying revisions to the guidelines "conflicting judicial decisions might suggest."[34]

Interpretation of the Guidelines. In *Stinson v. U.S.* (1993), the court clarified that commentary in the Guidelines that interprets or explains a guideline is authoritative unless it violates the Constitution or federal statute or is inconsistent with or a plainly erroneous reading of that guideline.[35] The case drew on *Williams v. U.S.* (1992), in which the court had previously stated that "where […] a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline."[36] While today the Guidelines are advisory, these decisions still stand for the idea that the guidelines and their commentary should be read and interpreted as a whole by sentencing judges.

Relevant Conduct. *Witte v. U.S.* (1995) held that, after a court has considered relevant uncharged conduct in determining a sentence within the legislatively authorized punishment range, it does not constitute

[28] *Id.* at 245–266.
[29] Alleyne v. U.S., 570 U.S. 99 (2013).
[30] *Harris v. U.S.*, 536 U.S. 545 (2002).
[31] *Alleyne*, 570 U.S. at 111-12.
[32] *See People v. Lockridge*, 870 N.W.2d 503 (Mich. 2015) (holding that *Alleyne* invalidates judicial finding of facts that raise the presumptive minimum sentence under the Michigan guidelines).
[33] *Mistretta v. U.S.*, 488 U.S. 361, 412 (1989).
[34] *Braxton v. U.S.*, 500 U.S. 344, 348 (1991).
[35] *Stinson v. U.S.*, 508 U.S. 36, 38 (1993).
[36] *Williams v. U.S.*, 503 U.S. 193, 201 (1992).

additional punishment for that conduct, within the meaning of the Double Jeopardy Clause, when the uncharged conduct is later made the subject of separate charges. The guidelines have "significant safeguards" to prevent criminal conduct that has already been considered in calculating one sentence from affecting the length or severity of a different sentence. Thus, Mr. Witte could be convicted of a federal marijuana charge and sentenced considering uncharged conduct (in this case, attempting to import cocaine) and later tried and convicted for conspiring and attempting to import cocaine.[37]

Departure Below Statutory Minimum. In *Melendez v. U.S.* (1996), the court held that a government motion for downward departure under the Guidelines cannot also serve as a motion to depart below the applicable statutory minimum sentence. Although the government's motion for departure below the guidelines range of 135 to 168 months was based on substantial assistance to the government, and such assistance could also be grounds for going below the statutory minimum of 120 months, the government must expressly request the court to sentence below that (lower) minimum.[38]

Sentencing and Rehabilitation. *Tapia v. U.S.* (2011) held that under the federal sentencing scheme, a court could not impose or lengthen a prison sentence based on the rationale that it would promote a defendant's rehabilitation. Under the guidelines statutes, courts must "recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation."[39]

Retroactive Effect of Changes to Guidelines. Penalty reductions never raise *ex post facto* concerns, so offenses committed prior to the lowering of a guidelines sentence but sentenced afterwards always benefit from the lower sentence under Guidelines Section 1B1.11 (discussed below). In *Dorsey v. U.S.* (2012) the court held that a similar rule applies to statutory penalty reductions – regardless of when the offense was committed, courts should apply the lower penalty to all cases sentenced after the statutory change; and where legislative intent is clear, the same rule will apply to cases sentenced after the statutory change but before the guidelines implementing that change have gone into effect.[40]

Ex Post Facto Limits on Sentencing Penalty Increases. *Peugh v. U.S.* (2013) held that a court cannot sentence a defendant pursuant to a more punitive guideline recommendation that became effective after the defendant committed the offense.[41] Although the guidelines are advisory, giving guidelines penalty increases retroactive effect would violate the constitutional prohibition against *ex post facto* laws. Guidelines Section 1B1.11 directs courts to apply the guidelines in effect on the date of sentencing unless that would violate the *ex post facto* clause -- which would be the case under *Peugh,* if the penalty was increased after the date the defendant committed the offense. However, where a defendant is convicted of two offenses, the first committed before and the other after a revised edition of the Guidelines Manual recommending a higher penalty becomes effective, the Guidelines provide that the revised edition of the Guidelines Manual is to be applied to both offenses.[42] This is because, under the guidelines sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction. The *ex post facto* clause is not implicated because the guidelines range applicable to the second offense (committed after the guideline amendment) will encompass any relevant conduct (including the prior offense) for that offense of conviction. This is known as the one-book rule.

