

Federal Sentencing: The Basics

UNITED STATES SENTENCING COMMISSION



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November 2018

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I. Introduction

This paper provides an overview of the federal sentencing system. For historical context, it first briefly discusses the evolution of federal sentencing during the past four decades, including the landmark passage of the Sentencing Reform Act of 1984 (SRA),¹ in which Congress established a new federal sentencing system based primarily on sentencing guidelines, as well as key Supreme Court decisions concerning the guidelines. It then describes the nature of federal sentences today and the process by which such sentences are imposed. The final parts of this paper address appellate review of sentences; the revocation of offenders' terms of probation and supervised release; the process whereby the United States Sentencing Commission (the Commission) amends the guidelines; and the Commission's collection and analysis of sentencing data.

II. Evolution of Federal Sentencing Since The 1980s

Before the federal sentencing guidelines went into effect on November 1, 1987, federal judges imposed “indeterminate” sentences with virtually unlimited discretion within broad statutory ranges of punishment, and the United States Parole Commission would thereafter decide when offenders were actually released from prison on parole.² The Supreme Court has recognized that “the broad discretion of sentencing courts and parole [officials] had led to significant sentencing disparities among similarly situated offenders.”³ As found by members of Congress who enacted the SRA: “[E]ach judge [was] left to apply his own notions of the purposes of sentencing. . . . As a result, every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”⁴

In response to both concern regarding sentencing disparities and also a desire to promote transparency and proportionality in sentencing, Congress created the United States Sentencing Commission, a bipartisan expert agency located in the judicial branch.⁵ The Commission is composed of up to seven voting members, including a chair, who are nominated by the President and must be confirmed by the Senate. No more than four Commissioners can be from the same political party, and at least three Commissioners must be federal judges.⁶

The SRA directs the Commission to establish sentencing policies and practices in two primary ways: (1) by promulgating (and regularly amending) the federal sentencing guidelines; and, (2) by issuing reports to Congress that recommend changes in federal legislation related to sentencing. The SRA also directs the Commission to establish a data collection and research program for the purpose of serving as “a clearinghouse and information center” concerning sentencing-related issues and to establish a training branch to provide education about federal sentencing practices to federal judges, prosecutors, defense counsel, and probation officers.⁷

The Commission has a staff of approximately 100 attorneys, social scientists, and other professionals with expertise in criminal justice and sentencing, led by the Commission’s Staff Director. The staff’s organization reflects the various statutory functions in the SRA and includes, among others, the Offices of General Counsel (OGC), Research and Data (ORD), Education and Sentencing Practice (OESP), and Legislative and Public Affairs (OLPA).

The SRA and contemporaneous federal sentencing legislation created a fundamentally different sentencing system from the prior system, with the guidelines being the central feature and with parole no longer available for offenders convicted of offenses committed on or after November 1, 1987.⁸ Congress specifically directed the Commission to create guidelines that increased existing penalties for “many” types of cases, such as “serious” white-collar offenses and violent offenses.⁹ Before the initial set of guidelines was promulgated, Congress also enacted statutes creating mandatory minimum penalties for several commonly prosecuted drug-trafficking and firearms offenses¹⁰ and prohibiting probation for certain offenders.¹¹

With respect to the sentencing process itself, the SRA (in 18 U.S.C. § 3553(a)) sets forth seven factors that a sentencing court must consider:

Seven Factors to be Considered at Sentencing

- (1) *the nature and circumstances of the offense and the history and characteristics of the defendant;*
- (2) *the need for the sentence imposed to reflect the four primary purposes of sentencing, i.e., retribution, deterrence, incapacitation, and rehabilitation;*
- (3) *the kinds of sentences available (e.g., whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute);*
- (4) *the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines;*
- (5) *any relevant “policy statements” promulgated by the Commission;¹²*
- (6) *the need to avoid unwarranted sentencing 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.¹³*

Significantly, two of the seven factors in section 3553(a) are the guidelines and the policy statements promulgated by the Commission, and the remaining five reflect factors that the Commission itself considers in promulgating the guidelines and policy statements.¹⁴ As the Supreme Court has recognized, “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”¹⁵

The SRA specifically directed the Commission to do three things in drafting guidelines that significantly narrowed the degree of sentencing discretion previously possessed by judges: (1) create a “detailed set of sentencing guidelines” that addresses “all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results”;¹⁶ (2) prohibit or limit consideration of several personal characteristics of defendants regarding sentencing;¹⁷ and (3) significantly limit the breadth of the individual sentencing ranges within the guidelines’ sentencing table such that “the maximum of the range . . . shall not exceed the minimum of the range by more than the greater of 25 percent or six months” (commonly referred to as the “25 percent rule”).¹⁸ These limitations were created for the primary purpose of providing “certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct”¹⁹

In the SRA as enacted, courts were required to sentence defendants within the applicable guideline range unless either the Commission had created a permissible basis for a “departure” from the range or there existed “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission

in formulating the guidelines that should result in a sentence” outside of the applicable range.²⁰ Departures from the range were limited in order to reflect Congress’s desire for general uniformity in sentencing of similarly situated offenders, without consideration of several offender characteristics deemed irrelevant to the sentencing decision, including “socio-economic status.”²¹

In 1987, the original Commission responded to Congress’s directives in the SRA with the first *Guidelines Manual* containing a detailed set of guidelines and policy statements that included a sentencing table (discussed *infra* in Part V.B.5) with much narrower sentencing ranges than the larger statutory sentencing ranges governing federal crimes.²² For instance, in a bank robbery case in which the indictment does not allege that the defendant used a dangerous weapon, the statutory range of punishment is zero to 20 years, while a typical guideline range in such a case is much narrower (*e.g.*, 78-97 months).²³

In 2005, in *United States v. Booker*,²⁴ the Supreme Court declared that the existing guideline system violated the Constitution by permitting judges to find facts that raised the guideline range by a preponderance of the evidence (as opposed to juries making such findings beyond a reasonable doubt). The Court in *Booker* remedied the constitutional defect by striking the provisions of the SRA that made the guidelines “mandatory;” the result was a judicially modified guideline system that the Court described as “effectively advisory.”²⁵ After *Booker*, courts use a three-step process—discussed below in Part IV.B.—in which they properly calculate and consider the guidelines as well as any relevant policy statements, along with the other five statutory factors in 18 U.S.C. § 3553(a) (set forth above), in deciding what sentence to impose within the broader statutory range of punishment.²⁶

The Court repeatedly has stressed that the advisory guidelines remain the “starting point and the initial benchmark” in the federal sentencing process and, moreover, “district courts must . . . remain cognizant of them throughout the sentencing process.”²⁷ As the Court has stated, “[t]hese requirements mean that in the usual sentencing . . . the judge will . . . impose a sentence within [the applicable] guidelines range,” as such range is “the Federal Government’s authoritative view of the appropriate sentence for specific crimes.”²⁸ “The *Booker* remedy, while not the system Congress enacted [in 1984], was designed to continue to move sentencing in Congress’s preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”²⁹

Consistent with the Court’s description of the role of the guidelines after *Booker*, the guidelines have proved to be “the lodestone of sentencing” in federal court.³⁰ Sentencing data since 2005 show that, although the “within-range” rate of sentences has decreased, it has remained steady, at around 50 percent of cases, in recent years.³¹ It is also notable that, of those cases in which below-range sentences are imposed, around 40 percent of them are the result of grounds for downward departure specifically recognized by the *Guidelines Manual*, including for defendants’ “substantial assistance to the authorities” or guilty pleas pursuant to an “Early Disposition” Program (departures discussed *infra* in

Part V.D.).³² Moreover, the average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.³³

According to a 2014 survey of federal district judges, most judges believed that the guidelines generally increased certainty and fairness in meeting the purposes of punishment and reduced unwarranted sentencing disparities. A majority of judges also favored the current guideline system over alternative systems.³⁴

By 2018, over 1.8 million defendants had been sentenced under the guidelines.³⁵ There also have been tens of thousands of federal appeals involving the guidelines and nearly three dozen Supreme Court decisions concerning the guidelines. It is no exaggeration to say that the guidelines are a central feature of the federal criminal justice system.

III. Overview of the Federal Sentencing Process

The federal sentencing process typically begins well before the formal imposition of a sentence. It involves a lengthy adversarial process that revolves around the presentence report (PSR), which includes a proposed application of the sentencing guidelines. At the sentencing hearing, the court must resolve any objections to the PSR and also engage in the “*Booker* three-step process” in accordance with 18 U.S.C. § 3553.

A. Guilty Pleas and Plea Bargains

For the overwhelming majority of federal defendants, the sentencing process actually begins before the formal sentencing phase of the case. In recent years, 97 percent of federal defendants convicted of a felony or Class A misdemeanor offense are adjudicated guilty based on a guilty plea rather than on a verdict at a trial.³⁶ As a result, in a typical case involving a guilty plea, some but not all of the facts relevant to sentencing are established at the guilty plea hearing. Although a “factual basis” for the specific offense or offenses to which the defendant pleads guilty is provided to the court,³⁷ a more complete recitation of the relevant sentencing facts usually is contained in a subsequent PSR (discussed *infra* in Part III.C.).

At the guilty plea hearing, the court must advise the defendant of not only the statutory range of punishment but also “the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).”³⁸ Many defendants who plead guilty do so as the result of plea agreement with the prosecution, and some plea agreements contain the parties’ agreement about the application of the sentencing guidelines in the defendant’s case.³⁹

Unlike civil cases, where district judges may participate in settlement discussions, a judge in a federal criminal case “must not participate in [plea bargain] discussions” between the parties, although the “parties must disclose the plea agreement in open court when the plea is offered”⁴⁰ The court must decide whether to accept or reject the

proposed plea agreement, including whether to be bound by any plea agreement pursuant to Rule 11(c)(1)(C) that specifies a particular sentence. To the extent that a plea agreement contains “stipulations relevant to sentencing,” such stipulations must not be misleading and instead must “set forth the relevant facts and circumstances of the actual offense conduct.”⁴¹ The Commission “recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report,” which typically is prepared *after* the guilty plea hearing and which often will provide a more fulsome recitation of the facts relevant to the sentencing guidelines calculation and the other § 3553(a) factors.⁴²

B. Presentence Interview

After a defendant is convicted, whether by way of a guilty plea or a verdict at trial, a federal probation officer typically conducts a presentence interview of the defendant. At the presentence interview, the probation officer may ask questions about a wide variety of matters concerning the defendant’s offense or offenses of conviction and related uncharged criminal conduct, criminal history, personal history (including family history and substance abuse history), financial circumstances, and numerous other issues potentially related to the court’s sentencing decision.⁴³

Counsel for the defendant must be given notice of and the opportunity to attend the presentence interview.⁴⁴ A defendant may invoke his or her constitutional right to remain silent during the interview,⁴⁵ although failure to provide truthful information about the offense or offenses of conviction may result in denial of credit for “acceptance of responsibility”⁴⁶ at sentencing⁴⁷ (an issue discussed *infra* in Part V.B.3.).

