

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 commission was established by statute in 1984,¹ and remains in existence to this day.²

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

The Commission consists of seven voting members appointed by the President with Senate approval, and two non-voting ex-officio members: the Attorney General or a designee, and the chair of the United States Parole Commission.³ At least three of the seven voting members must be federal judges, and no more than four may be members of the same political party. The President also designates the Commission Chair with Senate approval, and designates three Commission Vice Chairs of whom no more than two may be from the same party.⁴ Voting members are appointed for six-year terms, and may serve no more than two terms.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 located in the judicial branch.⁶

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

The Commission currently has a dedicated staff of approximately 100 divided into the offices of the Staff Director, General Counsel, Research and Data, Legislative and Public Affairs, Education and Sentencing Practice, and Administration. The Office of the Staff Director supervises and coordinates all agency functions. The director of each office outlined above reports to the Staff Director, who in turn reports to the Commission Chair.⁷

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

The purposes of the United States Sentencing Commission are to:

- (1) establish sentencing policies and practices for the Federal criminal justice system that—
 - (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
 - (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar

¹ Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, chap. II.

² See United States Sentencing Commission [hereinafter *USSC*], <http://www.ussc.gov/>.

³ 28 U. S. C. § 991(a) (2019). See also 18 U.S.C. § 3551, n.5 (2019) (although originally limited to a five-year term, the membership and term of the chair of the United States Parole Commission as a nonvoting ex officio member have been extended eight times, most recently in Pub.L. 113-47 § 2, (2013), which extended the chair's term to 31 years from the effective date of the Act).

⁴ 28 U. S. C. § 991(a) (2019).

⁵ 28 U. S. C. § 992(a), (b)(1)(A) (2019).

⁶ 28 U. S. C. § 991(a) (2019).

⁷ USSC, *Organization*, <http://www.ussc.gov/about/who-we-are/organization> (last visited June 21, 2019).

criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

- (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.⁸

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

The enabling statute requires the Commission, when drafting or revising the guidelines, to “take into account the nature and capacity of the penal, correctional, and other facilities and services available.”⁹ The Commission is further directed to “make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines” and is required to formulate the guidelines so as to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.”¹⁰ Accordingly, when the commission considers amendments to the guidelines, it considers the impact of these amendments on the federal prison population. In addition, the Commission is often asked by Congress to complete prison and sentencing impact assessments for proposed legislation.¹¹

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?

To support its mandate of conducting ongoing sentencing guidelines research, and as required by statute,¹² the commission extensively studies federal sentencing practices by means of detailed annual monitoring data sets covering all felons sentenced that year, as well as more specialized data sets. Much of this data is available to the public on the commission’s website, as well as from the [University of Michigan's Inter-University Consortium for Political and Social Research \(ICPSR\)](#).¹³ The Commission also makes its sentencing data and research available to the public in several other ways.¹⁴ Analyses of the data extracted from sentencing documents are reported in the *Annual Report* and the *Sourcebook of Federal Sentencing Statistics*, which are available both in print and on the website. In order to provide the timeliest information on national sentencing trends and practices, the Commission disseminates key aspects of this data on a quarterly basis, and provides trend analyses of the changes in federal sentencing practices over time. The Commission has continued to improve and expand its *Interactive Sourcebook of Federal Sentencing Statistics*, which allows users to create and customize tables and figures (for example: by circuit, district, or state).¹⁵ The Commission has also expanded its *Quick Facts* series, first introduced in FY 2013, which are designed to provide concise facts about a single area of federal crime in an easy-to-read, two-page format.¹⁶

⁸ 28 U.S.C. § 991.

⁹ 28 U.S.C. § 994(g) (2019).

¹⁰ *Id.*

¹¹ 18 U.S.C. § 4047 (2017). Added in 1994, this provision requires the submission of assessments of the prison bed-impacts of changes made to sentencing and other laws in the prior year, as well as expected impacts of legislation proposed by the Judicial or Executive branches.

¹² 28 U.S.C. §§ 995(a)(12) – (16) (2019).

¹³ See USSC, *Commission Datafiles*, available at <http://www.ussc.gov/research/datafiles/commission-datafiles> (last visited June 21, 2019).

