

THE INTERACTION BETWEEN MANDATORY MINIMUM PENALTIES AND THE SENTENCING GUIDELINES

A. INTRODUCTION

The statutory directive requires the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by the Supreme Court’s decision in *United States v. Booker*.²³⁰ As part of that assessment, this chapter presents an overview of the interaction between mandatory minimum penalties and the sentencing guidelines. First, the chapter provides a history of the Sentencing Reform Act, its directives to the Commission, the operation of the guidelines, and an overview of how the Commission promulgates amendments to the guidelines. Next, the chapter describes how the guidelines incorporate mandatory minimum penalties in formulating sentencing ranges for various offenses. Finally, the chapter compares how mandatory minimum penalties and the guidelines determine sentences.

B. DEVELOPMENT AND OPERATION OF THE GUIDELINES

1. *History of the Sentencing Reform Act*

The Sentencing Reform Act responded to an emerging consensus that the federal sentencing system needed major reform.²³¹ Prior to the Sentencing Reform Act, federal judges possessed almost unlimited authority to fashion an appropriate sentence within a broad statutorily prescribed range and “decided [] the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which these factors would be combined in determining a specific sentence.”²³² Sentences were limited only by statutory minimums and maximums. Because each judge was “left to apply his own notions of the purposes of sentencing,” the federal sentencing system exhibited “an unjustifiably wide range of sentences to offenders convicted of similar crimes.”²³³ Neither party had any meaningful right of appellate review. In addition, the parole system, which applied to only a portion of those

²³⁰ 543 U.S. 220 (2005).

²³¹ See S. REP. NO. 97–307, at 956 (1981) (“glaring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence); H.R. REP. NO. 98–1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

²³² See U.S. SENT’G COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 9 (1991) [hereinafter 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM].

²³³ S. REP. NO. 97–307, at 955 (1981).

sentenced and which permitted the release of prisoners based on inconsistent ideas regarding the potential for rehabilitation, exacerbated the lack of uniformity.²³⁴

The Sentencing Reform Act, the culmination of lengthy bipartisan efforts, sought to eliminate unwarranted disparity in sentencing and to address the inequalities created by indeterminate sentencing.²³⁵ Congress determined that sentencing should be tailored:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.²³⁶

To this end, the Sentencing Reform Act created the Commission as an independent agency within the judicial branch of the federal government²³⁷ and directed it to promulgate guidelines that were required to be used for sentencing within the prescribed statutory maximum.²³⁸ The statutory purposes of the Commission, among others, are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.²³⁹

²³⁴ 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM, at 9 (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

²³⁵ See S. REP. NO. 97–307 (1981); H.R. REP. NO. 98–1017 (1984); 28 U.S.C. § 994(k).

²³⁶ See 18 U.S.C. § 3553(a)(2).

²³⁷ Established as “as an independent commission in the Judicial Branch of the United States,” the Commission is comprised of seven voting members (including the Chair) appointed by the President “by and with the advice and consent of the Senate.” The Act provides that “[a]t least three of the [Commission’s] members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States” and no more than four members of the Commission can be members of the same political party. The Attorney General, or his designee, and the Chairman of the United States Parole Commission are designated as *ex officio* non-voting members. See 28 U.S.C. § 991(a).

²³⁸ See 28 U.S.C. §§ 991, 994, and 995(a)(1).

²³⁹ See 28 U.S.C. § 991 (b)(1).

For nearly 20 years, federal judges were required to impose sentences within the applicable guideline range unless the court found the existence of an aggravating or mitigating circumstance not adequately taken into consideration by the Commission in formulating the sentencing guidelines.²⁴⁰ This system changed in 2005, when the Supreme Court held in *United States v. Booker* that the mandatory operation of the guidelines violated the Sixth Amendment right to a jury trial and the associated right to have all “elements” of the offense proved beyond a reasonable doubt.²⁴¹ The Court remedied the constitutional violation by striking two provisions from the Sentencing Reform Act, thereby rendering the guidelines “effectively advisory.”²⁴² The Court reasoned that although an advisory guideline system lacked the mandatory features that Congress enacted, it nevertheless “retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted.”²⁴³ The Court concluded that an advisory guideline system would “continue to move sentencing in Congress’s preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”²⁴⁴

Booker and its progeny explicitly and repeatedly reinforced the continued importance of the guidelines in the sentencing determination.²⁴⁵ District courts are required to properly calculate and consider the guidelines when sentencing.²⁴⁶ “The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors

²⁴⁰ 18 U.S.C. § 3553(b).

²⁴¹ 543 U.S. at 244 (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”). The Court did not hold that “mandatory” guidelines are unconstitutional *per se*, but rather that the federal sentencing guidelines were unconstitutional as applied because facts increasing the maximum sentence were found by a judge, not a jury. Accordingly, a guideline system could be mandatory in nature and not violate the Sixth Amendment provided that the system requires that any facts increasing the maximum sentence are either admitted by the defendant or determined by a jury upon proof beyond a reasonable doubt. For a more detailed discussion of *Booker* and its impact on mandatory minimums, see *infra* Appendix E(A)(3).

²⁴² *Id.* at 245 (excising 18 U.S. C. §§ 3553(b)(1) and 3742(e)).

²⁴³ See USSG Ch. 1, Pt. A (Introduction and Authority).

²⁴⁴ 543 U.S. at 264-65.