C. Presentence Report and Objections

After conducting the presentence interview as well as an independent investigation of the offense and the defendant’s background, the probation officer prepares a PSR.⁴⁸ The PSR contains not only information about the offense and offender but also the statutory range of punishment and a calculation of the relevant sentencing guidelines (with a corresponding guideline sentencing range), as well as any bases that may exist for imposing a sentence outside of the applicable range.⁴⁹ The defense and prosecution must be provided a copy of the PSR at least 35 days before sentencing and must submit any objections (factual or legal in nature) within 14 days and otherwise may respond to the PSR (typically in the form of a sentencing memorandum).⁵⁰ The PSR is a confidential document that may not be disclosed to the public and must be filed under seal.⁵¹ Together with a PSR, a probation officer also submits to the court a confidential sentencing recommendation (which, unless the court wishes to do so, need not be disclosed to the parties).⁵²

The Federal Bureau of Prisons (BOP) also uses the PSR, in determining the offender’s “classification as an inmate . . . , choosing an appropriate treatment program, [and] deciding eligibility for various programs.”⁵³ Additionally, the PSR is used to inform the conditions and methods of supervision of an offender on probation or supervised release.⁵⁴

D. Sentencing Hearing

Although not as formal as trial proceedings, federal sentencing hearings are adversarial proceedings governed by procedural rules contained primarily in Rule 32 of the Federal Rules of Criminal Procedure and Chapter Six of the *Guidelines Manual*. A district court must allow the defendant and counsel for both parties—and, in appropriate cases, victims⁵⁵—to provide input before a sentence is imposed.⁵⁶ Furthermore, at the court’s discretion, it may allow the parties to call witnesses and present evidence about disputed facts or other matters (*e.g.*, mitigating or aggravating factors).⁵⁷

If a court is contemplating “departing” from the applicable guideline range, sufficient presentence notice to the parties is required (whether from the court, in the PSR, or in pleadings). However, such specific presentence notice is not required if the court “varies,” rather than “departs,” from the applicable range based on information contained in the PSR or otherwise known to the parties.⁵⁸ The difference between a “departure” and a “variance” is discussed in Part V.D. below.

Neither the Federal Rules of Evidence⁵⁹ nor constitutional provisions related to evidentiary matters (*e.g.*, the Confrontation Clause of the Sixth Amendment) apply at sentencing.⁶⁰ Therefore, the court may consider hearsay and other types of information that would not be admissible during a trial.⁶¹ However, the Commission has stated that information considered by a court at sentencing must have “sufficient indicia of reliability to support its probable accuracy.”⁶² Under Federal Rule of Criminal Procedure 32, the court “must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.”⁶³ In resolving factual disputes, the court ordinarily applies the preponderance of the evidence standard.⁶⁴

After the court orally pronounces sentence, the court must complete two documents—the “Judgment in a Criminal Case” and the “Statement of Reasons” (SOR) (both of which are contained in AO Form 245B)—that memorialize what the judge orally pronounced in court. The judgment specifies the sentence (the term of probation or imprisonment, any term of supervision release following imprisonment and the conditions thereof, and any financial penalties). The judgment is entered into the record as a publicly accessible document. The SOR, which in the vast majority of districts is a sealed part of the record and thus is not publicly accessible, provides information about whether the court’s sentence was within or outside of the applicable guideline range and also provides the specific reasons for a sentence imposed outside of that range (including whether the defendant provided substantial assistance to the prosecution in the investigation or prosecution of another person).⁶⁵

At the conclusion of the sentencing hearing, the court must advise the defendant of his right to appeal, including the right to proceed *in forma pauperis* on appeal and the right to appointed appellate counsel in the event the defendant is indigent.⁶⁶ A defendant

may waive the right to appeal as part of a voluntary plea agreement, which will generally be enforced on appeal (resulting in a dismissal of the appeal).⁶⁷ Appellate review will be discussed in Part VI below.

Within 30 days of the entry of the written judgment in the record, the court must submit copies of the judgment and SOR, along with the PSR, the charging document, and any plea agreement, to the Sentencing Commission (in furtherance of the Commission’s data collection and analysis duties).⁶⁸ In most districts, the chief district judge has delegated that responsibility to the United States Probation Office.

IV. The Nature of A Federal Sentence

What follows is a discussion of the nature of a federal sentence in felony and Class A misdemeanor cases⁶⁹—first with respect to the statutory framework governing sentencing and then with respect to the guidelines framework.

A. Types of Sentences Available by Statute

1. Probation or Prison

There are a variety of components of a federal sentence, one or more of which apply in every case. The primary component—some form of deprivation of liberty, either probation or incarceration—is imposed in over 99 percent of cases.⁷⁰ Where probation is authorized, the maximum term allowable is five years and, in the case of a felony offense, a minimum one-year term is required.⁷¹ Various conditions of probation exist, including certain “mandatory” conditions (*e.g.*, a defendant may not illegally possess a controlled substance) and a long list of potential “discretionary” conditions, which must be “reasonably related” to the nature of the offense, the defendant’s history and characteristics, or the relevant purposes of punishment.⁷²

The majority of federal penal statutes do not require a term of imprisonment and, instead, authorize either a term of probation or a term of imprisonment. There are two exceptions: (1) penal statutes carrying a mandatory minimum term of imprisonment⁷³ (unless one of two exceptions applies—a “substantial assistance” departure or application of the “safety valve”—which will be discussed in Part IV.A.2. below); and (2) penal statutes expressly prohibiting probation, even though they do not require imposition of a particular term of imprisonment.⁷⁴ Federal penal statutes that provide for potential terms of imprisonment are classified according to the maximum term available—ranging from Class A felonies (with a maximum punishment of life imprisonment) to Class E felonies (with maximum terms in excess of one year of imprisonment and not more than five years of imprisonment), and Class A misdemeanors (with a maximum of one year of imprisonment) to Class C misdemeanors (with a maximum of 30 days of imprisonment).⁷⁵

Although the Sentencing Reform Act of 1984 prospectively abolished parole, federal prisoners may earn “good-time credit,” which can reduce an offender’s term of imprisonment by up to 54 days for each year the offender has engaged in appropriate behavior in federal prison.⁷⁶ In order to be eligible for such credit, an offender must receive a prison sentence in excess of 12 months.⁷⁷ For that reason, it is not uncommon for courts impose a prison sentence of 12 months and one day (which, with good-time credit, will result in an actual term served of a little more than ten months).⁷⁸

In addition to allowing early release based on good-time credit, the BOP also may allow offenders (other than deportable aliens and certain other classes of offenders) to serve the final portion of their sentences—up to 12 months—in a halfway house and/or in home detention (with a maximum period of six of the 12 months, or ten percent of the offender’s sentence, whichever is less, in home detention).⁷⁹ Eligible non-violent offenders with substance abuse histories also may have their prison sentences reduced by up to one year (depending on the length of their sentences) if they successfully complete a 500-hour residential drug abuse program (RDAP).⁸⁰ Finally, the Director of the Bureau of Prisons is authorized to request the sentencing court to release a prisoner before the end of his or her term of imprisonment in limited situations related to the prisoner’s advanced age, terminal illness, or other “extraordinary and compelling” circumstances.⁸¹

2. Mandatory Minimum Sentences and Relief from Them

Approximately one-fifth of all federal defendants are convicted of an offense that carries a mandatory minimum prison sentence.⁸² Such offenses include drug-trafficking crimes involving certain types and quantities of drugs, the use of a firearm during a crime of violence or drug-trafficking offense, and a felon’s illegal possession of a firearm after having been convicted of three violent felonies or serious drug-trafficking offenses.⁸³ In creating sentencing guidelines applicable to such offenses, the Commission accounted for congressionally-mandated minimum penalties in formulating corresponding sentencing guideline ranges.⁸⁴

There are two ways that a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum: (1) if the prosecution files a motion⁸⁵ based on the defendant’s “substantial assistance” to the prosecution in the investigation or prosecution of another person, pursuant to 18 U.S.C. § 3553(e); and (2) in certain drug-trafficking cases, if the defendant qualifies for the statutory “safety valve” contained in 18 U.S.C. § 3553(f). Unlike a substantial assistance departure—which applies to all types of federal offenses carrying a mandatory minimum penalty—the safety valve statute only applies in cases in which a defendant faces a mandatory minimum penalty after being convicted of certain types of drug-trafficking offenses. Section 3553(f) contains the five criteria governing a court’s decision whether a defendant qualifies for the safety valve; it typically applies only to lower-level, non-violent drug offenders.⁸⁶

In addition to the statutory safety valve, the guidelines contain a related but separate safety valve provision, which requires a court to reduce an eligible drug-trafficking

offender's guidelines offense level by two levels (assuming the defendant satisfies the same five criteria).⁸⁷ Note that, unlike the statutory safety valve, the guidelines safety valve applies even if a defendant has not been convicted one of the drug-trafficking offenses specified in section 3553(f) that carries a mandatory minimum.⁸⁸

3. Financial Penalties

Federal law provides for three primary types of financial penalties—fines, restitution, and special assessments—which can be imposed in addition to imprisonment or probation.⁸⁹ In cases in which a statute does not require imprisonment, a fine may be imposed as a stand-alone sentence.⁹⁰

Unless a particular penal statute provides for a specific maximum fine, the maximum amount depends on the class of felony or misdemeanor in the count(s) of conviction.⁹¹ Restitution in a criminal case is different from restitution in a civil case. In a criminal case, restitution refers to compensatory damages for a victim's losses, while restitution in a civil case seeks to disgorge a defendant's unjust enrichment.⁹² A special assessment is a standard fee assessed for each count of conviction (e.g., \$100 per felony count and \$50 per Class A misdemeanor count).⁹³ In certain cases, criminal restitution, where applicable, is mandatory, as is the special assessment.⁹⁴ Upon motion of the prosecution, however, the court may remit a fine or special assessment.⁹⁵

4. Supervised Release

As noted, a major change brought about by the SRA was the prospective abolition of parole in the federal system. Defendants convicted of an offense committed on or after November 1, 1987, are required to serve their federal prison sentences without early release on parole.⁹⁶ In the place of parole, Congress created supervised release as a form of "post-confinement monitoring."⁹⁷ However, unlike parole—which was substituted for a portion of the term of imprisonment imposed by the court—a supervised release term is served *in addition to* the term of imprisonment.⁹⁸ Congress did not create supervised release as a form of punishment and, instead, primarily intended it to protect the public and "facilitate the reintegration of the defendant into the community."⁹⁹ With certain statutory exceptions, which require terms of supervised release,¹⁰⁰ courts have "the freedom to provide . . . supervision for those, and only those, who need[] it" upon release from prison.¹⁰¹ Like terms of probation, terms of supervised release have both mandatory and discretionary conditions of supervision.¹⁰²

Revocation of terms of supervised release (and probation), in the event that offenders violate their conditions of supervision, is discussed below in Part VII.

5. Apprendi and Its Progeny

The Supreme Court's landmark 2000 decision in *Apprendi v. New Jersey*¹⁰³ and its progeny have had a significant impact on the statutory (and guideline) framework governing federal sentencing. In *Apprendi*, which was a precursor to the Court's 2005 decision in *Booker*¹⁰⁴ discussed above, the Court held that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

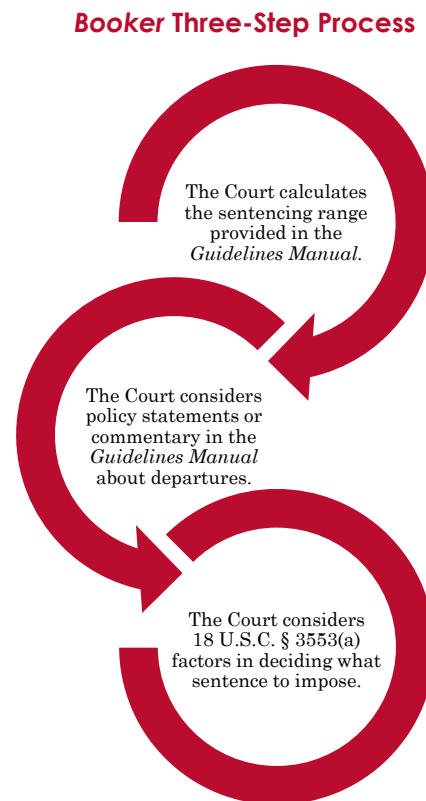
maximum must be submitted to a jury, and proved beyond a reasonable doubt” or admitted by the defendant in his plea of guilty.¹⁰⁵ Thus, facts such as the quantity of drugs in a drug-trafficking case or the defendant’s use of a dangerous weapon during a robbery—which can raise the statutory maximum punishment¹⁰⁶—must be charged in an indictment and proved to a jury beyond a reasonable doubt (or admitted by the defendant in pleading guilty) in order to raise the statutory maximum penalty. The Court has extended its holding in *Apprendi* to facts that trigger a mandatory minimum sentence of imprisonment¹⁰⁷ and facts that raise a statutory maximum fine.¹⁰⁸ Therefore, any fact (except a defendant’s prior conviction) that raises the statutory minimum or maximum penalty otherwise applicable must be proved to a jury beyond a reasonable doubt unless the defendant admits to that fact during his or her guilty plea.