¹⁴ See generally USSC, *Research*, available at <http://www.ussc.gov/research> (last visited June 21, 2019).

¹⁵ See USSC, *Annual Report 2018*, available at <https://www.ussc.gov/about/annual-report-2018> (last visited June 21, 2019); see USSC, *2018 Sourcebook of Federal Sentencing Statistics*, available at <https://www.ussc.gov/research/sourcebook-2018> (last visited June 21, 2019).

¹⁶ See USSC, *Quick Facts*, available at <https://www.ussc.gov/research/quick-facts> (last visited June 21, 2019).

2. THE GUIDELINES

Q. When were the guidelines first implemented?

The federal guidelines went into effect on November 1, 1987,¹⁷ but they were not applied by some courts until early 1989 when the U.S. Supreme Court considered and rejected a number of constitutional challenges to the guidelines.¹⁸

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

The Commission updates the Guidelines annually to account for new and amended crimes, desired policy changes, and any necessary technical changes.¹⁹

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

The Commission's enabling statute provided that the Commission was to submit its proposed guidelines to Congress by April 13, 1987, and that the guidelines would take effect on November 1st of that year unless rejected or modified by a new statute. The statute further provided that any proposed modifications to the guidelines must be submitted to Congress no later than May 1st of each year. Unless rejected or modified by Congress, the changes take effect when specified by the Commission, but no sooner than 180 days after submission and no later than November 1st of the year in which they were submitted.²⁰

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 all felonies and to Class A misdemeanors.²¹

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

The guidelines are primarily presented in a grid format; there is a single grid (referred to as the Sentencing Table) for all covered offenses that contains 43 severity levels.²²

Q. How is the presumptive sentence determined?

The rows on the sentencing table represent the severity levels of offenses; the columns represent offender criminal history categories. The presumptive sentence (sentence range) is determined by locating the cell on the table where the severity level of the offense and the offender's criminal history category intersect.²³

¹⁷ U.S. Sentencing Guidelines Manual § 1A1 (2018).

¹⁸ See *Mistretta v. U.S.*, 488 U.S. 361 (1989).

¹⁹ See, e.g., USSC, *Amendments to the Sentencing Guidelines*, April 30, 2018, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf (last visited June 21, 2019).

²⁰ Pub. L. No. 98-473, § 235 (1984); 28 U.S.C. § 994(p) (2019).

²¹ U.S. Sentencing Guidelines Manual § 1B1.9 (2018) (stating that the Guidelines exclude class B and C misdemeanors and infractions).

²² U.S. Sentencing Guidelines Manual § 5A ("Sentencing Table") (2018).

²³ U.S. Sentencing Guidelines Manual § 1B1.1 (2018).

The offense severity level is determined through a series of steps. First, the “base offense level” for each conviction offense is found in the applicable section of chapter two of the guidelines manual. Next, any applicable “specific offense characteristics” and other special rules provided or cross-referenced in chapter two are applied, to raise or lower the base offense level. Lastly, various further adjustments are made under generally-applicable rules found in chapter three of the manual (e.g., adjustments for the offender’s role in the offense, for multiple current offenses, and for offender acceptance of responsibility). Thus, offense-severity classification decisions are often affected by mitigating and aggravating facts related to the conviction offense or offenses that are separate from the elements of any of those offenses.²⁴ Moreover, unlike state guidelines systems, an offender’s offense severity level (and thus, his or her recommended sentence) can also be increased in light of aggravating facts that relate to current and/or prior offenses that did not result in conviction (because those charges were dismissed, acquitted, or never filed), provided two conditions are met: 1) the unconvicted acts involved quantifiable harms or losses similar to the conviction offense(s); and 2) those acts were part of the same course of conduct or common scheme or plan as the conviction offense(s).²⁵

Next the offender’s criminal history category must be determined. Points are given for various items including prior sentences for felony convictions, some prior misdemeanor convictions, some prior juvenile adjudications, and the offender’s custody status as the time of the offense. The sum total of these points determines the applicable criminal history category (I-VI).²⁶ Following that, the court must determine whether grounds exist to depart from the criminal history category – upward or downward if the category substantially under-represents or over-represents the seriousness of the defendant’s criminal history – and whether the offender qualifies as a career offender or armed career criminal.²⁷