²⁴⁵ See *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Irizarry v. United States*, 553 U.S. 708 (2008); *Spears v. United States*, 555 U.S. 261 (2009); *Dillon v. United States*, 130 S. Ct. 2683 (2010); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

²⁴⁶ See 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall*, 552 U.S. at 49 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”).

under 18 U.S.C. § 3553(a).”²⁴⁷ Most circuits agree on the three-step approach reflected in USSG §1B1.1 (Application Instructions), including the consideration of departure provisions in the *Guidelines Manual*, in determining the sentence to be imposed.²⁴⁸

2. *The Sentencing Reform Act’s Requirements*

The Sentencing Reform Act contains several provisions that have governed and guided the Commission’s development of the sentencing guidelines since their inception. The Sentencing Reform Act mandates that the guidelines be “consistent with all pertinent provisions of any Federal statute.”²⁴⁹ Accordingly, the Commission considers the same factors that sentencing courts are required to consider under 18 U.S.C. § 3553(a).²⁵⁰ The Sentencing Reform Act further directs that the guidelines are to take into account, to the degree relevant, certain characteristics of the offense, including “the nature and degree of the harm caused by the offense,” “the community view of the gravity of the offense,” “the public concern generated by the offense,” “the deterrent effect a particular sentence may have on the commission of the offense by others,” and “the current incidence of the offense in the community and in the Nation as a whole.”²⁵¹ The Commission uses these characteristics to measure the relative seriousness of

²⁴⁷ See USSG Ch. 1, Pt. A (citing *Rita*, 551 U.S. at 351).

²⁴⁸ See *United States v. Dixon*, 449 F.3d 194, 204 (1st Cir. 2006) (court must consider “any applicable departures”); *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) (court must consider “available departure authority”); *United States v. Jackson*, 467 F.3d 834, 838 (3d Cir. 2006) (court’s correct Guideline calculation includes “ruling on Guidelines departures”); *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) (departures “remain an important part of sentencing even after Booker”); *United States v. Tzep-Mejia*, 461 F.3d 522, 525 (5th Cir. 2006) (“Post-*Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence.” (internal footnote and citation omitted)); *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006) (district court “still required to consider . . . whether a Chapter 5 departure is appropriate”); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006) (“the district court must decide if a traditional departure is appropriate,” and after that must consider a variance (internal quotation omitted)); *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005) (stating that “the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered”). *But see United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) (stating that departures are “obsolete”); *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006) (“[W]e elect to review the district court’s application of the advisory sentencing guidelines only insofar as they do not involve departures. To the extent that a district court has framed its analysis in terms of downward or upward departure, we will treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range.”). *Cf. United States v. Guyton*, 636 F.3d 316, 319 n.2 (7th Cir. 2011) (“In a strictly legal sense, the ‘obsolete’ description was accurate as applied to appellate review of a sentence, but the ‘obsolete’ line of cases should not discourage district courts from taking genuine guidance from all the Guidelines, including their departure provisions, as required by the amended section 1B1.1”).

²⁴⁹ 28 U.S.C. § 994(a) (as amended by the PROTECT Act, § 401, Pub. L. No. 108–21, 117 Stat. 650 (2003)).

²⁵⁰ See 18 U.S.C. § 3553(a).

²⁵¹ 28 U.S.C. § 994(c).

the offense as compared to other offenses and to maintain proportionality throughout the guidelines.²⁵²

The Sentencing Reform Act further instructs the Commission to use past sentencing practices “as a starting point”²⁵³ for creating the initial guidelines, and the Commission continues to use them in ongoing proportionality analyses. However, the Commission is not bound by past practices. The Sentencing Reform Act states that “[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.”²⁵⁴

The Sentencing Reform Act also instructs the Commission to take into account, to the degree relevant, certain characteristics of the offender, including criminal history,²⁵⁵ while assuring “that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”²⁵⁶ Furthermore, “in recommending a term of imprisonment or length of a term of imprisonment,” the Act requires that the guidelines and policy statements reflect the “general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”²⁵⁷

²⁵² Among other requirements, the Sentencing Reform Act mandates that the Commission “take into account the nature and capacity of the penal, correctional, and other facilities and services available” and formulate the guidelines “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” 28 U.S.C. § 994(g). The Commission must further “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.” *Id.* § 994(j).

²⁵³ *Id.* § 994(m).

²⁵⁴ *Id.*

²⁵⁵ Over the course of its history, the Commission has ensured that the departure provisions set forth in the *Guidelines Manual* are consistent with the directives in 28 U.S.C. § 994. Section 994 of title 28, United States Code, instructs *the Commission* to assure the guidelines and policy statements reflect the general inappropriateness of considering certain offender characteristics (for example “family ties and responsibilities”) in the guidelines, but 18 U.S.C. § 3553(a) can be read to direct the *sentencing courts* to consider those same characteristics. Accordingly, judges often determine that the guidelines have not sufficiently addressed offender characteristics and impose a sentence outside the guidelines. The Commission recommends that Congress clarify the relationship between these two statutory provisions, specifically as they relate to certain offender characteristics in 28 U.S.C. § 994 and the courts’ consideration of those same factors under 18 U.S.C. § 3553(a).

²⁵⁶ *Id.* § 994(d).

²⁵⁷ *Id.* § 994(e); *see also id.* § 994(k) (requiring “that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”). *See also* *Tapia v. United States*, 131 S. Ct. 2382 (2011) (holding that the Sentencing Reform Act precludes a sentencing court from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation).

3. *Operation of the Sentencing Guidelines*

In promulgating the initial set of guidelines, the Commission started with the premise that a rational and just sentencing policy should treat similar offenders who commit similar offenses equally.²⁵⁸ The Commission designed the guidelines to take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's prior criminal record and role in the offense. Using this information, the guidelines prescribe proportional individualized sentences within a sentencing table consisting of 43 offense levels and six criminal history categories.

The offense level is determined based upon the elements of the offense committed by the defendant, the particular harms associated with the defendant's crime, and any other aggravating or mitigating factors associated with the particular offense. The offense level increases based upon the severity of the offense committed, and the number of identified harms associated with the commission of the offense.

In determining which base offense level, specific offense characteristics, adjustments, cross references among guidelines, or other special instructions apply, a court must consider all "relevant conduct." Relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."²⁵⁹ Relevant conduct also includes "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."²⁶⁰ In addition, "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior,"²⁶¹ relevant conduct includes "all acts and omissions [of the defendant or others in furtherance of the jointly undertaken criminal activity] that were part of the same course of conduct or common scheme or plan as the offense of conviction."²⁶² In this manner, the guidelines implement a "modified real offense system."²⁶³

Each guideline in Chapter Two of the *Guidelines Manual* contains a base offense level, which is the starting point for measuring the seriousness of each particular offense. More serious

²⁵⁸ 28 U.S.C. § 994(f) directs the Commission, in promulgating guidelines, to pay "particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted disparities."