B. The Booker Three-Step Process in Sentencing

After the Supreme Court’s decision in *Booker*, just as before it, a sentencing court must correctly calculate a defendant’s guideline range and then consider whether there is any basis set forth in the *Guidelines Manual* to “depart” from the range. However, the practical effect of *Booker* was to add a third step in the sentencing process—namely, the court’s decision whether, after considering *all* of the factors in 18 U.S.C. § 3553(a), a sentence outside of the applicable guideline range should be imposed as a “variance.”¹⁰⁹ This *Booker* “three-step process” requires “respectful consideration”¹¹⁰ of the *Guidelines Manual* in all three steps:

1. in initially calculating the sentencing range;
2. in considering policy statements or commentary in the *Guidelines Manual* about departures from the guideline range; and
3. in considering *all* of the § 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the *Guidelines Manual*) in deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or as both).¹¹¹

This three-step process illustrates the respective roles of both the Commission and the courts in federal sentencing, both as envisioned by Congress (in the SRA) and as modified by the Supreme Court (in *Booker*). The application of this three-step process will be set forth in more detail in Part V.



C. “Relevant Conduct” as the “Cornerstone” of the Guideline System

Before elaborating on the three-step process, it is important to understand what has become known as a “cornerstone” of the federal sentencing system—“relevant conduct.”¹¹² Relevant conduct is a defendant’s actual conduct—and not simply the conduct for which he or she was convicted—that is considered, along with the defendant’s conduct reflected in the count or counts of conviction, to calculate his or her sentencing guideline range.¹¹³ “The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant’s actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.”¹¹⁴ The Commission’s decision to factor in relevant conduct into the guidelines system is consistent with the pre-guidelines practice of federal sentencing judges¹¹⁵ and was intended to reduce the effect of prosecutorial charging decisions that do not reflect the defendant’s actual conduct on the court’s sentencing decision.¹¹⁶

Relevant conduct specifically encompasses a defendant’s “real offense conduct” (and certain types of conduct of coconspirators, whether or not charged as such) before, during, and after the commission of the offense or offenses of conviction. For most types of federal offenses, relevant conduct also includes other offenses committed as part of the “same course of conduct or common scheme or plan.”¹¹⁷ Such conduct need not have been formally charged or proved at a trial (or admitted by a defendant in a guilty plea), so long as the sentencing judge finds the relevant conduct by a preponderance of the evidence using information that has sufficient indicia of reliability.¹¹⁸ Such relevant conduct is considered in the application of various factors in the *Guidelines Manual*—such as in determining whether a defendant used a dangerous weapon during a bank robbery;¹¹⁹ in calculating the amount of loss in the fraud guideline¹²⁰ and the drug quantity in the drug-trafficking guideline;¹²¹ and in determining whether a felon who unlawfully possessed a firearm used the firearm in connection with another felony offense.¹²²

V. Basic Guideline Application

The *Guidelines Manual* has eight chapters, which are summarized as follows:

- Chapter One: Definitions, Application Instructions, and General Policies
- Chapter Two: Offense-Specific Guidelines
- Chapter Three: Adjustments for General Aggravating and Mitigating Factors and Adjustments for Multiple Counts of Conviction
- Chapter Four: Criminal History Calculation Rules and “Overrides”
- Chapter Five: Departures and Sentencing Options (including the Sentencing Table)
- Chapter Six: Sentencing Procedures
- Chapter Seven: Violations of the Conditions of Probation and Supervised Release
- Chapter Eight: Sentencing of Organizations

Chapter Two—which contains guidelines for hundreds of federal offenses—is the longest portion of the *Guidelines Manual*.

A. Application Instructions

Section 1B1.1 sets forth instructions for using the eight chapters of the *Guidelines Manual*. For sentencing of individual (as opposed to organizational) defendants for their offenses of conviction, only Chapters One through Six apply. For revocations of offenders’ terms of probation or supervised release, Chapter Seven applies. For the sentencing of organizational defendants, Chapter Eight applies.

As discussed above, a federal probation officer does the initial guidelines calculations in the PSR, which is submitted to the court after counsel for the defense and prosecution are given the opportunity to respond to the probation officer’s proposed guideline application.

A summary of the steps in the guideline application process, for individual defendants sentenced for their offenses of conviction, is as follows:

- Determine which Chapter Two offense guideline applies by consulting Appendix A of the *Guidelines Manual*.
- After the proper Chapter Two guideline is identified, calculate the “offense level” from that guideline through consideration of the applicable “base offense level” (BOL) combined with any “specific offense characteristics” (SOCs) (which are aggravating and mitigating factors related to a particular offense type). Chapter One’s provisions concerning “relevant conduct” are sometimes used to determine the BOL and usually used to determine the applicable SOCs.

- Determine whether there are any additional “adjustments” to the offense level based on the provisions in Chapter Three, which addresses general aggravating and mitigating factors that are common across offense types. Relevant conduct also must be considered in determining whether any Chapter Three adjustments apply. Chapter Three also has provisions for adjusting a defendant’s offense level based on multiple counts of conviction in certain types of cases.
- Calculate the defendant’s “criminal history points” according to Chapter Four’s provisions. Based on the criminal history score, the defendant is placed in the appropriate “Criminal History Category” (CHC).¹²³
- Identify the sentencing guideline range in the Chapter Five’s Sentencing Table by locating the cell in the table that is at the intersection of the defendant’s offense level and CHC. (The Sentencing Table is set forth as Attachment A, *infra*.) Chapter Five’s provisions also address what types of sentences a court may impose (*e.g.*, probation or imprisonment), according to the location of the defendant’s applicable sentencing range in one of the four Zones (A-D) of the Sentencing Table.¹²⁴
- Finally, consider possible grounds for a “departure” or “variance” from the applicable guideline range.¹²⁵ Departures and variances are further discussed below in Part V.D.

The SRA requires a court to use the version of the *Guidelines Manual* in effect on the date of sentencing.¹²⁶ One exception to the rule is that the Ex Post Facto Clause of the Constitution prevents retroactive application of amended guidelines that increased the applicable sentencing range after the offense was completed.¹²⁷ In such a case, the version of the guidelines in effect on the date of the offense must be used.¹²⁸ The determination of whether the earlier version of the *Manual* carries a lower penalty range is made under the “one-book rule.” That rule compares the guideline range for the version of the *Manual* in effect at sentencing with the version of the *Manual* in effect on the last date of the offense of conviction, applying each *Manual* in its entirety rather than applying portions of different versions of the *Manual*.¹²⁹

B. Applying the Guidelines

What follows is an illustration of the application of the *Guidelines Manual* to a short hypothetical case involving a defendant convicted of a single count of bank robbery in violation of 18 U.S.C. § 2113(a), which carries a statutory maximum of 20 years of imprisonment but does not carry any mandatory minimum penalty. The facts of that hypothetical case are below:

Bank Robbery Case Hypothetical

The defendant entered a federally-insured bank and approached a teller while brandishing a realistic-looking toy gun. He demanded all the money that she and other tellers had and handed the teller a bag in which to place the money. The teller gave the defendant \$25,000. No one was injured during the robbery. Nor did the defendant physically restrain anyone or force anyone to move to a different location within or outside the bank. After the teller gave the defendant the bag of money, the defendant ran out of the bank and got into a car being driven by another person, who drove away from the bank at a normal rate of speed. Shortly thereafter, based on an eyewitness's description of the getaway car, police officers stopped the car without a chase and arrested the defendant and the getaway driver.

Both individuals confessed to their roles in the bank robbery. The police officers recovered the \$25,000 and returned it to the bank. The co-defendant (the defendant's nephew) was determined to be a 16-year old juvenile and was not prosecuted in federal court. A federal grand jury indicted the defendant for a single count of bank robbery. At the time of the robbery, the defendant had two prior state convictions for offenses committed as an adult: (1) a conviction for felony assault, for which he had received a six-month jail sentence 11 years before the robbery, and (2) a felony conviction for distributing a small amount of cocaine to an undercover officer one year before the robbery, for which he had received a five-year term of probation. The defendant pleaded guilty to the charge without the benefit of a plea agreement with the prosecution.

1. Determine the Applicable Chapter Two Guideline

The first step in applying the guidelines is to identify the applicable Chapter Two guideline, which is done by looking at Appendix A of the *Guidelines Manual* and determining from the statute of conviction which guideline applies. In this case, for a bank robbery conviction under 18 U.S.C. § 2113(a), the applicable guideline is USSG §2B3.1 (robbery), which is set forth as Attachment B to this paper.

2. Calculate the Chapter Two Offense Level

Turning to §2B3.1, the next step is to determine the appropriate BOL. Some guidelines contain multiple BOLs, although §2B3.1 contains a single BOL of 20. Next, determine whether any SOCs apply, including by consulting any pertinent commentary in the application notes following the guideline,¹³⁰ which may offer interpretive aids regarding the SOCs. Based on the facts in this hypothetical case, the following three SOCs in §2B3.1 apply:

- §2B3.1(b)(1): +2 because money was taken from a “financial institution”;
- §2B3.1(b)(2): +3 because the defendant brandished a “dangerous weapon” (discussed below); and
- §2B3.1(b)(7)(B): +1 because the “loss” exceeded \$20,000 but was less than \$95,000 (discussed below).

The determination that a toy gun qualifies as a “dangerous weapon” is made by reference to the commentary following §2B3.1, which states that the definition of “dangerous weapon” includes “an instrument” that “closely resembles . . . an instrument capable of inflicting death or bodily injury.”¹³¹ Note that, although the indictment in this case did not charge the defendant with using a dangerous weapon during the robbery (which, if it had, would have raised the statutory maximum to 25 years under 18 U.S.C. § 2113(d)), the sentencing court must apply the SOC if the court finds by a preponderance of the evidence that the defendant in fact brandished a toy gun during the robbery.¹³² Although the \$25,000 was returned to the bank, it still qualifies as “loss” for purpose of the guideline because the guideline’s commentary states that, “[l]oss means the value of the property *taken*, damaged, or destroyed.”¹³³ Assuming no other SOCs apply, the defendant’s total Chapter Two offense level would be 26 (20 + 2 + 3 + 1).

3. Calculate the Offense Level after Chapter Three Adjustments

The next step in the guideline application process is to determine whether any adjustments in Chapter Three of the Guidelines Manual apply.