Having identified the offense severity level and criminal history category, the appropriate cell on the sentencing table can be identified. Each cell contains a range of numbers representing the presumptive duration of custody sentences, in months; judges may pronounce a sentence within the applicable cell range without departing from the guidelines.²⁸ By statute, the maximum of the range may not exceed the minimum of that range by more than the greater of 25 percent or 6 months.²⁹

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 sentencing table is divided into four zones, which indicate whether probation, community confinement, or incarceration is available, as follows:³⁰

- In Zone A all sentences have ranges of zero to six months, and for most cases no period of incarceration is recommended (the sentence may consist solely of probation and/or a fine, but any custody term within the cell range is also permitted).

²⁴ U.S. Sentencing Guidelines Manual §§ 1B1.1 (“Application Instructions”), 1B1.3 (“Relevant Conduct (Factors that Determine the Guidelines Range)”).

²⁵ U.S. Sentencing Guidelines Manual § 1B1.3(a)(2) – (3) (referencing § 3D1.2, dealing with “Groups of Closely Related Counts”).

²⁶ U.S. Sentencing Guidelines Manual §§ 4A1.1 – .2.

²⁷ U.S. Sentencing Guidelines Manual §§ 4A1.3; 4B1.

²⁸ U.S. Sentencing Guidelines Manual § 5A.

²⁹ 28 U.S.C. § 994(b) (2019) (limiting the maximum width of table cell ranges: “the maximum of the range shall not exceed the minimum by more than the greater of 25% or six months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.”).

³⁰ U.S. Sentencing Guidelines Manual §§ 5A; 5B1.1; 5C1.1 (2018).

- In Zone B, where the lowest cell ranges are 1-7 months and the highest are 9-15 months, the sentence may consist entirely of incarceration, entirely of probation with community confinement or home detention, or a sentence of incarceration followed by supervised release with community or home confinement of at least one month.
- In Zone C, where cell ranges are either 10-16 or 12-18 months, the sentence may consist entirely of incarceration, or a mix of incarceration for at least half the minimum cell duration followed by supervised release with community or home confinement.
- In Zone D, where cell ranges start at 15-21 months and the most severe cells recommend life in prison, the entire sentence must consist of incarceration.

The pre-guidelines statutory authority to suspend execution or imposition of a custody sentence has been abolished under the guidelines -- courts may no longer grant probation by pronouncing a prison term and suspending its execution, or by suspending (i.e., deferring) imposition of sentence; instead, probation is recognized as a sentence in itself, not a condition of a suspended sentence.³¹ If a defendant violates probation conditions, they may face revocation of probation and imposition of any sentence that initially could have been imposed.³² The retention of such plenary sentencing authority following revocation of probation is functionally equivalent to suspended imposition of sentence; furthermore, there are no table cells or other categories of cases for which a prison term is definitively precluded by the guidelines or statutory law, even if the defendant has initially been given a non-prison sentence.³³

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

In three of the four zones on the table (Zones A, B, and C), judges have discretion to impose a sentence of incarceration, a community-based sentence, or, in Zones B and C, a combination of incarceration and a community-based sentence.³⁴

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

The guidelines are advisory, but judges are required to consider them along with traditional sentencing purposes and other statutory factors. The Supreme Court has held that the Guidelines are “the lodestone of sentencing,”³⁵ and that the Guidelines in effect at the time of the offense “anchor both the district court’s discretion and the appellate review process.”³⁶ Reasons must be stated for departing or varying from the recommended guidelines sentence, and all sentences are subject to appellate review applying a general standard of reasonableness.³⁷ On appellate review, courts of appeal may apply a presumption of reasonableness when reviewing a sentence imposed within the guideline sentencing range.³⁸

³¹ U.S. Sentencing Guidelines Manual § 5B intro. cmt.

³² See 18 U.S.C. § 3565 (2017).

³³ See generally U.S. Sentencing Guidelines Manual §§ 7B1.1-7B1.5.