²⁵⁹ See USSG §1B1.3(a)(1)(A) (Relevant Conduct (Factors that Determine the Guideline Range)).

²⁶⁰ See USSG §1B1.3(a)(1)(B).

²⁶¹ See USSG §3D1.2(d) (Procedure for Determining Offense Level on Multiple Counts).

²⁶² See USSG §1B1.3(a)(2).

²⁶³ 1991 COMMISSION REPORT at iii.

types of crime have higher base offense levels; for example, trespass has a base offense level of 4,²⁶⁴ while kidnapping has a base offense level of 32.²⁶⁵

Most guidelines in Chapter Two include a number of specific offense characteristics that increase or decrease the base offense level. For example, in drug trafficking cases, the base offense level is increased if the offense involves violence or a firearm, among other things.²⁶⁶ In contrast, the base offense level is decreased in drug trafficking cases if the defendant meets the safety valve subdivision criteria.²⁶⁷ Additionally, a defendant who qualifies for a mitigating role adjustment may receive an offense level reduction in some circumstances.²⁶⁸

Finally, a defendant's offense level also may increase or decrease depending on whether any adjustments in Chapter Three apply.²⁶⁹ Chapter Three contains adjustments generally applicable across all offense types. Categories of adjustments include: victim-related adjustments, the offender's role in the offense, and obstruction of justice. For example, if the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by two levels.²⁷⁰ The offense level is also increased by two levels if the offender obstructed justice.²⁷¹ However, if the offender was a minimal participant in the offense, the offense level is decreased by four levels.²⁷² Chapter Three also includes rules for determining the guideline range when the defendant is convicted of multiple counts and when a downward adjustment for the acceptance of responsibility applies.

Calculation of the guideline sentence also requires a determination of the defendant's criminal history.²⁷³ Chapter Four contains the rules that assign offenders to one of six criminal history categories, with Criminal History Category I for offenders with the least serious prior criminal records (including first-time offenders) and Criminal History Category VI for offenders with the most extensive prior criminal records. An offender's criminal history category is

²⁶⁴ See USSG §2B2.3(a) (Trespass).

²⁶⁵ See USSG §2A4.1(a) (Kidnapping, Abduction, Unlawful Restraint).

²⁶⁶ See USSG §2D1.1(Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

²⁶⁷ *Id.*

²⁶⁸ See, e.g., USSG §2D1.1(a)(5), (b)(15).

²⁶⁹ See generally USSG Ch. 3 (Adjustments).

²⁷⁰ See USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

²⁷¹ See USSG §3C1.1 (Obstruction or Impeding the Administration of Justice).

²⁷² See USSG §3B1.2(a) (Mitigating Role).

²⁷³ See generally USSG Ch. 4 (Criminal History and Criminal Livelihood).

calculated by scoring prior sentences,²⁷⁴ according to the rules in USSG §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

A prior sentence of imprisonment²⁷⁵ exceeding one year and one month receives 3 points²⁷⁶ to the criminal history score if the sentence was “imposed within fifteen years of the defendant’s commencement of the instant offense” or “resulted in the defendant being incarcerated during any part of such fifteen-year period.”²⁷⁷ A prior sentence of imprisonment of at least sixty days receives 2 points²⁷⁸ and any other prior sentence not otherwise counted receives 1 point,²⁷⁹ if “imposed within ten years of the defendant’s commencement of the instant offense.”²⁸⁰ “Any prior sentence not within the time periods specified above is not counted.”²⁸¹ The guidelines also increase the criminal history points by 2 points if the “defendant committed the instant offense while under a criminal justice sentence.”²⁸²

The guidelines include instructions for counting multiple prior sentences. Prior sentences are counted separately if imposed for offenses that were separated by an intervening arrest. Prior sentences not separated by an intervening arrest and resulting from offenses contained in the same charging instrument or imposed on the same day are counted as a single sentence. However, an offender’s criminal history score increases by 1 additional point for such a prior sentence if a “crime of violence”²⁸³ was involved.²⁸⁴

²⁷⁴ The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense. See USSG §4A1.2(a)(1).

²⁷⁵ The term “sentence of imprisonment” means a sentence of incarceration and refers to the maximum sentence imposed. See USSG §4A1.2(b)(1).

²⁷⁶ See USSG §4A1.1(a).

²⁷⁷ See USSG §4A1.2(e)(1).

²⁷⁸ See USSG §4A1.1(b).

²⁷⁹ See USSG §4A1.1(c).

²⁸⁰ See USSG §4A1.2(e)(2).

²⁸¹ See USSG §4A1.2(e)(3).

²⁸² See USSG §4A1.1(d). Prior to November 1, 2010, the guidelines also added either 1 or 2 “recency” points to the criminal history score “if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under [§4A1.1] subsection (a) or (b) or while in imprisonment or escape status on such a sentence.” The Commission eliminated recency points from the criminal history score calculation, in part, because its research indicated that consideration of recency only minimally improved the predictive ability of the criminal history score. See USSG, App. C, amend. 742.

²⁸³ See USSG §§4A1.2(p), 4B1.2(a) for the definition of “crime of violence.”

²⁸⁴ See USSG §4A1.1(e). This section limits to 3 the number of additional points that may be added for such sentences.