- Because the defendant had recruited and directed an accomplice (the getaway driver) before the robbery, the defendant receives a 2-level upward adjustment pursuant to USSG §3B1.1(c) (Aggravating Role)¹³⁴—bringing his offense level to 28.
- Because the defendant used a minor as the getaway driver, 2 additional levels are added pursuant to USSG §3B1.4 (Using a Minor to Commit a Crime),¹³⁵ which brings the defendant’s offense level to 30.
- If the defendant has “accepted responsibility” for the offense by pleading guilty in a timely manner and admitting the conduct constituting the offense of conviction, his offense level is reduced by either 2 or 3 levels under §3E1.1 (Acceptance of Responsibility). The third level of reduction

requires a motion from the prosecution pursuant to §3E1.1(b). Assuming he receives a 3-level downward adjustment, the defendant's final offense level would be 27.

Note that, just as with the application of Chapter Two SOCs, a sentencing court determines whether Chapter Three adjustments apply based not only on the conduct for which a defendant was convicted but also on any relevant conduct proved by a preponderance of the evidence.

4. Determine the Criminal History Category

After determining the hypothetical robbery defendant's offense level, the next step is to calculate the defendant's criminal history points, which in turn determine his Criminal History Category, by applying the criminal history rules in Chapter Four of the *Guidelines Manual*. As a general rule, criminal history points are based on the length of a sentence imposed for a prior conviction in a local, state, or federal court¹³⁶ and whether the defendant committed the instant federal offense while still serving a sentence in another case (*e.g.*, the defendant was on probation or parole).¹³⁷ There are certain exceptions to these general rules, though. Some prior offenses fall outside of Chapter Four's time limits,¹³⁸ several types of minor offenses are excluded from consideration,¹³⁹ and prior juvenile convictions may be counted only if they occurred within five years of the defendant's commission of the instant federal offense.¹⁴⁰

Based on the defendant's two prior convictions, his criminal history calculations would be as follows.

- He would receive no criminal points for his assault conviction because it falls outside Chapter Four's time limits (as he received a six-month sentence over ten years before committing the bank robbery).¹⁴¹
- Because his prior drug-trafficking conviction falls well within the time limits, it would receive one point based on the length of sentence imposed (*i.e.*, less than 60 days) and an additional two points based on the fact that the defendant was on supervision (*i.e.*, probation) at the time of the bank robbery offense.¹⁴²

Three criminal history points would place the defendant in CHC II on the Sentencing Table (discussed below).

5. Determine the Guideline Sentencing Range from the Sentencing Table

Based on an offense level of 27 and a CHC of II, the applicable guideline sentencing range is 78-97 months, as reflected in the guidelines' Sentencing Table, which is attached as Attachment A to this paper. Note that the guideline sentencing range is well within the broader statutory range of punishment of 0-240 months (0-20 years) under the statute of conviction, 18 U.S.C. § 2113(a). In some other cases, a defendant's guideline range is constrained by either a statutory mandatory minimum penalty (raising the "floor") or a

statutory maximum penalty (lowering the “ceiling”).¹⁴³ Because the robbery defendant’s range falls in Zone D of the Sentencing Table, the only type of sentence provided under the guidelines is a term of imprisonment as opposed to any alternative to imprisonment.¹⁴⁴

C. Chapter Four “Overrides”

For a small percentage of defendants, the application of their guideline ranges is not determined solely by the offense levels established in Chapters Two and Three and their Criminal History Categories established in Chapter Four, Part A. Instead, it is determined by application of four special “override” provisions in Chapter Four, Part B, and one special provision in the Chapter Three Adjustments. Chapter Four, Part B has four such provisions: Career Offender (§4B1.1); Criminal Livelihood (§4B1.3); Armed Career Criminal (§4B1.4); and Repeat and Dangerous Sex Offender Against Minors (§4B1.5). Sections 4B1.1, 4B1.4, and 4B1.5, which can impact both the offense level and the Criminal History Category, are aimed at serious recidivist defendants whose instant convictions are for violence or drug-trafficking, firearms, or sex offenses against minors. The resulting guideline ranges generally call for lengthy terms of imprisonment for such offenders. Section 4B1.3 applies to a defendant whose instant offense was part of pattern of criminal conduct engaged in as the defendant’s livelihood and ensures a minimum offense level if not achieved by application of Chapters Two and Three. The sole Chapter Three override is the terrorism adjustment (§3A1.4), which impacts both the offense level and the Criminal History Category. If a defendant’s guideline range resulting from one of the override provisions is higher than the range otherwise applicable, the override range applies.

D. Departures and Variances

After determining the defendant’s guideline sentencing range, the court must determine whether one or more “departure” factors set forth in the guideline commentary or policy statements in the *Guidelines Manual* warrant consideration for imposing a sentence outside of the range. Departures—upward and downward—are addressed in various places in the *Guidelines Manual*. Many offense-specific bases for departures are in the commentary following the guidelines in Chapter Two;¹⁴⁵ bases for departures concerning an offender’s criminal history are addressed in Chapter Four;¹⁴⁶ and many generic bases for departure are set forth in policy statements in Chapter Five.¹⁴⁷ A complete list of departure provisions in all chapters is set forth at the very end of the *Guidelines Manual* (immediately following the Index). These provisions specify the circumstances under which a departure would be appropriate in the discretion of the court.

Grounds for departure typically are either “discouraged” or “encouraged.”¹⁴⁸ The *Guidelines Manual* also provides that certain bases for departure are prohibited.¹⁴⁹ A court has broad discretion to depart based on “encouraged” grounds, has more limited discretion to depart based on “discouraged” grounds (*i.e.*, may only do so within the limits set forth in the policy statements), and has no discretion to depart based on a prohibited basis. Finally, §5K2.0(a)(1) provides that, with the exception of certain offense types (such as sexual offenses

against children), a court may depart based on aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration” by the Commission in “formulating” the guidelines that, “in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different” from that called for by the *Guidelines Manual*.

Two of the most common grounds for downward departures, that have occurred both before and after *Booker*, are ones that the prosecution must raise by way of a motion for downward departure (and thereby differ from other grounds for downward departure, which can be raised by the defense, the prosecutor, or by the court *sua sponte*). Those two “government-sponsored” grounds are: (1) the defendant provided the prosecution with “substantial assistance in the investigation or prosecution of another person” (§5K1.1);¹⁵⁰ and (2) the defendant participated in an “Early Disposition” (or “fast-track”) Program, in a district in which the Attorney General and the district’s United States Attorney have authorized such a departure (§5K3.1). In recent years, a “substantial assistance” or “fast-track” downward departure (or both) occurred in around one-fifth of all federal cases.¹⁵¹ Such below-range sentences are not only sponsored by the prosecution but also explicitly authorized by the *Guidelines Manual*.

The final step of the three-step process is for the court to consider *all* of the applicable factors in 18 U.S.C. § 3553(a)—including factors from the first two steps (*i.e.*, the guideline range and any bases for departure in the *Guidelines Manual*)—“taken as a whole,” and impose a sentence.¹⁵² As the Supreme Court has observed, “[t]he fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”¹⁵³

A final guiding principle is for a court to impose a sentence that is “sufficient, but not greater than necessary” to accomplish the goals of sentencing.¹⁵⁴ This provision in the SRA is referred to as the “parsimony” clause.¹⁵⁵ It is explicitly set forth in the Introductory Commentary in Chapter 5, Part A of the *Guidelines Manual* as a reminder to sentencing judges.

E. Fines

In addition to addressing whether a court should impose a sentence of probation or imprisonment, the *Guidelines Manual* also provides that “[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay a fine.”¹⁵⁶ The fine guideline also contains a table containing fine ranges that correspond to the final guidelines offense level applicable to a defendant.¹⁵⁷

Under the guidelines, a fine-only sentence is authorized only for a defendant whose sentencing range is 0-6 months.¹⁵⁸ However, the guidelines recommend that, “[i]f . . . the fine is not paid in full at the time of sentencing, . . . the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation.”¹⁵⁹

F. Supervised Release under the Guidelines

The guidelines provide that, if a defendant receives a term of imprisonment in excess of one year, the court generally should impose a term of supervised release, even if not required by statute.¹⁶⁰ The guidelines also specify ranges of supervised release depending on the class of the offense of conviction.¹⁶¹ With respect to non-citizen defendants—who, as discussed below in Part IX.B. have been around 40 percent of all federal offenders in recent years—the Commission recommends that courts not impose a term of supervised release for such defendants if they likely will be deported after serving their terms of imprisonment, unless required by statute.¹⁶² For sex offenders, the Commission recommends the maximum statutory term of supervision available, which for most sex offenders is a life term of supervised release.¹⁶³

VI. Appellate Review of Sentences

Before the Sentencing Reform Act of 1984, there was virtually no appellate review of federal sentences.¹⁶⁴ Along with creating the sentencing guideline system, the SRA provided for significant appellate review of guideline sentences.¹⁶⁵ Since the guidelines went into effect, tens of thousands of federal defendants have appealed their sentences, while prosecution appeals have occurred in a much smaller number of cases.¹⁶⁶

After *Booker*, a federal appellate court reviews a sentence for “reasonableness” using an abuse of discretion standard.¹⁶⁷ Such reasonableness review actually encompasses two types of review—“procedural” reasonableness review and “substantive” reasonableness review. As the Supreme Court has explained:

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. 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. . . . [In the case of a sentence imposed outside of the guideline range, the appellate court] may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.¹⁶⁸

As a part of an appellate court’s review for “procedural” reasonableness, if the appellant properly preserved the issue for appeal, the court engages in *de novo* review of pure legal questions concerning guideline application and reviews the district court’s underlying

findings of fact for “clear error.”¹⁶⁹ In order for a sentence to be deemed procedurally reasonable, the district court should have properly calculated the applicable guideline range (as the “starting point” in the *Booker* three-step process) and addressed all of the parties’ “non-frivolous arguments” about why a sentence should have been imposed outside the range.¹⁷⁰ Even if a defendant did not properly preserve a guidelines application issue for appeal, a federal appellate court ordinarily must deem a guideline miscalculation as reversible “plain error” if the district court sentenced the defendant based on an incorrectly calculated guideline range.¹⁷¹

Regarding “substantive” reasonableness, the Supreme Court has permitted (but not required) federal circuit courts to apply a rebuttable “presumption of reasonableness” in reviewing a district court’s decision to impose a sentence within the applicable guidelines range.¹⁷² “[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case.”¹⁷³ Such a presumption of reasonableness is applicable only to a federal appellate court’s review of a district court’s sentence; it may not be applied by a district court in determining whether to impose a within-range sentence.¹⁷⁴

Furthermore, the fact that a district court imposed a sentence outside of the applicable guideline range does not trigger a presumption of unreasonableness on appeal.¹⁷⁵ The Court also has stated that “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when it is based on the particular facts of a case” as opposed to a general disagreement with a particular “policy” embodied in a provision of the *Guidelines Manual*.¹⁷⁶

VII. Violations of the Conditions of Probation and Supervised Release

In Chapter Seven of the *Guidelines Manual*, the Commission promulgated policy statements addressing a district court’s decision of whether to revoke or modify a defendant’s term of probation or supervised release upon a finding of a violation of one or more conditions of supervision. Chapter Seven classifies violations of the conditions of supervision (as “A,” “B,” or “C” grade violations), recommends when courts should revoke the term of supervision,¹⁷⁷ and recommends terms of imprisonment for the different grades of violations, in the event a court revokes.¹⁷⁸ The Revocation Table used in revocation cases—set forth in §7B1.4—is different from the more complex Sentencing Table appearing in Chapter Five that governs original sentencings. The Revocation Table contains two axes—one based on the seriousness of the violation (*i.e.*, the grade) and the other based on the offender’s original Criminal History Category (as determined at the original sentencing hearing).¹⁷⁹