³⁴ U.S. Sentencing Guidelines Manual §§ 5A, 5B1.1, 5C1.1 (2018).

³⁵ *Peugh v. U.S.*, 133 S.Ct. 2072, 2084 (2013). See also *Gall v. U.S.*, 552 U.S. 38, 48 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark”).

³⁶ *Peugh*, 133 S. Ct. at 2087.

³⁷ *U. S. v. Booker*, 543 U.S. 220, 260 (2005); 18 U.S.C. §§ 3553(a), (c); 3742(a) – (b) (2019).

³⁸ *Rita v. U.S.*, 551 U.S. 338, 347 (2007).

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

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

The court may depart from the recommended guidelines sentence when there exist aggravating or mitigating circumstances “of a kind, or to a degree, not adequately taken into consideration by the sentencing Commission in formulating the guidelines” that requires a departure sentence to advance the statutory sentencing goals and principles; a downward departure is also permitted upon motion of the Government stating that the defendant has provided substantial assistance to law enforcement.³⁹ In addition, because the guidelines were rendered advisory by the Supreme Court’s decision in *U.S. v. Booker*, judges may “vary” from the recommended guidelines sentence, based on the listed statutory sentencing goals and principles, even where departure would not be permitted under applicable guidelines rules.⁴⁰

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 contain two sets of rules that function to define permissible and prohibited departure factors. One set of rules deals with offender characteristics that may or may not be deemed relevant to sentencing; the other set of rules deals with allowable departure factors (most of which relate to characteristics of conviction offenses).⁴¹

Certain offender characteristics are designated as either never relevant in the determination of the sentence (e.g., race, lack of guidance as a youth); not ordinarily relevant (e.g., education, employment records); sometimes relevant (e.g., age, mental/emotional condition); or always relevant at least for some purposes (e.g., role in the offense compared to codefendants). In the guidelines sections dealing with departure factors, these factors are listed as justifying upward departure (e.g., death or other serious harms), justifying downward departure (e.g., victim provocation, coercion/duress), or not justifying any departure (e.g., drug or alcohol dependence).⁴² Additionally, a departure may also be permitted in regard to unusual aspects of the defendant’s criminal history.⁴³ Other departures are provided for throughout chapter two of the guidelines manual, dealing with specific offenses.⁴⁴ Unlike most state guidelines systems, an upward departure is expressly permitted based on conduct that is not related to any conviction offense (the conduct was never charged, or it related to charges that resulted in acquittal or that were dismissed).⁴⁵

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

The guidelines provide for a downward adjustment of two offense severity levels, or in some circumstances three levels, if a “defendant clearly demonstrates acceptance of responsibility for his offense.”⁴⁶ A guilty

³⁹ U.S. Sentencing Guidelines Manual §§ 5K1.1 (substantial assistance); 5K2.0 (general grounds for departure) (2018).

⁴⁰ *U.S. v. Booker*, 543 U.S. 220, 260-65 (2005) (remedy opinion of Justice Breyer); *Rita v. U.S.*, 551 U.S. 338, 355 (2007) (using the term “variance” to describe a non-guidelines sentence based on statutory goals and principles rather than guidelines departure rules); 18 U.S.C. § 3553(a) (2019) (listing “factors to be considered in imposing a sentence”).

⁴¹ U.S. Sentencing Guidelines Manual §§ 5H1.1–5H1.12 (offender characteristics) and 5K2.0 (grounds for departure) (2018).

⁴² U.S. Sentencing Guidelines Manual §§ 5H1.1–5H1.12.

⁴³ U.S. Sentencing Guidelines Manual § 4A1.3 (departure based on inadequacy of criminal history category).

⁴⁴ See U.S. Sentencing Guidelines Manual, “List of Departure Provisions” [this un-numbered appendix is located at the end of the Manual, after Appendix A and the Index to Guidelines Manual].

⁴⁵ U.S. Sentencing Guidelines Manual § 5K2.21.