Due Process Clause "Void for Vagueness" Challenges. In *Beckles v. U.S.* (2017), a defendant challenged his sentence under the residual clause of the career offender guidelines, enhancing penalties for offenders who have committed three or more "crime[s] of violence." In 2015, *Johnson v. U.S. had* held that identical statutory language in the residual clause of the Armed Career Criminal Act was void for vagueness.

[37] *Witte v. U.S.*, 515 U.S. 389, 401-06 (1995).
[38] *Melendez v. U.S.*, 518 U.S. 120, 124-26 (1996).
[39] *Tapia v. U.S.*, 564 U.S. 319, 326-332 (2011), citing 18 U.S.C. § 3582(a) (2011).
[40] *Dorsey v. U.S.*, 567 U.S. 260, 281-82 (2012).
[41] *Peugh v. U.S.,* 133 S.Ct. 2072 (2013).
[42] U.S. Sentencing Guidelines Manual § 1B1.11(b)(3) (2018).

However, *Beckles* held that because the guidelines do not have the force of law, they are not subject to vagueness challenges under the Due Process Clause.[43]

Rule 52(b) Plain Error Reviews by Appellate Courts for Guidelines Miscalculations. In *Rosales-Mireles v. United States*, the Supreme Court held that a Sentencing Guidelines miscalculation at sentencing automatically warrants a Rule 52(b) plain error review by the appeals court, even if the issue was not raised at trial, and even if the resulting sentence was still within the range of the correct Guidelines calculation.[44] Rule 52(b) of the Federal Rules of Criminal Procedure allows appeals courts to consider errors not raised at trial if they are plain and affect substantial rights. In *United States v. Olano*, the Supreme Court established four conditions that must be satisfied before an appeals court may exercise its discretion to correct an error under 52(b): 1) The error must not be intentionally relinquished or abandoned by the movant; 2) the error must be plain, clear, or obvious; 3) the error must have affected the defendant's substantial rights; 4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. The *Olano* Court specifically rejected a strict "miscarriage of justice" requirement to correct plain error under 52(b), which would have required the defendant to be actually innocent.[45] Likewise, the Supreme Court in *Rosales-Mirales* struck down the 5th Circuit's "shock the conscience" standard as unduly restrictive, as such a standard is typically employed in reviewing governmental Due Process violations, not in plain-error review under 52(b).

Adequacy of a Sentencing Judge's 18 U.S.C. § 3553(c) Explanation for Imposing a Sentence. In *Chavez-Meza v. United States*, the Supreme Court held that a sentencing judge does not need to provide a lengthy explanation for imposing a sentence within the Guidelines recommendation.[46] The defendant was initially sentenced to 135 months, with a 135-168 month range. After the Sentencing Commission lowered the relevant range to 108-135 months, the defendant's sentence was lowered to 114 months, not 108 like the defendant expected.[47] In respect to the brevity or length of the judge's explanation for imposing a particular Guidelines sentence, *Rita* leaves much to the judge's own professional judgement, so long as the 3553(a) factors are adequately considered to allow for meaningful appellate review.[48]

Reviewability of a Refusal to Grant a Downward Departure or a Downward Variance. In *United States v. Angeles-Moctezuma*, the 8th Circuit held that "A district court's decision to deny a downward departure is unreviewable unless the district court had an unconstitutional motive or erroneously thought that it was without authority to grant the departure".[49] Similarly, a refusal to grant a downward variance is subject to a reasonableness inquiry, using the abuse-of-discretion standard.[50]

[43] *Beckles v. U.S.*, 137 S. Ct. 886, 892 (2017) referencing *Johnson v. U.S.*, 135 S. Ct. 2551 (2015).
[44] *Rosales-Mirales v. United States*, 138 S. Ct. 1897, 1904-05 (2018),
[45] *United States v. Olano*, 507 U.S. 725, 733-35 (1993).
[46] *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1964 (2018) (referencing *Rita v. United States*, 551 U.S. 338, 357 (2007)).
[47] *Id*. at 1964-65.
[48] *Id*. at 1965-66 (referencing *Rita*, 551 U.S. at 356); *see also Gall*, 552 U.S at 50.
[49] *United States v. Angeles-Moctezuma*, 2019 U.S. App. LEXIS 18723, *7 (8th Cir. 2019) (quoting *United States v. Montgomery*, 525 F.3d 627, 629 (8th Cir. 2009).
[50] *Id*. at *8 (quoting *United States v. Gonzalez*, 573 F.3d 600, 607 (8th Cir. 2009).