At a revocation hearing, a court is governed by the preponderance of the evidence standard and may find that an offender committed a new law violation as a basis for revocation even if the offender was not convicted of the new offense.¹⁸⁰ In deciding whether to revoke and, if so, whether to impose a sentence of imprisonment as recommended by Chapter Seven’s policy statements, a court must consider not only those policy statements but also the factors in 18 U.S.C. § 3553(a), to the extent that they are applicable.¹⁸¹

In cases where offenders have allegedly violated the conditions of their supervision, district courts are governed by statutory provisions¹⁸² that at times operate in a different manner than Chapter Seven’s policy statements. In particular, those statutory provisions may require revocation in certain cases that Chapter Seven does not, such as when an offender possessed a controlled substance or refused to take a court-ordered drug test.¹⁸³ For violations of supervised release, the statutory maximum term of imprisonment upon revocation depends on the classification of the underlying offense of conviction at the original sentencing proceeding.¹⁸⁴ For violations of probation, the maximum term of imprisonment upon revocation is the statutory maximum of the underlying offense of conviction at the original sentencing hearing.¹⁸⁵

On appeal, a district court’s sentence imposed upon revocation is reviewed with at least as much deference as exists in appellate review of a court’s imposition of an original sentence.¹⁸⁶ A district court abuses its discretion by not considering Chapter Seven’s policy statements in a revocation proceeding, yet a court need not follow the policy statements’ recommendations regarding revocation or sentence length.¹⁸⁷

VIII. Guideline Amendment Process

In enacting the SRA, Congress envisioned that the Commission would regularly amend the guidelines to reflect various changes in circumstances.¹⁸⁸ Since the guidelines went into effect in 1987, the Commission has promulgated more than 800 amendments to the *Guidelines Manual*.¹⁸⁹

A. The Amendment Cycle

The guideline “amendment cycle” begins in the late spring of each year. The Commission normally begins the cycle by issuing a list of policy “priorities”—published in the Federal Register (FR) and also made available on the Commission’s website (*www.ussc.gov*)—and invites specific stakeholder groups (*e.g.*, the Criminal Law Committee of the Judicial Conference, the Federal Public Defender community, the Criminal Division of the United States Department of Justice, and the Commission’s various advisory groups) as well as the general public to comment on those priorities. Thereafter, the Commission publishes “proposed amendments” for consideration and solicits comment from the stakeholder groups and general public.¹⁹⁰ The Commission then holds a public hearing on proposed amendments and hears from various witnesses, including representatives of the stakeholder groups. Thereafter, typically in April, the Commission votes on whether to adopt any of the proposed amendments.

By statute, no later than May 1st the Commission must submit the amendments it has voted to promulgate along with “reasons for amendment” (contained in Appendix C to the *Guidelines Manual*) to Congress, which has 180 days to decide whether to modify or disapprove them. If Congress does not pass legislation (signed by the President) modifying or disapproving amendments by November 1st, the amendments become effective on that date. On rare occasion, Congress has authorized the Commission to promulgate “emergency amendments” which can be passed on an expedited basis outside of the regular amendment cycle.¹⁹¹ Since 1987, Congress has enacted legislation rejecting only two guideline amendments promulgated by the Commission.¹⁹²



B. Retroactivity of Amendments

If an amendment to the guidelines potentially lowers the sentencing range for offenders, the Commission must decide whether to apply the amendment retroactively to offenders already serving sentences of imprisonment.¹⁹³ If the Commission votes for retroactivity of such an amendment, the eligible offenders can apply to their original sentencing courts for the benefit of such retroactive amendment.¹⁹⁴ Courts are afforded discretion in deciding whether to grant the offenders’ petitions seeking to benefit from a retroactive amendment, but, if they choose to exercise that discretion, must reduce the offender’s sentence within the limits imposed by §1B1.10. The Supreme Court has held that, when a court elects to reduce an offender’s sentence based on a retroactive guideline amendment, the court may not engage in a full-fledged resentencing under 18 U.S.C. § 3553(a) and, instead, must impose a new sentence that modifies the original sentence in a manner consistent with the retroactive amendment.¹⁹⁵ As of 2018, the Commission has voted to give retroactive effect to 30 of its over 800 amendments.¹⁹⁶

IX. A Brief Overview of Sentencing Data

A. The Commission's Collection and Analysis of Sentencing Data

The SRA requires the Commission to “establish a research . . . program . . . for the purpose of . . . serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices” and also to “collect systematically and disseminate information concerning [federal] sentences actually imposed.”¹⁹⁷ The Commission, through its Office of Research and Data, has carried out these duties in a variety of ways, including by publishing annual *Sourcebooks of Federal Sentencing Statistics* and several other publications concerning federal sentencing.¹⁹⁸ The Commission’s data analysis results from its collection of sentencing documents in virtually all federal cases in which a sentence was imposed after a judge applied the *Guidelines Manual*.¹⁹⁹ Commission staff analyze such documentation and create an annual data file of numerous data-points about guidelines use and offender and offense characteristics from which the Commission may engage in empirical research about offender and offense characteristics as well as federal sentencing practices.²⁰⁰

B. Snapshot of Federal Offenses and Offenders

In recent years, approximately 65,000 to 86,000 federal offenders have been sentenced for felonies and Class A (non-petty) misdemeanor offenses annually.²⁰¹ Approximately 30 percent are convicted of drug-trafficking offenses (usually involving marijuana, methamphetamine, powder cocaine, crack cocaine, or heroin). Likewise, approximately 30 percent of federal offenders today are convicted of immigration offenses (*e.g.*, illegally reentering to the United States after being deported or smuggling aliens into the country). Fraud and other “white-collar” offenses make up approximately 12 percent of federal offenses today, and firearms offenses (*e.g.*, being a felon in possession of a firearm or using a firearm in connection with a drug-trafficking or violent offense) account for approximately 12 percent of cases. Sex offenses (*e.g.*, sexual assaults and child pornography offenses) and violent offenses (*e.g.*, bank robbery) make up a relatively small percentage of the federal caseload.²⁰²

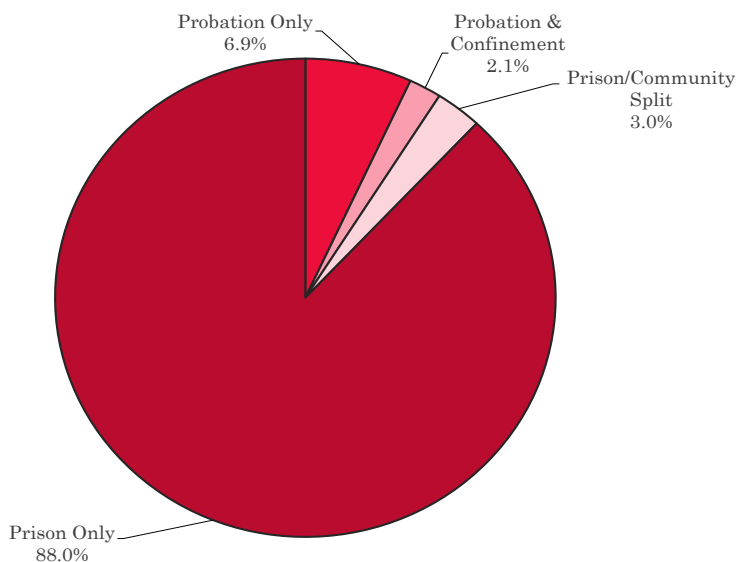
Approximately nine out of ten federal offenders today receive sentences of imprisonment, while one out of ten is sentenced to probation (including probation with a condition of home detention or community confinement).²⁰³ The average prison sentence for federal offenders today is 52 months.²⁰⁴ The average prison sentence for offenders convicted of an offense carrying a mandatory minimum penalty is 110 months, while the average prison sentence for offenders convicted of an offense not carrying a mandatory minimum penalty is 28 months.²⁰⁵ The federal prison population today is approximately 181,000 inmates.²⁰⁶

Of those offenders who receive terms of imprisonment, 86.0 percent also receive terms of supervised release. Of those offenders who receive terms of supervised release, on average they receive a 47-month term of supervised release.²⁰⁷ The “revocation

rate”—defined as the percentage of offenders whose federal supervision was revoked (because of either the commission of a new criminal offense or a “technical” violation) in relation to the total supervision cases closed each year—has been around 30 percent in recent years.²⁰⁸ The average sentence of imprisonment imposed upon revocation is slightly less than one year.²⁰⁹

Federal offenders, other than in their gender (almost nine out of ten are males), are a diverse group today in terms of demographic characteristics. With respect to racial identity, 21.5 percent of offenders are White, 21.1 percent are Black, and 53.2 percent are Hispanic. At the time of sentencing, nearly half of federal offenders have not completed high school, while one-fifth have at least some college education. The average age of federal offenders at the time of sentencing is 37 years.²¹⁰ In recent years, over 40 percent of all federal offenders have been non-citizens, who generally face deportation after their release from federal custody. Nearly two-thirds of all federal offenders have a prior criminal record counted under Chapter Four of the *Guidelines Manual*, and nearly one-third of all federal offenders have significant criminal records (defined as six or more criminal history points).²¹¹

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X. Conclusion

This paper has covered all of the major aspects of the federal sentencing system, including the guidelines and policy statements in the *Guidelines Manual*, statutes and court rules, and relevant decisions of the Supreme Court. It has discussed the evolution of federal sentencing from the pre-SRA era to the present day and explained how the current system seeks to promote transparency, certainty, and proportionality in sentencing, while at the same time avoiding unwarranted sentencing disparities.

Various resources for members of the federal judicial branch, federal sentencing practitioners, and members of the public are available on the Commission’s website, www.ussc.gov. In addition, the Commission operates a public “HelpLine” for questions concerning federal sentencing during regular business hours at 202-502-4545.

Endnotes

- 1 Pub. L. 98–473, 98 Stat. 1987 (1984).
- 2 *Mistretta v. United States*, 488 U.S. 361, 363-64 (1989) (describing the federal sentencing system before the SRA).
- 3 *Peugh v. United States*, 569 U.S. 530, 535 (2013).
- 4 S. Rep. No. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N., 3182. The Senate Judiciary Committee’s report (hereafter “Senate Report”) is the primary legislative history of the SRA. *See Mistretta*, 488 U.S. at 366.
- 5 *See Dorsey v. United States*, 567 U.S. 260, 265 (2012) (“ . . . [T]he Sentencing Reform Act of 1984 . . . sought to increase transparency, uniformity, and proportionality in sentencing.”); *see also Mistretta*, 488 U.S. at 379 (“Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”).
- 6 *See* 28 U.S.C. § 991(a). Biographies of the current Commissioners are available at <http://www.ussc.gov/about/commissioners/about-commissioners>. A list of past Commissioners is available at <http://www.ussc.gov/about/commissioners/former-commissioner-information>.
- 7 *See* 28 U.S.C. § 994; *see also* 28 U.S.C. § 995(a)(12)-(20). Henceforth, unless otherwise noted, all citations to the United States Code (U.S.C.) and United States Sentencing Guidelines (USSG) will be to the 2018 edition of the U.S.C. and the 2018 edition of the USSG. This paper follows the conventions for guidelines citations set forth in the *Guidelines Manual* (*see id.* at ii).
- 8 *Mistretta*, 488 U.S. at 368.
- 9 21 U.S.C. § 994(m); *see also* SENATE REPORT, *supra*, at 76-79, 116, 177-78.
- 10 The Anti-Drug Abuse Act of 1986, which created mandatory minimum prison sentences for many drug-trafficking offenses – *see* 21 U.S.C. § 841(b) – went into effect for offenses committed on or after October 27, 1986. Pub. L. No. 99–570, 100 Stat. 3207 (1986). The Armed Career Criminal Act, *see* 18 U.S.C. § 924(e), which created a 15-year mandatory minimum prison sentence for certain recidivist felons who possess firearms, was enacted along with the Sentencing Reform Act on October 12, 1984. Pub. L. No. 98–473, 98 Stat. 2185 (1984). Section 924(e) of title 18, which created mandatory minimum penalties ranging from 5 to 30 years for offenders who use firearms during drug-trafficking offenses or crimes of violence, went into effect in 1984 (for violent offenses) and 1986 (for drug-trafficking offenses). Pub. L. No. 98–473, 98 Stat. 2138 (1984); Pub. L. No. 99–308, 100 Stat. 449 (1986).
- 11 *See* 18 U.S.C. § 3561(a)(1) (prohibiting probation for offenders convicted of Class A and B felonies). Section 3561 was enacted as part of the Sentencing Reform Act of 1984. *See United States v. Daiagi*, 892 F.2d 31, 32 (4th Cir. 1989).
- 12 The SRA mentions both “guidelines” and “policy statements.” The Commission incorporated both in the *Guidelines Manual*, along with interpretive “commentary” (concerning both the guidelines and policy statements). *See Stinson v. United States*, 508 U.S. 36, 41 (1992).
- 13 18 U.S.C. § 3553(a)(1)-(7).
- 14 *See* 21 U.S.C. § 991(b)(1)(A) (requiring the Commission to consider the § 3553(a) factors in

promulgating guidelines and policy statements).