⁴⁶ U.S. Sentencing Guidelines Manual § 3E1.1 (2018).

plea is common in such instances, but in “rare situations” a defendant pleading not guilty can qualify for the adjustment, for example, if he went to trial to assert and preserve for appeal a constitutional challenge to the criminal statute being charged or some other claim unrelated to factual guilt.⁴⁷ A government motion stating that the defendant has provided substantial assistance to law enforcement can support a downward departure from the recommended guidelines sentence. Such a Government motion also permits the court to impose a sentence below an otherwise applicable statutory mandatory minimum.⁴⁸

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

The guidelines generally do not limit the degree of durational (length-of-custody) departure, and the Supreme Court has seemed to reject any “rigid mathematical formula.”⁴⁹

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

Other than the prohibited grounds listed in the guidelines or recognized in case law, and mandatory-minimum-sentence statutes, there are no limits on the availability of dispositional departures from recommended executed-prison sentences.⁵⁰ (However, since executed-custody is required or an option in all four zones on the sentencing table, there are no cases in which a custody sentence would constitute an upward dispositional departure).

4. PRISON RELEASE DISCRETION

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

The Commission’s enabling statute abolished parole release discretion for all crimes.⁵¹ Offenders sentenced for crimes committed before the guidelines effective date, November 1, 1987, continue to be subject to release by the U.S. Parole Commission.⁵²

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

Federal sentences are determinate. Thus, offenders serve a prison term that cannot be changed by a parole board or other agency, but can be reduced through the award of good-conduct credits.⁵³

⁴⁷ *Id.* at Application Note 2.

⁴⁸ 18 U.S.C. § 3553(e) (2016) (sentence below mandatory minimum); U.S. Sentencing Guidelines Manual § 5K1.1 (2018) (substantial assistance to authorities). See also *Melendez v. U.S.*, 518 U.S. 120, 125-6, (1996) (holding that § 3553(e) requires a Government motion explicitly requesting or authorizing the court to sentence below the mandatory minimum; a motion for a guidelines downward departure, on grounds of substantial assistance, is not sufficient).

⁴⁹ *Gall v. United States*, 552 U.S. 38, 47 (2007).

⁵⁰ See Departures and Variances Primer (III)(c)(2) (2019) (listing prohibited grounds for departure).

⁵¹ U.S. Sentencing Guidelines Manual § 1A1.2 (2018).

⁵² See U.S. Parole Comm’n, *Organization, Mission and Functions Manual* (2016), <http://www.justice.gov/jmd/organization-mission-and-functions-manual-united-states-parole-commission> (last visited June 21, 2019).

⁵³ 18 U.S.C. § 3624(b) (2016) (good conduct credits).

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 shown on the guidelines grid, and the sentence pronounced by the judge either from the grid or by departure, represent the maximum time the offender will serve in prison if no good-conduct credits are earned. There is no parole release discretion for offenses sentenced under the guidelines.⁵⁴

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

As a general rule, when a prison term is imposed the judge decides whether the sentence will include a term of post-prison supervised release, and if so, of what length. Maximum periods of post-prison supervision (known as “supervised release” in the federal system) are usually one year, three years, or five years, depending on the severity of the crime of conviction, and are independent of the unserved prison term that results from the award of good conduct credit.⁵⁵ For some crimes, a specified period of supervised release is required.⁵⁶ If an offender violates the conditions of post-prison release and is revoked back to prison, the judge may impose a new period of supervised release to follow that prison term. The duration of the new supervision period may not exceed that authorized for the initial supervision period for the conviction offense, reduced by the duration of the prison term imposed on revocation.⁵⁷

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

Prisoners can earn good-conduct credits of up to 54 days per year.⁵⁸

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

Upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, a court may reduce the term of imprisonment if it finds “extraordinary and compelling” circumstances that warrant the reduction, or if the defendant is at least 70 years old and has served at least 30 years of a life sentence for certain repeat violent or drug crimes.⁵⁹ The court may also reduce a prison term, on motion of the Director or on its own motion, if subsequent to the defendant’s sentencing the Commission has lowered the guidelines range for that offense and the Commission has affirmatively made such change retroactive.⁶⁰

⁵⁴ U.S. Sentencing Guidelines Manual §1A1.2 (2018).

⁵⁵ 18 U.S.C. §§ 3583(a) – (b) (2019).

⁵⁶ U.S. Sentencing Guidelines Manual § 5D1.1 (2018).