The guidelines also instruct that sentences for prior felony offenses are always counted toward the criminal history score, if imposed within the prescribed time limits. Sentences for misdemeanors and petty offenses may also be counted, unless excluded by the guideline rules. For example, certain enumerated misdemeanor or petty offenses (*e.g.*, careless or reckless driving and leaving the scene of an accident) are counted only under specified circumstances.²⁸⁵ Certain other enumerated misdemeanor or petty offenses (*e.g.*, fish and game violations and hitchhiking) are never counted.²⁸⁶ Likewise, sentences for offenses committed by an offender prior to the age of eighteen and military sentences are counted under specified circumstances.²⁸⁷ By contrast, foreign sentences, tribal court sentences, and expunged convictions are never counted toward the criminal history score.²⁸⁸

Chapter Four also contains a special provision at USSG §4B1.1 (Career Offenders), which implements the directive in the Sentencing Reform Act (28 U.S.C. § 994(h)) that requires the Commission to provide a sentence “at or near the maximum term authorized” for certain categories of violent and drug trafficking offenders with two or more prior offenses. Other provisions apply to offenders who are subject to a statutorily enhanced sentence under 18 U.S.C. § 924(e),²⁸⁹ and to certain sex offenders.²⁹⁰

Once the offense level and criminal history are calculated, the applicable sentencing range is determined by use of the sentencing table.²⁹¹ As noted above, the sentencing table contains 43 offense levels (located on the vertical axis) and six criminal history categories (located on the horizontal axis), for a total of 258 cells. Each cell prescribes a sentencing range, expressed in months of imprisonment. The sentencing ranges partially overlap so that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Moreover, having this number of levels and cells enables proportional

²⁸⁵ See USSG §4A1.2(c)(1). “Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense.” The subsection then lists 13 specific types of offenses.

²⁸⁶ See USSG §4A1.2(c)(2) for a complete list.

²⁸⁷ See USSG §4A1.2(d), (g).

²⁸⁸ See USSG §4A1.2(h), (i), (j). Because the criminal history score is largely based on the length of prior sentences, rather than the nature of the prior offenses, offenders with different types of prior convictions may fall within the same criminal history category. For example, an offender with a prior conviction for burglary who received a 2 year sentence and has multiple prior tribal convictions has 3 criminal history points. See USSG §4A1.1(a). An offender with a prior conviction for careless driving placed on probation for 2 years, who commits a new offense while on probation also has 3 criminal history points: 1 point for the probationary sentence, see USSG §4A1.1(a), and 2 additional points for committing a new offense while on probation, see USSG §4A1.1(d). Both of these offenders would fall within Criminal History Category II. The guidelines provide for an upward or downward departure to account for the inadequacy of a criminal history category. See USSG §4A1.3.

²⁸⁹ See USSG §4B1.4 (Armed Career Criminals).

²⁹⁰ See USSG §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

²⁹¹ See USSG Ch. 5, Pt. A (Sentencing Table).

sentence increases. (Generally, a change of six levels roughly doubles the guideline sentence). By statute, the maximum of any sentence range cannot exceed the minimum by more than the greater of 25 percent or six months.²⁹² Consistent with the “25 percent rule,” the Commission chose to use 43 levels to “permit courts to exercise the greatest permissible range of sentencing discretion.”²⁹³ Thus, the guidelines provide a “system of finely calibrated sentences.”²⁹⁴

Given the difficulty of establishing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision, the guidelines provide for departures from the sentencing range to account for aggravating or mitigating offense or offender characteristics of a kind, or to a degree, not adequately taken into account by the Commission in formulating the guidelines.²⁹⁵ The Commission has explained that it intends for courts “to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”²⁹⁶ Thus, when the circumstances of a particular case make that case “atypical,” the court may depart from the guideline range.²⁹⁷ The guidelines provide several, non-exhaustive, factors that may warrant a departure,²⁹⁸ as well as several factors that may not serve as grounds for departure.²⁹⁹ The departure framework, which exists separately from the court’s authority to vary from the guidelines after *Booker*, is designed to permit the imposition of “an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing.”³⁰⁰

Thus, after *Booker*, the sentencing court must engage in a three-step process to determine the appropriate sentence in a particular case, considering: (1) the properly calculated guideline range; (2) any grounds for departure from the guideline range; and then (3) the factors under section 3553(a).³⁰¹

²⁹² See 28 U.S.C. § 994(b)(2).

²⁹³ See USSG Ch. 1, Pt. A at 11.

²⁹⁴ 1991 Commission Report at iii.

²⁹⁵ See USSG Ch. 1, Pt. A at 6-7; USSG §5K2.0 (Grounds for Departure (Policy Statement)), comment. (backg’d).

²⁹⁶ See USSG Ch. 1, Pt. A at 6.

²⁹⁷ *Id.*

²⁹⁸ See USSG §§4A1.3 (Departures Based on Inadequacy of Criminal History Category); 5K1.1; 5K3.1 (Early Disposition Programs); see also USSG Ch. 1, Pt. A at 6 (providing that, aside from enumerated prohibited factors, “the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case”).

²⁹⁹ See USSG Ch. 1, Pt. A at 6; see also USSG §§5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), 5K2.12 (Coercion and Duress).

³⁰⁰ See USSG §5K2.0, comment. (backg’d); USSG §1B1.1.

³⁰¹ See *Rita*, 551 U.S. at 351.

4. *Amending the Guidelines*

The Sentencing Reform Act contemplated that guideline development would be an ongoing process that would evolve over time as continuing research, experience, analysis, and new criminal statutes warranted modifications and revisions to the guidelines.³⁰² To that end, the Act directs the Commission to “periodically . . . review and revise, in consideration of comments and data coming to its attention, the guidelines”³⁰³ As of November 2010, the Commission had promulgated 747 amendments to the sentencing guidelines and policy related statements.³⁰⁴

The Sentencing Reform Act establishes a process by which the Commission promulgates amendments to the federal sentencing guidelines and policy statements. In particular, the Act requires the Commission to comply with the notice and comment provisions of the Administrative Procedure Act at section 553 of title 5, United States Code,³⁰⁵ and the Commission has adopted administrative Rules of Practice and Procedure that adhere to these statutory procedural requirements and guide the guideline amendment cycle.³⁰⁶

Consistent with these procedural requirements, before promulgating a guideline amendment, the Commission “consult[s] with authorities on, and individuals and institutional representatives of, various aspects of the Federal criminal justice system,”³⁰⁷ by conducting public hearings, publishing proposed amendments for comment in the *Federal Register*, consulting with advisory groups, and considering public comment and informal input. As required by the Sentencing Reform Act, the Commission consults with the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders. During its consideration of proposed amendments, the Commission studies relevant data, reports, and other information compiled by the Commission staff (which may

³⁰² See USSG Ch. 1, Pt. A at 12.