15 *See* *Rita v. United States*, 551 U.S. 338, 348 (2007).

16 SENATE REPORT, *supra*, at 168; *see also id.* at 169 (directing that the guidelines should “reflect every important factor relevant to sentencing.”).

17 *See* 28 U.S.C. § 994(d) (“The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”), and (e) (“The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”). The SRA likewise clearly intended that sentencing judges would generally not be permitted to depart from applicable guideline ranges based on aggravating or mitigating factors about which the guidelines restricted or limited departures (including those related to offenders’ personal characteristics). *See* 28 U.S.C. § 991(b)(1)(B) (directing the Commission to create a sentencing system that would “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices”).

18 *See* 28 U.S.C. § 994(b)(2).

19 28 U.S.C. § 991(a)(1)(B); *see also* 28 U.S.C. § 994(f).

20 18 U.S.C. § 3553(b)(1); *see also* *Mistretta*, 488 U.S. at 367 (noting that the SRA “ma[de] the Sentencing Commission’s guidelines binding on the courts”).

21 *See generally* USSG, Ch. 5, Pt. H.

22 For a thorough history of the initial Commission, *see* Brent E. Newton and Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission*, 45 HOFSTRA L. REV. 1167 (2017).

23 *See infra* pages 17-18.

24 543 U.S. 220 (2005).

25 *Id.* at 245-46.

26 *Id.* at 264-65.

27 *Gall v. United States*, 552 U.S. 38, 49, 50 n.6 (2007); *see also* *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903-04, 1908 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016).

28 *Peugh*, 569 U.S. at 542, 545 (citation and internal quotation marks omitted).

29 *Id.* at 536-37.

30 *Id.* at 544.

31 *See* U. S. SENT. COMN’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-53 (2017) (Table N) (noting that 49.1% of all federal sentences fell within the applicable guideline range); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-50 (Table N) (2013) (noting that 51.2% of all federal sentences fell within the applicable guideline range). Henceforth, the Commission’s annual *Sourcebooks* will be cited as follows: “[Year] SOURCEBOOK.”

32 For instance, in 2017, of all below-range sentences, 40.9 percent were pursuant to USSG §§5K1.1 (substantial assistance departure) or 5K3.1 (early disposition departure). See 2017 SOURCEBOOK at S-53 (Table N). Such departures are discussed in Part V.D., *infra*.

33 See U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART A, at 60 (2012); see also *Peugh*, 569 U.S. at 544 (“[T]he Sentencing Commission’s data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.”).

34 See U.S. SENTENCING COMM’N, RESULTS OF 2014 SURVEY OF UNITED STATES DISTRICT JUDGES, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20150225_Judges_Survey.pdf (2015) (Tables 44 and 45) (noting a majority of judges either “strongly agree” or “somewhat agree” that the federal sentencing guidelines have increased certainty and fairness in meeting the purposes of sentencing, and have reduced unwarranted sentencing disparities; also noting that 77% of district judges favor the current guideline system over alternative sentencing systems).

35 See Patti B. Saris *et al.*, *Lessons Learned from Thirty Years Ago*, 45 HOFSTRA L. REV. 1163, 1166 (2017) (noting “1.7 million offenders” were sentenced under the guidelines through fiscal year 2016). Over 100,000 additional offenders have been sentenced since January 1, 2017. See 2017 SOURCEBOOK, at S-31 (Tab. 12) (66,873 defendants sentenced in FY2017); U.S. SENTENCING COMM’N, QUARTERLY DATA REPORT (Second Quarter, FY2018), at 2 (Tab. 1) (32,860 defendants sentenced in first two quarters of FY2018).

36 See, e.g., 2017 SOURCEBOOK, at S-25 (Figure C) (noting that 97.2% of federal offenders who were sentenced under the guidelines pleaded guilty); 2013 SOURCEBOOK, at S-22 (Figure C) (noting that 97.1% of federal offenders who were sentenced under the guidelines pleaded guilty).

37 FED. R. CRIM. P. 11(b)(3) (requiring a “factual basis” for the guilty plea).

38 FED. R. CRIM. P. 11(b)(1)(M).

39 Rule 11(c)(1) describes the two primary types of plea agreements related to the sentencing guidelines, whereby the prosecution agrees either –

. . . (B) [to] recommend, or . . . not to oppose the defendant’s request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) . . . that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

FED. R. CRIM. P. 11(c)(1)(B) & (C). A third type of plea agreement exists under Rule 11(c)(1)(A) – the prosecution’s agreement to dismiss or not bring certain charges and, instead, allow a defendant to plead guilty to other charges. Such a plea agreement does not directly concern the sentencing guidelines, although in some cases a guilty plea to a charge with a lesser statutory maximum can reduce a defendant’s sentencing exposure by reducing the statutory maximum term of imprisonment below what would otherwise be the applicable sentencing range under the guidelines. See USSG §5G1.1(a)(1) (“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.”); see also USSG §6B1.2(a) (“In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.”).

40 FED. R. CRIM. P. 11(c)(3) & (4).

41 USSG §6B1.4(a); *see also id.*, comment. (n.1) (“This provision requires that when a plea agreement contains a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the determination of the sentence.”).

42 USSG §6B1.1, comment. (n.1).

43 *See, e.g.*, Kenneth Greenblatt, *What You Should Know Before Your Client’s Interview: A Former Federal Probation Officer’s Perspective*, THE CHAMPION (Nov. 2007).

44 *See* FED. R. CRIM. P. 32(c)(2).

45 *See* Mitchell v. United States, 526 U.S. 314, 326-27 (1999) (defendant maintains the Fifth Amendment privilege against self-incrimination not only during guilt-innocence phase of trial but also during the sentencing phase).

46 USSG §3E1.1 (Acceptance of Responsibility).

47 *See, e.g.*, United States v. Cohen, 171 F.3d 796, 805-06 (3d Cir. 1999) (citing Corbitt v. New Jersey, 439 U.S. 212 (1978)). According to the commentary following USSG § 3E1.1, a defendant need only “truthfully admit[]” the “conduct comprising the offense(s) of conviction” and need not admit relevant conduct beyond the offense(s) of conviction. However, a defendant should not receive credit for acceptance of responsibility if he or she “falsely denies” or “frivolously contests” any relevant conduct for which the defendant is accountable. USSG § 3E1.1, comment. (n.1). Yet “the fact that a defendant’s challenge [to relevant conduct] is unsuccessful does not necessarily establish that it was either a false denial or frivolous.” *Id.*

48 *See* FED. R. CRIM. P. 32(c)(1)(A) (“The probation officer must . . . submit a report to the court before it imposes sentence”); *see generally* 8 GUIDE TO JUDICIARY POLICY: PROBATION AND PRETRIAL SERVICES (Part D: Presentence Investigation Report) (commonly called “Monograph 107”).

49 *See* FED. R. CRIM. P. 32(d).

50 *See* FED. R. CRIM. P. 32(e), (f).

51 *See* United States v. Smith, 992 F. Supp. 743, 750 (D.N.J. 1998).

52 FED. R. CRIM. P. 32(e)(3).

53 U.S. Dep’t of Justice v. Julian, 486 U.S. 1, 5 (1988).

54 Tess Lopez, *Making the Sentencing Process Work for You*, 23 CRIM. JUST. 58, 60 (2009) (“The presentence report is the only document that follows the [defendant] through the Bureau of Prisons process, and the information it contains will affect the [defendant’s] classification level, eligibility for programs, and designation; it also influences the risk level and level of supervision provided by the probation officer upon the [defendant’s] release from custody.”).

55 *See* 18 U.S.C. § 3771(a)(4) (providing for crime victims with the “right to be reasonably heard at any public proceeding in the district court involving . . . sentencing”).

56 *See* FED. R. CRIM. P. 32(i).

57 *Id.*

58 *See* Irizarry v. United States, 553 U.S. 708 (2008); Burns v. United States, 501 U.S. 129 (1991).

59 FED. R. EVID. 1101(d)(3).

60 *See* Williams v. New York, 337 U.S. 241 (1949).

61 18 U.S.C. § 3661; *see also* Pepper v. United States, 562 U.S. 476, 480 (2011) (“This Court has long recognized that sentencing judges ‘exercise a wide discretion’ in the types of evidence they may consider when imposing sentence and that ‘[h]ighly relevant — if not essential — to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.’ Williams v. New York, 337 U.S. 241, 246–247 (1949). Congress codified this principle at 18 U.S.C. § 3661, which provides that ‘[n]o limitation shall be placed on the information’ a sentencing court may consider ‘concerning the [defendant’s] background, character, and conduct,’ and at § 3553(a), which sets forth certain factors that sentencing courts must consider, including ‘the history and characteristics of the defendant,’ § 3553(a)(1).”).

62 USSG §6A1.3(a).

63 FED. R. CRIM. P. 32(i)(3)(B).

64 USSG §6A1.3, comment.; *see also* McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986) (holding that due process does not require sentencing factors to be proved by more than a preponderance of the evidence).

65 *See* 18 U.S.C. § 3553(c)(2); 28 U.S.C. § 994(w)(1); *see also* United States v. Denny, 653 F.3d 415, 422 n.3 (6th Cir. 2011).

66 *See* FED. R. CRIM. P. 32(j); *see also* White v. Johnson, 180 F.3d 648, 652 (5th Cir. 1999).

67 *See, e.g.,* United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995).

68 28 U.S.C. § 994(w)(1).

69 The guidelines do not apply to petty misdemeanor offenses (*i.e.*, offenses carrying a statutory maximum term of incarceration of six months or less). *See* USSG §1B1.9. Petty misdemeanor cases are typically handled by federal magistrate judges pursuant to 28 U.S.C. § 626(a)(4).

70 *See* 2017 SOURCEBOOK, at S-30 (Fig. D & n.1) (noting that probation or imprisonment was imposed in 66,389, or 99.4%, of the 66,873 cases in fiscal year 2017).

71 *See* 18 U.S.C. § 3561(c) (providing that, for a felony offense, not less than one nor more than five years of probation may be imposed; for a misdemeanor not more than five years of probation may be imposed).