⁵⁷ 18 U.S.C. § 3583(h) (2019).

⁵⁸ 18 U.S.C. § 3624(b) (2019). The First Step Act of 2018, 115 P.L. 391 § 102 (b)(1), amended 18 U.S.C. § 3624(b) to ensure that prisoners could earn good-conduct credits of up to 54 days per year of sentence, rather than the previous wording that reduced the amount to 47 days per year. See *Barber v. Thomas*, 560 U.S. 474 (2010).

⁵⁹ 18 U.S.C. § 3582(c)(1) (2019). The First Step Act of 2018, 115 P.L. 391 § 603(b)(1), amended 18 U.S.C. § 3624(b) to provide that such reductions can sometimes be made on motion of the defendant (a motion by the Director of the Bureau of Prisons is no longer essential).

⁶⁰ 18 U.S.C. § 3582(c)(2) (2019); U.S. Sentencing Guidelines Manual §1B1.10 (2016).

5. RELATIONSHIP TO CRIMINAL LAWS

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

The guidelines did not replace any previous statutory maximum sentences, but rather were designed to operate within those maxima; if the recommended sentence under the guidelines would exceed the applicable statutory maximum, the latter prevails.⁶¹ Subject to normal rules for upward departure or *Booker* variance, judges can impose a sentence all the way up to the statutory maximum.⁶²

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?

In drafting the guidelines, the Commission generally ties the guideline range to any applicable mandatory minimum, such that the applicable range for offenders in the lowest criminal history category who are convicted of crimes subject to that statute includes the mandatory minimum penalty. The Commission then extrapolates from those mandatory minimum penalties in establishing applicable guideline ranges for related crimes.⁶³ For example, in drafting the drug offense guidelines, the Commission set the severity level for specific quantities of controlled substances such that the applicable range is tied to the applicable mandatory minimum. The Commission then extrapolated from those mandatory minimum penalties in establishing guideline ranges for other related crimes. To the extent a calculated guideline range is lower than an applicable mandatory minimum sentence, the mandatory minimum will generally override the guidelines range so that the mandatory minimum becomes the applicable guideline range.⁶⁴

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

A Government motion stating that the defendant has provided substantial assistance to law enforcement permits the court to impose a sentence below a statutory mandatory minimum.⁶⁵ Additionally, the guidelines also incorporate a statutory “safety valve” provision with regard to certain drug offenses.⁶⁶ This provision implements 18 U.S.C. § 3553(f), which allows a judge to impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence if certain conditions are met. These conditions include: 1) the defendant does not have more than 4 criminal history points; 2) the defendant did not use violence or credible threats of violence or possess a firearm or dangerous weapon; 3) the offense did not result in death or serious bodily injury; 4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense; and 5) that the defendant has truthfully provided the Government all information and evidence in the defendant’s possession.

⁶¹ U.S. Sentencing Guidelines Manual § 5G1.1 (2018).

⁶² 28 U.S.C. § 994(h) (2019).

⁶³ See Michael Tonry, *Sentencing Matters* 78–79, 96–98 (Oxford University Press 1996).

⁶⁴ U.S. Sentencing Guidelines Manual § 5G1.1 (2018).

⁶⁵ 18 U.S.C. § 3553(e) (2017); U.S. Sentencing Guidelines Manual § 5K1.1 (2018).

⁶⁶ 18 U.S.C. § 3553(f); See also U.S. Sentencing Guideline Manual § 5C1.2. (although 5C1.2 is based on this statute, the statutory text, updated by the First Step Act of 2018, allows this exception to apply to defendants with no more than four criminal history points, not just one, so 5C1.2 is effectively superseded by the First Step Act of 2018).

6. CRIMINAL HISTORY SCORING

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

The major components of the criminal history score are countable prior adult convictions and juvenile adjudications, as well as custody status at the time the current offense was committed. Additional points are also provided for prior violent crimes that would otherwise not be counted under generally-applicable rules.⁶⁷ Prior convictions and adjudications are weighted according to the sentence imposed for that offense.⁶⁸

The guidelines also include certain criminal history overrides. If the defendant qualifies as a career offender, this can raise his or her offense severity level, and always places the offender in the highest criminal history category (category VI).⁶⁹ In addition, if the defendant committed the current offense “as part of a pattern of criminal conduct engaged in as a livelihood,” the offense severity level cannot be less than 13 (or 11, if the adjustment for offender acceptance of responsibility applies).⁷⁰ Unlike most state guidelines systems, federal judges are given express authority to depart upward or downward based on inadequacy of the offender’s criminal history category.⁷¹

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?