³⁰³ 28 U.S.C. § 994(o).

³⁰⁴ See USSG App. C.

³⁰⁵ 28 U.S.C. § 994(x).

³⁰⁶ See, e.g., Commission Rules of Practice and Procedure (2007) [hereinafter Commission Rules], Rule 2.2– Voting Rules for Action by the Commission (requiring the affirmative vote of at least four members at a public meeting to promulgate guidelines, policy statements, official commentary, and amendments thereto); Rule 3.2– Public Meetings (stating that, to the extent practicable, the Commission shall issue a public notice of any public meeting); Rule 3.4– Public Hearings (allowing for public hearings “on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission’s business”); Rule 4.1– Promulgation of Amendments (setting forth the amendment process pursuant to 28 U.S.C. § 994(p)); Rule 4.4– *Federal Register* Notice of Proposed Amendments (stating that “[a] vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the *Federal Register* shall be deemed to be a request for public comment”); Rule 5.2– Notice of Priorities (requiring the Commission to “publish annually in the *Federal Register*, and make available to the public, a notice of the tentative priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary”).

³⁰⁷ 28 U.S.C. § 994(o).

include sentencing data, case-law analyses, literature reviews, surveys of state laws, and other relevant information).

The amendment process typically begins in the summer, when the Commission publishes for comment a notice of proposed policy priorities, followed by the publication of final policy priorities in the fall. Typically in December or January, the Commission formally requests comment on proposed amendments and issues for comment, usually with a 60-day comment period. In addition to soliciting written public comment, the Commission conducts at least one public hearing, usually in February or March, regarding proposed amendments. After the close of the public comment period, the Commission refines the proposed amendments in light of comments and testimony it receives. Promulgation of guidelines, policy statements, official commentary, and amendments thereto requires the affirmative vote of at least four members of the Commission at a public meeting.³⁰⁸ The vote to promulgate proposed amendments typically is held at a public meeting in April. Through this administrative process, the Commission considers the various substantive factors set forth throughout the Sentencing Reform Act.

The guideline amendment process culminates with the submission of promulgated amendments to Congress for its review. The Sentencing Reform Act authorizes the Commission, at or after the beginning of a new session of Congress, but not later than the first day of May of each year, to submit to Congress amendments to the guidelines, which must include a “statement of reasons therefor.”³⁰⁹ Amendments to the guidelines become effective on a date specified by the Commission, which may not be earlier than 180 days after submission to Congress or later than the first day of November in the year in which the amendments were submitted.³¹⁰ During the pendency of the amendments, Congress may modify or reject submitted amendments. If Congress does not act, the amendments take effect as submitted.³¹¹

In addition to its power to disapprove guideline amendments, Congress retains the ability to influence federal sentencing policy by enacting directives to the Commission. These directives may be general or specific. When Congress enacts such a provision, the Commission is obligated to implement the directive in a manner consistent with the legislation. As the Supreme Court stated in *United States v. LaBonte*, “Congress has delegated to the Commission

³⁰⁸ 28 U.S.C. § 994(a).

³⁰⁹ *Id.* § 994(p). Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission endeavors to include amendments to policy statements and commentary in any submission of guideline amendments to Congress. Commission Rules, Rule 4.1–Promulgation of Amendments.

³¹⁰ 28 U.S.C. § 994(p).

³¹¹ *Id.* The Sentencing Reform Act also authorized the Commission to decide whether amendments that reduce “the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses” should be applied retroactively. *See* 28 U.S.C. § 994(u). *See also* *Dillon v. United States*, 130 S. Ct. 2683 (2010) (holding that *Booker* did not apply to proceedings under 18 U.S.C. § 3582(c)(2) and that USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) is binding on courts reducing sentences under that provision.).

significant discretion in formulating guidelines Broad as that discretion may be, however, it must bow to the specific directives of Congress.”³¹²

In responding to directives, the Commission follows the same procedure outlined above for other amendments, unless the directive provides for an alternative procedure (*i.e.*, “emergency amendment authority”). Nevertheless, using the reasoning of the Supreme Court in *Kimbrough*,³¹³ courts are more closely examining sentencing guidelines developed in response to “congressional directives”³¹⁴ and using policy disagreements with the underlying rationale for the guideline as a basis for imposing a sentence below the guidelines range. The Supreme Court based its holding in *Kimbrough* in part on the assertion that in setting the crack cocaine guidelines, the Commission abandoned what the Court perceived as its characteristic institutional role.³¹⁵

Some courts have read *Kimbrough* and *Spears* to have established a “new paradigm” in which district courts are permitted “to disagree categorically with [congressional] directives in providing an individual sentence.”³¹⁶ They read *Kimbrough* to instruct “sentencing courts to give *less* deference to guidelines that are not the product of the Commission acting in ‘its characteristic institutional role,’ in which it typically implements guidelines only after taking into account ‘empirical data and national experience.’”³¹⁷ Other circuits disagree.³¹⁸ Thus the circuits are divided on the question whether guidelines promulgated in response to a

³¹² 520 U.S. 751, 757 (1997) (quotation omitted).

³¹³ 552 U.S. 85 (2007).

³¹⁴ The Sentencing Reform Act contained a number of congressional directives to the Commission about how it should formulate and structure the federal sentencing guidelines. Since 1984, Congress has directed the Commission to act in the areas of sentencing well over 100 times.