72 *See* 18 U.S.C. § 3563(b).

73 *See, e.g.,* 18 U.S.C. § 924(c) (setting forth mandatory minimum statutory penalties for using a firearm in course of a drug-trafficking offense or crime of violence); 21 U.S.C. § 841(b)(1) (setting forth mandatory minimum statutory penalties for drug-trafficking involving certain types and quantities of drugs).

74 *See, e.g.,* 18 U.S.C. § 3561(a)(1) (prohibiting probation for offenders convicted of Class A and B felonies); *see also* 18 U.S.C. § 3559(a)(1) & (2) (defining Class A and B felonies as offenses that are punishable by a maximum of life imprisonment (for Class A) or by 25 years or more of imprisonment (for Class B)). Offenses such as bank fraud and armed bank robbery are Class B felonies. *See* 18 U.S.C. §§ 1344 & 2113(d).

- 75 *See* 18 U.S.C. § 3559(a).
- 76 *See* 18 U.S.C. § 3624(b); *see also* Barber v. Thomas, 560 U.S. 474 (2010).
- 77 *See* 18 U.S.C.A. § 3624(b)(1).
- 78 *See, e.g.*, United States v. Steele, 682 Fed. App'x 100, 101 (3d Cir. 2017).
- 79 *See* 18 U.S.C.A. § 3624(c).
- 80 *See* 18 U.S.C. § 3621(e)(2)(B); 28 CFR § 550.55; *see also* Lopez v. Davis, 531 U.S. 230 (2001).
- 81 *See* 18 U.S.C. § 3582(c); 28 U.S.C. § 994(t); USSG §1B1.13. This mode of early-release is referred to as “compassionate release.”
- 82 *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017) (hereafter 2017 MANDATORY MINIMUM REPORT).
- 83 *See* 18 U.S.C. § 924(c) & (e) (firearms offenses); 21 U.S.C. § 841(b) (drug-trafficking offenses).
- 84 *See* REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 53 (2011) (hereafter 2011 MANDATORY MINIMUM REPORT) (“Congress charged the Commission with promulgating guidelines that are ‘consistent with all pertinent provisions’ of federal law and with providing sentencing ranges that are ‘consistent with all pertinent provisions of title 18, United States Code.’ To that end, the Commission has incorporated mandatory minimum penalties into the guidelines since their inception, and has continued to incorporate new mandatory minimum penalties as enacted by Congress.”) (citing 28 U.S.C. § 994(a) & (b)).
- 85 *See* Melendez v. United States, 518 U.S. 120 (1996) (requiring prosecutor to specifically move for a downward departure under § 3553(e) in order for a court to have authority to impose a sentence below the statutory mandatory minimum penalty; holding that the mere filing of a request for downward departure from the applicable guideline range pursuant to USSG §5K1.1 does not authorize a departure below the statutory minimum).
- 86 Those five criteria are:
- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that

the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f).

87 *See* USSG §2D1.1(b)(18).

88 USSG §2D1.1, comment. (n.21).

89 *See* 18 U.S.C. §§ 3572 (fines), 3663-3663A (restitution), & 3013 (special assessment).

90 *United States v. Elliot*, 971 F.2d 620, 622 (10th Cir. 1992).

91 *See* 18 U.S.C. § 3571(b) (generally providing that, for felonies, the maximum fine amount is \$250,000, and for Class A misdemeanors the maximum fine amount is \$100,000); *but cf.*, *e.g.*, 21 U.S.C. § 841(b)(1)(A) (providing for a maximum fine of \$10,000,000 for a defendant convicted of certain drug-trafficking offenses).

92 *See United States v. Amato*, 540 F.3d 153, 156 (2d Cir. 2008).

93 A special assessment goes into a crime victim compensation fund. *See United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990).

94 *See* 18 U.S.C. §§ 3663A (providing for mandatory restitution in some types of cases) & 3013 (providing for mandatory special assessments).

95 18 U.S.C.A. § 3573.

96 *Johnson v. United States*, 529 U.S. 694, 696-97 (2000).

97 *Id.*

98 U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1-2 (2010).

99 *United States v. Vallejo*, 69 F.3d 992, 994 (9th Cir. 1995) (quoting USSG §5D1.1, comment (n.2) (1992)).

100 Some penal statutes specify that terms of supervised release are mandatory and also specify the minimum length of such terms. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (mandating a minimum 8-year term of supervised release for certain drug-trafficking offenses).

101 *Johnson*, 529 U.S. at 709. In cases where supervised release is not mandatory, the relevant statutes set forth maximum terms only. *See* 18 U.S.C. § 3553(b) (setting forth authorized terms of supervised release for federal offenses according to the class of the offense; unless otherwise provided in a different statute; for a Class A or Class B felony, a term not more than five years; for a Class C or Class D felony, a term of not more than three years; and for a Class E felony, or for a misdemeanor (other than a petty offense), a term of not more than one year).

102 *See* 18 U.S.C. § 3583(d).

103 530 U.S. 466 (2000).

104 *United States v. Booker*, 543 U.S. 220 (2005); *see also Blakely v. Washington*, 542 U.S. 296 (2004).

105 *Apprendi*, 530 U.S. at 489. A defendant’s prior conviction may be found by a sentencing judge by a preponderance of the evidence as a basis to enhance the defendant’s statutory maximum. *See* *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

106 *See* 18 U.S.C. § 2113(d) (25-year maximum term of imprisonment for a bank robbery with a “dangerous weapon or device” compared to 20-year maximum for bank robbery without a dangerous weapon or device); 21 U.S.C. § 841(b)(1)(A)-(D) (increased drug quantities can raise statutory maximum from 5 years to life without parole depending on the drug type).

107 *Alleyne v. United States*, 570 U.S. 99 (2013).

108 *Southern Union Co. v. United States*, 567 U.S. 343 (2012).

109 USSG § 1B1.1, comment. (backg’d).

110 *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

111 *See* *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (“The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”).

112 *See* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990). The authors were the Chair and General Counsel of the Commission at the time.

113 *See* USSG §1B1.3.

114 Wilkins & Steer, *supra*, at 497; *see also id.* at 502 (“The parameters of . . . ‘Relevant Conduct’ . . . are potentially much broader than the minimum necessary to satisfy the elements of the convicted offense.”); *see generally* USSG, Ch. 1, Pt. A.4(a) (“Real Offense vs. Charge Offense Sentencing”).

115 *See, e.g.*, *United States v. Brock*, 211 F.3d 88, 92 n.4 (4th Cir. 2000) (“The use of relevant conduct mirrors pre-guidelines practice, in which a sentencing judge could consider all factors relevant to sentencing.”).

116 *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 513 (1992) (“By not adopting a pure offense-of-conviction-charge system, the guidelines protect the system from the unintended transfer of discretion from courts to prosecutors.”).

117 *See* USSG §1B1.3(a). The formal definition of “relevant conduct” includes:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above

that were part of the same course of conduct or common scheme or plan as the offense of conviction; [and]

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions . . .

USSG §1B1.3(a).

118 *See* USSG §6A1.3, comment.

119 *See* USSG §2B3.1(b)(2).

120 *See* USSG §2B1.1(b)(1).

121 *See* USSG §2D1.1(a)(5) (and the corresponding Drug Quantity Table).

122 *See* USSG §2K2.1(b)(6).

123 The Commission created the CHC's based in significant part on their ability to predict recidivism on the part of offenders. *See* U.S. SENTENCING COMM'N, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION'S SALIENT FACTOR SCORE (2005), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf.

124 *See* USSG §§5B1.1, 5C1.1 (defendants in Zones A and B may receive a probationary sentence or a sentence of incarceration, in the court's discretion; defendants in Zone C may receive a "split" sentence of incarceration followed by community confinement or a sentence of incarceration only, at the court's discretion; and defendants in Zone D may only receive a sentence of imprisonment absent a downward departure or variance from that zone).

125 *See* USSG §1B1.1(a)-(c).

126 18 U.S.C. § 3553(a)(4)(A)(ii).

127 *See* *Peugh v. United States*, 569 U.S. 530 (2013).

128 USSG §1B1.11(b)(1).

129 USSG §1B1.11(b)(2).

130 The commentary is generally "authoritative." *See* *Stinson v. United States*, 508 U.S. 36, 42 (1993).

131 *See* USSG §2B3.1, comment. (n.1) (referencing USSG §1B1.1, comment. (n.1(D))).

132 *See* USSG §1B1.3(a) (relevant conduct provision).

133 *See* USSG §2B3.1, comment. (n.3) (emphasis added).

134 Section 3B1.1 provides for a 2-level enhancement "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" involving less than five participants. USSG §3B1.1(c).

135 Section 3B1.4 provides for a 2-level enhancement "[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense . . ." USSG §3B1.4.

136 *See* USSG §4A1.1(a)-(c) (providing for 3 criminal history points for each prior conviction receiving a sentence of incarceration exceeding 13 months, 2 points for each prior conviction receiving a sentence of incarceration of at least 60 days but no more than 13 months, and 1 point for any other prior conviction). Note that, although prior local, state, and federal convictions (including some military convictions) can count, tribal convictions and foreign convictions are categorically excluded. *See* USSG §4A1.2(g)-(i).

137 *See* USSG §4A1.1(d).

138 *See* USSG §4A1.2(e) (providing that any prior conviction for which a sentence of more than 13 months was imposed receives criminal history points only if it was imposed or if the defendant was released from imprisonment “within fifteen years of the defendant’s commencement of the instant offense,” and any prior conviction for which any other sentence was imposed receives criminal history points only if it was imposed “within ten years of the defendant’s commencement of the instant offense”).

139 *See* USSG §4A1.2(c) (list of excluded offenses).

140 *See* USSG §4A1.2(d)(2). If a defendant (when a juvenile) was prosecuted as an adult and received a prison sentence exceeding one year and one month, a court should treat that prior conviction in the same manner as it would treat such a conviction involving an adult. *See United States v. Gipson*, 46 F.3d 472, 475 (5th Cir. 1995).

141 *See* USSG §4A1.2(e).

142 *See* USSG §4A1.1(c) & (d).

143 *See* USSG §5G1.1. For instance, assuming a bank robbery defendant had a guideline range (before consideration of the 20-year (240-month) statutory maximum) of 210-262 months, the defendant’s guideline range would be 210-240 months under §5G1.1(c)(1).

144 *See* USSG §5C1.1(f).

145 *See, e.g.*, USSG §§2B1.1, comment. (n.21) (listing possible bases for upward and downward departures in fraud and theft cases); 2D1.1, comment. (n.27) (listing possible bases for upward and downward departures in drug cases); and 2L1.2, comment. (nn.6-8) (listing possible basis for upward and downward departures in illegal reentry immigration cases).

146 *See* USSG §4A1.3.

147 *See, e.g.*, USSG §§5H1.1 (downward departure based on defendant’s age in some circumstances), 5H1.3 (downward departure based on defendant’s mental or emotional condition in some circumstances), & 5K2.8 (upward departure based on defendant’s extreme conduct toward a victim that was unusually heinous, cruel, brutal, or degrading).

148 *Koon v. United States*, 518 U.S. 81, 94 (1996).

149 *See, e.g.*, USSG §5H1.10 (providing that offenders’ race, sex, national origin, creed, religion, and socio-economic status are not proper bases for departure).

150 There are two varieties of “substantial assistance” motions filed by the prosecution — the first seeks a downward departure below the applicable *guideline range*, and the second seeks a downward departure below a statutory mandatory minimum sentence. *Compare* USSG §5K1.1, *with* 18 U.S.C. § 3553(e). Substantial assistance motions permitting a sentencing court to depart below a statutory mandatory minimum penalty are discussed in Part IV.A.2.