The “decay” or washout rules are as follows: 1) an adult conviction resulting in a sentence of more than one year and one month is no longer counted if more than fifteen years have elapsed from the date the prior sentence was imposed until the date of commencement of the current offense, but if incarceration resulted from that sentence (including custody imposed upon revocation of probation or post-prison release) the period begins to run upon final release from custody (this rule also applies to juveniles prosecuted as adults); 2) a prior conviction resulting in a sentence of one year and one month or less is no longer counted if more than ten years have elapsed from the date the prior sentence was imposed until the date of commencement of the current offense; 3) a juvenile adjudication or adult conviction for a crime committed prior to age eighteen, resulting in a sentence of no more than one year and one month, is no longer counted if more than five years have elapsed from the date the prior sentence was imposed until the date of commencement of the current offense, but if incarceration of sixty days or more resulted from that offense, the period begins to run upon final release from custody.⁷²

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)?

In addition to the decay rules noted above, the guidelines provide for some additional limitations in the calculation of criminal history. The “single sentence rule” provides that when a defendant’s criminal history includes two or more prior sentences that meet certain criteria, those prior sentences are counted as a “single sentence” rather than separately.⁷³ Generally, this operates to reduce the cumulative impact of prior sentences in determining a defendant’s criminal history score. Additionally, the guidelines place limitations on the counting of certain offenses in the calculation of criminal history. The guidelines contain both a list

⁶⁷ U.S. Sentencing Guidelines Manual §§ 4A1.1 (general rules), 4A1.2(d) (offenses committed prior to age 18) (2018).

⁶⁸ U.S. Sentencing Guidelines Manual § 4A1.1.

⁶⁹ U.S. Sentencing Guidelines Manual § 4B1.1.

⁷⁰ U.S. Sentencing Guidelines Manual § 4B1.3.

⁷¹ U.S. Sentencing Guidelines Manual § 4A1.3.

⁷² U.S. Sentencing Guidelines Manual §§ 4A1.2(d) – (e) (2018).

⁷³ U.S. Sentencing Guidelines Manual §§ 4A1.2(a)(2),

of offenses that are never counted, and a list of offenses that are only counted if they resulted in probation of more than one year or imprisonment for more than thirty days, or if the prior offense was similar to the instant offense.⁷⁴

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)?

Unless consecutive sentencing is specifically required under applicable statutes, the general rule is that multiple current sentences run concurrently except to the extent that at least partially- consecutive sentencing is required to authorize the total sentence imposed pursuant to guidelines rules or by departure or *Booker* variance. A single offense severity level is derived, taking into account all current offenses and applying a formula that can raise the offender's offense severity by up to five levels above the level that would apply to the most serious of those crimes. In some cases that formula will yield a total sentence greater than the highest statutory maximum for any of those crimes; in that case, consecutive sentencing of one or more counts is used to authorize the total sentence.⁷⁵

When a defendant is subject to an undischarged term of imprisonment or anticipated state term of imprisonment, the guidelines provide for the use of consecutive sentencing. In the case where a defendant commits the instant offense while serving a term of imprisonment or after sentencing but before beginning to serve that imprisonment, the sentence for the instant offense shall be imposed consecutively to the undischarged term of imprisonment. If the offense conduct for the undischarged term of imprisonment is relevant conduct to the instant offense, the Court may impose a sentence to run concurrently with the undischarged term of imprisonment.⁷⁶

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

Criminal history is only counted once even when multiple current offenses are sentenced consecutively. A single offense severity level is derived combining all such offenses, after which the criminal history category is computed; consecutive sentencing is then only used when required and as dictated by statute, or when necessary to authorize the total sentence where the latter exceeds the highest statutory maximum for any of the current offenses.⁷⁷

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

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

The Commission's enabling statute provides that the defendant and the Government may appeal a sentence on the grounds that it was imposed in violation of law, was imposed because of an incorrect application of the sentencing guidelines, or is more severe (defense appeals) or less severe (Government appeals) than the recommended sentence under the guidelines.⁷⁸ The statute also provides several

⁷⁴ U.S. Sentencing Guidelines Manual §§ 4A1.2(c).