³¹⁵ *Kimbrough*, 552 U.S. at 89. In *Spears v. United States*, 555 U.S. 261 (2009) (per curiam), the Court (in a 5-4 *per curiam* opinion) held that district courts may categorically disagree with the guidelines, at least with respect to the drug guidelines for crack cocaine offenses. Further explaining its holding in *Kimbrough*, the Court stated “[t]hat was indeed the point of *Kimbrough*: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.” *Id.* at 264. *Spears* clarified “that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.” *Id.* at 265-66.

³¹⁶ *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-418 (7th Cir. 2010) (“Congressional ‘directives’ to the Sentencing Commission are unlike statutes in that they are not equally binding on sentencing courts”).

³¹⁷ *Id.* at 418. *See also* *United States v. Rodriguez*, 527 F.3d 221, 227 (1st Cir. 2008) (“[T]he fast-track departure scheme does not ‘exemplify the [Sentencing] Commission’s exercise of its characteristic institutional role.’ [] In other words, the Commission has ‘not take [n] account of empirical data and national experience’ in formulating them. [] Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract.”) (citations omitted).

³¹⁸ *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149-150 (3d Cir. 2009) (collecting cases and rejecting the approach of the Fifth, Ninth, and Eleventh Circuits, which have concluded that district courts may not disagree with congressional policy, specifically with respect to varying due to perceived fast-track disparity, and stating that “the attempt to distinguish fast-track programs from the sentencing guidance provided in *Kimbrough*, and constrain a district court’s sentencing discretion solely on the basis of a congressional policy argument, is unpersuasive.”).

congressional directive to the Commission are entitled to less deference than guidelines promulgated pursuant to what the Supreme Court has described as the Commission’s “characteristic institutional role.”³¹⁹

5. *Constitutionality of Mandatory Minimum Penalties*

The Supreme Court’s decisions have drawn a distinction between the “elements of a crime,” which “must be charged in an indictment and proved to a jury beyond a reasonable doubt,” and “sentencing factors,” which “can be proved to a judge at sentencing by a preponderance of the evidence.”³²⁰ Congress may prescribe sentencing factors that guide or confine a judge’s discretion in sentencing an offender within the range prescribed by statute, but “judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury [or admitted by the defendant].”³²¹

For some offenses, a mandatory minimum penalty may apply because it is the only specified penalty for the defendant’s offense of conviction. For example, convictions for the offenses of aggravated identity theft and receipt of child pornography always carry a mandatory minimum penalty (two and five years of imprisonment, respectively).³²² In those circumstances, the facts that trigger the mandatory minimum penalty are the same facts that constitute the crime. Accordingly, each fact must be alleged in the indictment and proven to a jury beyond a reasonable doubt.³²³

In other circumstances, the facts that trigger the mandatory minimum penalty may also increase the statutory maximum sentence, thereby implicating the Supreme Court’s decision in *Apprendi v. New Jersey*.³²⁴ The Court held in *Apprendi* that the Sixth Amendment requires that

³¹⁹ The Commission promulgates all guidelines amendments, whether in response to a congressional directive or on its own initiative, in accordance with requirements contained in the Sentencing Reform Act, 28 U.S.C. §§ 991–995. Accordingly, the Commission considers, among other factors, “comments and data coming to its attention,” circumstances which mitigate or aggravate the seriousness of the offense, the nature and degree of the harm caused by the offense, the community view of the gravity of the offense, the public concern generated by the offense, and how often the offense occurs. 28 U.S.C. § 994. Furthermore, the Commission “consults with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system,” including the Judicial Conference of the United States Courts, the Department of Justice, representatives of the Federal Public Defenders, probation officers, and the Commission’s advisory groups, and follows the notice and comment procedural requirements set forth at section 553 of title 5, United States Code. 28 U.S.C. §§ 994(o), (x).

³²⁰ *United States v. O’Brien*, 130 S. Ct. 2169, 2174 (2010).

³²¹ *Id.* at 2175–76. For a more detailed discussion of the case law concerning judicially-determined sentencing factors, see *infra* Appendix E(A)(1) of this Report.

³²² See 18 U.S.C. §§ 1028A (aggravated identity theft); 2252A(a)(2) & (b)(1) (receipt of child pornography).

³²³ See *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (“An indictment must set forth each element of the crime that it charges.”); *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

³²⁴ 530 U.S. 466 (2000).

“[o]ther 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.”³²⁵ For example, drug trafficking offenses committed in violation of 21 U.S.C. § 841(b)(1)(C) have no mandatory minimum penalty and a statutory maximum penalty of 20 years of imprisonment.³²⁶ The type and quantity of drugs involved in the offense, however, can trigger a mandatory minimum penalty of five or ten years of imprisonment, while at the same time increasing the statutory maximum penalty to 40 years or life imprisonment.³²⁷ Courts have uniformly held that the type and quantity of drugs must be charged in the indictment and proven to a jury beyond a reasonable doubt when the defendant receives a sentence that is higher than the otherwise applicable statutory maximum penalty.³²⁸ However, the circuit courts of appeals disagree as to whether those facts must be alleged in the indictment and proven to a jury beyond a reasonable doubt when they trigger a mandatory minimum penalty, yet the offender receives a sentence that is still *within* the otherwise applicable statutory maximum penalty.³²⁹

Facts requiring the imposition of a mandatory minimum penalty within the sentencing range otherwise available to the court are not necessarily subject to the Constitution’s indictment, proof, and jury requirements. The Supreme Court explained in *Harris v. United States* that:

[t]hose facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury’s verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.³³⁰

³²⁵ *Id.* at 490.

³²⁶ *See* 21 U.S.C. § 841(b)(1)(C).

³²⁷ *See* 21 U.S.C. § 841(b)(1)(A) & (b)(1)(B).

³²⁸ *See, e.g.,* *United States v. Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc) (“Accordingly, *Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, *i.e.*, charged in the indictment and proved to the jury beyond a reasonable doubt.”) (collecting cases).