- 151 *See, e.g.*, 2017 SOURCEBOOK at S-53 (Table N) (19.6% of cases – 10.8% substantial assistance departures and 8.8% fast-track departures).
- 152 *See* USSG §1B1.1(c). The factors in section 3553(a) are set forth *supra* at page 3.
- 153 *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).
- 154 18 U.S.C. § 3553(a).
- 155 *See United States v. Narvaez-Soto*, 773 F.3d 282, 289 (1st Cir. 2014).
- 156 *See* USSG §5E1.2(a).
- 157 *See* USSG §5E1.2(c).
- 158 USSG §5C1.1, comment. (n.2).
- 159 USSG §5E1.2, comment. (n.1).
- 160 *See* USSG §5D1.1.
- 161 *See* USSG §5D1.2(a) (providing for “[a]t least two years but not more than five years for a defendant convicted of a Class A or B felony”; “[a]t least one year but not more than three years for a defendant convicted of a Class C or D felony”; and “[o]ne year for a defendant convicted of a Class E felony or a Class A misdemeanor”).
- 162 *See* USSG §5D1.1(c). As the Commission noted in the commentary to this guideline: “Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution [for illegal reentry by previously deported alien under 8 U.S.C. § 1326].” USSG §5D1.1, comment. (n.5).
- 163 *See* USSG §5D1.2(b); *see also* 18 U.S.C. § 3583(j).
- 164 *See Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (in the pre-SRA era, stating “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”).
- 165 18 U.S.C. § 3742(a) & (b); *see also* *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (“[The SRA] permits a defendant to appeal a sentence that is above the [guideline] range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline.”).
- 166 In 2017, appeals of original sentences by defendants occurred in 3,419 cases, while government appeals of original sentences occurred in only 21 cases. *See* 2017 SOURCEBOOK at S-147 & S-148 (Tables 57 & 58).
- 167 *Booker*, 543 U.S. at 261-62.
- 168 *Gall*, 522 U.S. at 51.
- 169 *See, e.g.*, *United States v. Kritsi*, 437 F.3d 1050, 1054 (10th Cir. 2006).
- 170 *Rita v. United States*, 551 U.S. 338, 357 (2007).

171 *See* *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) (holding that miscalculation of guideline range that was determined to be plain error and to affect defendant’s substantial rights would, in the ordinary case, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus would call for the Court of Appeals to exercise its discretion to vacate defendant’s sentence); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (holding that, when a defendant is sentenced under an incorrect guideline range, whether or not the defendant’s ultimate sentence falls within the correct range, the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error) .

172 *Rita*, 551 U.S. at 355-56. Seven out of the 12 circuits (the 4th, 5th, 6th, 7th, 8th, 10th, and D.C. Circuits) employ such a presumption of reasonableness, while five (the 1st, 2nd, 3rd, 9th, and 11th) do not. *See* *United States v. Carty*, 520 F.3d 984, 993-94 & nn. 9 & 10 (9th Cir. 2008) (en banc) (collecting cases).

173 *Rita*, 551 U.S. at 347.

174 *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam).

175 *Rita*, 551 U.S. at 354-55.

176 *Kimbrough*, 552 U.S. at 109.

177 Chapter Seven recommends revocation for Grade A and Grade B violations as well as for repeated Grade C violations where an offender had not been revoked after a court’s finding of the initial Grade C violation. *See* USSG §7B1.3 & comment. (n.1).

178 *See* USSG §§7B1.1, 7B1.2 & 7B1.4. Grade A violations include new felony drug-trafficking offenses or crimes of violence committed by offenders on supervision, as well as any other new felony offense punishable by more than 20 years of imprisonment. Grade B violations include all other felony offenses committed on supervision. Grade C violations include misdemeanor offenses committed on supervision and “technical” violations (such as failure to report to the supervising probation officer as directed by the court or willful failure to pay a fine). *See* USSG §7B1.1.

179 *See* USSG §7B1.4.

180 *See* USSG §7B1.1, comment. (n.1.).

181 In probation revocation cases, the court must consider all of the § 3553(a) factors (just as at an original sentencing). Conversely, in a supervised release revocation proceeding, the court should consider all of the factors except § 3553(a)(2)(A) (which requires courts at original sentencing hearings to consider imposing a sentence in order to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”). *See* 18 U.S.C. §§ 3565(a) & 3583(e).

182 *See* 18 U.S.C. §§ 3565 (probation revocation) & 3583(e), (g) (supervised release revocation).

183 18 U.S.C. §§ 3565(b) & 3583(g). There is a limited exception to the requirement that a court incarcerate an offender for possessing drugs: if a failed drug test constitutes the sole evidence of drug possession, and if the court finds that an offender would benefit from “an appropriate substance abuse treatment program,” the court may substitute drug abuse treatment for imprisonment. 18 U.S.C. §§ 3563(e) & 3583(d).

184 *See* 18 U.S.C. § 3583(e)(3) (for a Class A felony, the maximum term of imprisonment is 5 years upon revocation; for a Class B felony, the maximum is three years upon revocation; for a Class C or Class D felony, the maximum is two years upon revocation; and for a Class E felony, or for a misdemeanor (other than a

petty offense), the maximum is one year upon revocation).

185 18 U.S.C. § 3565(a)(2).

186 The Courts of Appeals vary in their characterizations of the applicable standard of review in revocation cases. Some apply the *Booker* “reasonableness” standard of review while others will reverse only if a district court was “plainly unreasonable” in revoking. See *United States v. Flagg*, 481 F.3d 946, 949 (7th Cir. 2007) (discussing the approaches of different circuits).

187 See, e.g., *United States v. Silva*, 443 F.3d 795, 799 (11th Cir. 2006).

188 See 28 U.S.C. § 994 (o), (p) & (x); see also *Rita*, 551 U.S. at 350 (“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”).

189 The amendments are contained in Appendix C to the *Guidelines Manual*. As of November 1, 2018, there were 813 amendments.

190 Although the Commission refers to such amendments as “proposed,” they should not be considered as finalized amendments being proposed to Congress for their consideration pursuant to 28 U.S.C. § 994(p). Rather, they are proposed for public consideration only, so as to inform the Commission’s decision of whether to adopt such possible amendments.

191 See generally U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE, Pts. 4 & 5, http://www.ussc.gov/sites/default/files/pdf/amendment-process/Practice_Procedure_Rules.pdf.

192 See *Federal Sentencing Guidelines, Amendment, Disapproval*, Pub. L. No. 104–38, 109 Stat. 334 (1995) (rejecting amendments related to the crack cocaine and money laundering guidelines).

193 28 U.S.C. § 994 (u); see also U.S. SENT. COMM., Rule 4.1, RULES OF PRAC. & PROC.

194 See 18 U.S.C. § 3582 (“In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o) . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”); USSG §1B1.10 (setting forth the procedure for considering an offender’s petition for resentencing under a retroactive guideline amendment).

195 *Dillon v. United States*, 560 U.S. 817 (2010).

196 See USSG §1B1.10(d) (listing the retroactive amendments). Sometimes an amendment to the guidelines is merely intended to be “clarifying” rather than to work a “substantive” change. In such a case, the amendment would be given effect to a defendant whose case is still pending on direct appeal, even if the Commission does not vote to apply the amendment retroactively. Such a clarifying amendment, however, may not be given retroactive effect to a defendant who already has concluded his direct appeal or who did not file a direct appeal, unless the Commission has voted to give retroactive effect to that amendment. See, e.g., *United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003); *United States v. Drath*, 89 F.3d 216, 217-18 (5th Cir. 1996).

197 28 U.S.C. § 995(a)(12)-(16).

198 Such publications are available on the Commission’s website at <http://www.ussc.gov/research-and-publications>.

199 See 28 U.S.C. § 994(w).

200 See Christine Kitchens, *Federal Sentencing Data and Analysis Issues* (U.S. Sent. Comm'n Aug. 2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100825_Federal_Sentencing_Data_Analysis.pdf.

201 In recent years, the number of federal offenders sentenced under the guidelines has ranged from 86,201 (in 2011) to 66,873 (in 2017). See 2017 SOURCEBOOK at S-6 (Table 2); 2011 SOURCEBOOK at 50 (Table 2).

202 2017 SOURCEBOOK at S-14 (Table 3); see generally U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2016, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf.

203 2017 SOURCEBOOK at S-30 (Figure D).

204 *Id.* at S-33 (Table 14).

205 2017 MANDATORY MINIMUM REPORT, *supra*, at 43 (Fig. 15). With respect to offenders convicted of an offense carrying a mandatory minimum penalty, the average prison sentence for offenders who received relief from the mandatory minimum sentence (in the form of the safety valve or motion for downward departure for substantial assistance) was 67 months, while the average prison sentence for offenders who did not receive such relief was 138 months. *Id.*

206 See Federal Bureau of Prisons, *Total Federal Inmates*, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited November 1, 2018; reporting 181,227 Total Federal Inmates"); see also Bureau of Justice Statistics, *Prisoners in 2016*, at 2 (2018) (noting total number of all federal and state prisoners at end of 2016 was 1,505,400).

207 SOURCE: Commission's FY2017 Datafile.

208 See Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out? Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, FED. PROB. (Sept. 2013).

209 See U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 61-63 (2010).

210 2017 SOURCEBOOK at S-16 - S-21 (Tables 4-9).

211 *Id.* at S-46 (Table 20).

Attachment A

Ch. 5 Pt. A

SENTENCING TABLE (in months of imprisonment)

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

Attachment B

§2B3.1

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§2B3.1. Robbery

- (a) Base Offense Level: **20**
- (b) Specific Offense Characteristics
 - (1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.
 - (2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.
 - (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6
(D) If the degree of injury is between that specified in subdivisions (A) and (B),	add 3 levels; or
(E) If the degree of injury is between that specified in subdivisions (B) and (C),	add 5 levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** levels.

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.
- (5) If the offense involved carjacking, increase by **2** levels.
- (6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.
- (7) If the loss exceeded \$20,000, increase the offense level as follows:

§2B3.1

LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A) \$20,000 or less	no increase
(B) More than \$20,000	add 1
(C) More than \$95,000	add 2
(D) More than \$500,000	add 3
(E) More than \$1,500,000	add 4
(F) More than \$3,000,000	add 5
(G) More than \$5,000,000	add 6
(H) More than \$9,500,000	add 7.

(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a), 2119. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. “*Firearm*,” “*destructive device*,” “*dangerous weapon*,” “*otherwise used*,” “*brandished*,” “*bodily injury*,” “*serious bodily injury*,” “*permanent or life-threatening bodily injury*,” “*abducted*,” and “*physically restrained*” are defined in the Commentary to §1B1.1 (Application Instructions).

“*Carjacking*” means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.

2. Consistent with Application Note 1(E)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

§2B3.2

3. **“Loss”** means the value of the property taken, damaged, or destroyed.
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.
5. If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).
6. “A threat of death,” as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as “Give me the money or I will kill you”, “Give me the money or I will pull the pin on the grenade I have in my pocket”, “Give me the money or I will shoot you”, “Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)”, or “Give me the money or you are dead” would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective June 15, 1988 (amendments 14 and 15); November 1, 1989 (amendments 110 and 111); November 1, 1990 (amendments 314, 315, and 361); November 1, 1991 (amendment 365); November 1, 1993 (amendment 483); November 1, 1997 (amendments 545 and 552); November 1, 2000 (amendment 601); November 1, 2001 (amendment 617); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791); November 1, 2018 (amendment 805).
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