⁷⁵ See U.S. Sentencing Guidelines Manual § 3D (sentencing of multiple counts); § 5G1.2 (concurrent and consecutive sentencing) (2018).

⁷⁶ U.S. Sentencing Guidelines Manual § 5G1.3.

⁷⁷ U.S. Sentencing Guidelines Manual, § 3D); § 5G1.2 (concurrent and consecutive sentencing) (2018).

⁷⁸ 18 U.S.C. §§ 3742(a) – (b) (2019).

standards of review for various aspects of a trial court's decision, but in *Booker* the Supreme Court severed and struck down that section of the statute, in order to uphold the constitutionality of the remaining sections, and substituted an overall appellate review standard of reasonableness.⁷⁹ Prior to *Booker*, defense and Government appeals had generated a substantial body of interpretive case law, clarifying and further developing many important issues of guidelines interpretation and policy. That case law has continued to grow, albeit at a slower pace, since *Booker*.⁸⁰

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

Judges are required to state in court at the time of sentencing the reasons for the particular sentence imposed.⁸¹ If the sentence is within a sentencing range that exceeds 24 months the judge must state the reason for the choice of the particular sentence; if the sentence departs from the recommended range in degree or type of sentence, the court must state "specific reasons" for the departure. The Court must record its reasons on a "Statement of Reasons" form submitted to the Probation System, the Sentencing Commission, and if the sentence includes imprisonment, the Bureau of Prisons.⁸² Pursuant to a Memorandum of Understanding with the Administrative Office of the Courts, judge-specific departure rates are not published by the Commission, but at least one federal district court has made judge-specific sentencing data publicly available for cases sentenced in that district.⁸³

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

In addition to deviations from the guidelines applying guidelines departure rules, judges may enter a "variance" from the recommended guidelines sentence under the Supreme Court's decision in *Booker*, holding that the guidelines have only "advisory" force.⁸⁴

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

There are no deviations from the guidelines that require especially strong justification. However, a "variance" from the recommended guidelines sentence under the Supreme Court's decision in *Booker* need only be justified by reference to the sentencing purposes and other factors listed in the guidelines enabling statute.⁸⁵ In *Gall v. U.S.*, the Court held that after determining a sentencing court's decision was procedurally sound, courts of appeal should then look to the substantive reasonableness of the sentence. Moreover, "When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness."⁸⁶ The court went on to conclude "[the reviewing court] may consider the extent of the deviation, but must give

⁷⁹ *U. S. v. Booker*, 543 U.S. 220, 260-65 (2005) (remedy opinion of Justice Breyer, invalidating the statutory section containing review standards, 18 U.S.C. § 3742(e), and substituting a reasonableness standard designed to permit some degree of appellate review while rendering the guidelines sufficiently "advisory" [not legally binding] to be exempt from the constitutional requirements of the court's earlier decision in *Blakely v. Washington*, 542 U.S. 296 (2004)).

⁸⁰ See Federal guidelines case law summary in this Repository.

⁸¹ 18 U.S.C. § 3553(c) (2019).

⁸² *Id.*

⁸³ See Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 Stan. L. Rev. 1, 21-23 (2010).

⁸⁴ *Booker*, 543 U.S. at 245, 257. See also *Rita v. United States*, 551 U.S. 338, 355 (2007), using the term "variance" to describe post-*Booker* deviations from the guidelines that need not conform to departure rules.

⁸⁵ *Booker*, 543 U.S. at 257, referring to the enabling statute provision codified in 18 U.S.C. §3553(a); *Rita*, 551 U.S. at 355.

⁸⁶ *Gall v. U.S.*, 552 U.S. 38, 51 (2007).

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due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."⁸⁷

⁸⁷ *Id.*