³²⁹ *Compare, e.g.,* *United States v. Gonzales*, 420 F.3d 111, 129 (2d Cir. 2005) (“The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case. Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and –(b)(1)(B) to create sentencing ranges that raise the limit of the possible federal sentence, drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges.” (citation and quotation marks omitted)), *with* *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (“*Apprendi* said that any fact extending the defendant’s sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of the aggravating crime – and thus the domain of the jury – by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury’s verdict has authorized the judge to impose the minimum with or without the finding. . . . Thus, where a defendant is made subject to a higher range of punishment under §§ 841(b)(1)(A) and (B) but is nonetheless sentenced within the confines of § 841(b)(1)(C), his rights under *Apprendi* are not violated.”).

³³⁰ 536 U.S. 545, 567 (2002).

The Court held in *Harris* that the seven-year mandatory minimum penalty for “brandishing” a firearm in violation of 18 U.S.C. § 924(c) need not be charged in the indictment nor proven to a jury beyond a reasonable doubt. Although the fact that the firearm was “brandished” increases the mandatory minimum penalty from five years to seven years, the Court concluded, it is a sentencing factor because it merely confines the court’s discretion within the otherwise applicable statutory maximum penalty.³³¹

Nonetheless, even facts that may trigger mandatory minimum penalties without increasing the statutory maximum may fall within the Constitution’s indictment, proof, and jury protections as a matter of legislative intent. The Supreme Court recently explained in *United States v. O’Brien* that, subject to constitutional limitations, “whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress.”³³² When Congress is not explicit in its characterization, “courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor.”³³³ *O’Brien* held that Congress intended the finding whether the offense involved a “machinegun,” triggering a 30-year mandatory minimum penalty, to be an element of the offense, not a sentencing factor.³³⁴

Finally, the fact of a prior conviction may trigger a mandatory minimum penalty, regardless of its effect on the statutory maximum penalty, without implicating the Constitution’s indictment, proof, and jury protections. The Supreme Court has held that the fact of a prior conviction may be found by the judge at sentencing even if it increases the statutory maximum sentence.³³⁵ The Court has described the fact of a prior conviction as a “narrow exception” to its general rule that any fact that increases the prescribed maximum penalty must be alleged in the indictment and proven to a jury beyond a reasonable doubt.³³⁶ Accordingly, where the

³³¹ See *id.* at 568. The Supreme Court has not revisited *Harris*’s Sixth Amendment holding after *Blakely v. Washington*, 542 U.S. 296 (2004) and *Booker*, although some federal courts have noted *Harris*’s apparent tension with those later decisions. See *United States v. Jones*, 418 F.3d 726, 732 (7th Cir. 2005) (observing that “there may be some tension between *Booker* and *Harris*”); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) (“We agree that *Harris* is difficult to reconcile with the Supreme Court’s recent Sixth Amendment jurisprudence, but *Harris* has not been overruled.”). Nonetheless, the circuit courts of appeals have uniformly continued to follow *Harris*, concluding that the decision has not yet been overruled by the Supreme Court. See, e.g., *United States v. Thompson*, 515 F.3d 556, 565 (6th Cir. 2008) (collecting cases). Circuit courts also hold that *Blakely* and *Booker* have no application to mandatory minimum sentencing provisions. See, e.g., *United States v. Harris*, 447 F.3d 1300, 1307 (10th Cir. 2006) (“*Booker* . . . does not apply to statutory minimum sentences.”); *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) (“Put simply, *Booker* and *Blakely* do not affect the imposition of statutory minimum sentences.”).

³³² *O’Brien*, 130 S. Ct. at 2175. See *infra* Appendix E, at E-5 of this Report.

³³³ See *id.*

³³⁴ See *id.* at 2180. In so holding, the Court reaffirmed its pre-*Apprendi* decision in *Castillo v. United States*, 530 U.S. 120 (2000), and utilized five-factors articulated in *Castillo* for assessing congressional intent: (1) language and structure; (2) tradition, (3) risk of unfairness, (4) severity of the sentence; and (5) legislative history. See *O’Brien*, 130 S. Ct. at 2175, 2180. See *infra* Appendix E, at E-5.

³³⁵ See *Almendarez-Torres*, 523 U.S. at 239.

³³⁶ See *Apprendi*, 530 U.S. at 489-90.

defendant's recidivism or criminal history triggers a mandatory minimum penalty, the prior conviction may be found by the sentencing judge by a preponderance of the evidence.³³⁷

C. INCORPORATION OF MANDATORY MINIMUM PENALTIES INTO THE GUIDELINES

Congress charged the Commission with promulgating guidelines that are “consistent with all pertinent provisions” of federal law³³⁸ and with providing sentencing ranges that are “consistent with all pertinent provisions of title 18, United States Code.”³³⁹ 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.³⁴⁰

The Commission generally has established guideline ranges that are slightly above the mandatory minimum penalty for offenders convicted of offenses carrying a mandatory minimum penalty, but its methods of incorporating mandatory minimum penalties into the guidelines have varied over time, with the benefit of the Commission's continuing research, experience, and analysis.³⁴¹ The Commission historically has achieved this policy by setting a base offense level for Criminal History Category I offenders that corresponds to the first guidelines range on the sentencing table with a minimum guideline range in excess of the mandatory minimum.

³³⁷ See, e.g., *United States v. Smith*, 390 F.3d 661, 666 (9th Cir. 2004) (concluding that prior convictions used to enhance a defendant's sentence pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), need not be charged in the indictment or found by a jury); *United States v. Mata*, 491 F.3d 237, 245 (5th Cir. 2007) (rejecting the defendant's argument that 21 U.S.C. §§ 841 and 851 are unconstitutional because they do not require the factual finding of a prior conviction that increases the statutory maximum penalty to be found by a jury beyond a reasonable doubt). Section 851 prescribes statutory procedural protections, beyond what the Constitution requires, for defendants in drug trafficking cases whose sentences are enhanced based on prior convictions. See 21 U.S.C. § 851; cf. *United States v. Espinal*, 634 F.3d 655, 664-65 n.5 (2d Cir. 2011) (comparing the Constitutional limitations placed on the enhancement of sentences using prior convictions with the protections afforded by section 851).

³³⁸ 28 U.S.C. § 994(a).

³³⁹ 28 U.S.C. § 994(b).

³⁴⁰ Incorporating mandatory minimum penalties into the guidelines posed a “substantial challenge” to the drafting of initial sentencing guidelines. “[D]rafting of guidelines for offenses having a mandatory minimum sentence requires a determination as to the intended ‘heartland’ covered by the mandatory minimum statute.” “If the heartland . . . is viewed as applying to the more culpable defendants, and the guidelines are drafted in accord with this view, the question arises as to how the guidelines should address less culpable defendants. If lower guidelines are drafted to cover defendants with lesser roles, guidelines technically will be incompatible with the mandatory minimum sentences that literally apply to such conduct.” “If, on the other hand, the guidelines are drafted so that the guideline range associated with the mandatory minimum sentence is set for the least culpable first offenders who could be prosecuted under the statute, the concern of proportionality can only be met by substantially escalating the penalties for more culpable defendants. . . .” 1991 COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM at 29.

³⁴¹ See USSG Ch. 1, Pt. A at 2. (“The Commission . . . views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.”); *id.* at 12. (“[The Commission's] mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, as more is learned about what motivates and controls criminal behavior.”).

Therefore, the base offense level, before any enhancements, adjustments, or consideration of criminal history, produces a guideline range that is above the applicable mandatory minimum penalty.

This general policy is most apparent in the guideline applicable to drug offenses, §2D1.1. The statutes applicable to drug trafficking offenses carry mandatory minimum penalties, usually five or 10 years in length, based on the type and quantity of drugs involved in the offense. Similarly, the Drug Quantity Table at §2D1.1(c) establishes base offense levels for drug trafficking offenders using the quantity and type of drugs involved in the offense. The Commission developed the Drug Quantity Table to ensure that the quantities triggering a mandatory minimum penalty carry a base offense level equal to the first range on the sentencing table that exceeds the mandatory minimum (*i.e.*, levels 26 and 32, respectively, for the commonly applied five- and ten-year mandatory minimums). For example, trafficking in at least 500 grams of powder cocaine carries a five-year mandatory minimum pursuant to 21 U.S.C. § 841(b)(1)(B), and the guidelines assign a base offense level of 26, yielding a guideline range just above the mandatory minimum for offenders in Criminal History Category I of 63 to 78 months. For quantities that are above or below the amounts that trigger the mandatory minimum penalty, the Drug Quantity Table extrapolates upward and downward from the mandatory minimum thresholds to set guidelines sentencing ranges for all drug quantities.

The Commission set the base offense levels at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.³⁴² The ranges therefore fulfill the Commission's statutory mandate to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance"³⁴³ Setting base offense levels at or just above the mandatory minimum penalty also fulfills the Commission's statutory mandate to consider "the community view of the gravity of the offense,"³⁴⁴ in that mandatory minimum penalties reflect Congress's expression of the community view of the gravity of the offense.

In 2007, the Commission amended the Drug Quantity Table for offenses involving crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, corresponded with the five and 10-year mandatory minimum penalties.³⁴⁵ For offenders in Criminal History Category I, those base offense levels produced ranges with low ends that were below the mandatory minimum term of imprisonment: 51 to 63 months at level 24, corresponding to the five-year

³⁴² See U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (1995).

³⁴³ 28 U.S.C. § 994(n).

³⁴⁴ See 28 U.S.C. § 994(c)(4).

³⁴⁵ See USSG App. C, amend. 706 (effective Nov. 1, 2007) & amend. 711 (effective Nov. 1, 2007). The Commission amended the Drug Quantity Table for crack cocaine offenses as "an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor complete solution to those problems." USSG App. C., Amendment 711.

mandatory minimum, and 97 to 121 months at level 30, corresponding to the ten-year mandatory minimum following this amendment. The Commission observed that the lower base offense levels did not appear to affect crack cocaine offenders' guilty plea and cooperation rates—the rates were the same before and after the 2007 amendment.³⁴⁶ The Commission has subsequently moved the levels corresponding to the crack cocaine mandatory minimum penalties back to 26 and 32, in light of the Fair Sentencing Act of 2010's changes to the mandatory minimum drug quantity thresholds.³⁴⁷

As Congress has enacted new mandatory minimum penalties, the Commission has drawn on its experience with particular offenses and related guidelines to incorporate the new penalties. For example, in the PROTECT Act, Congress established a new mandatory minimum of five years of imprisonment for existing child pornography trafficking and receipt offenses committed in violation of 18 U.S.C. §§ 2252 and 2252A.³⁴⁸ In light of the new mandatory minimum penalty, the Commission established a base offense level of 22 for those offenses, even though it produced a guideline range entirely below the mandatory minimum penalty for offenders in Criminal History Category I. The Commission modified its general approach for this mandatory minimum penalty because experience and data showed that several existing enhancements (*e.g.*, use of a computer, material involving children under 12 years of age, number of images) in the applicable guideline, §2G2.2, apply in almost every case.³⁴⁹ Thus, the Commission set the base offense level at 22 with knowledge that the Chapter Two calculations would lead to a range slightly above the mandatory minimum penalty for nearly all offenders thereby maintaining a consistent approach for determining sentencing ranges.³⁵⁰

Some commonly applied mandatory minimum penalties require consecutive terms of imprisonment in addition to the sentence imposed on an underlying offense. To ensure the guidelines' consistency with federal law, the Commission has incorporated those penalties by specifying that the guideline sentence for that count is the minimum term required by the statute. For example, under 18 U.S.C. § 924(c)(1), an offender is subject to consecutive mandatory minimum terms of imprisonment varying from five years to life for conduct involving a firearm during and in relation to a crime of violence or drug trafficking crime. USSG §2K2.4(b) provides that for an offender convicted of violating section 924(c), "the guideline sentence [for

³⁴⁶ In the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine offenders was 93.1%. In the two fiscal years after the 2007 amendment took effect, the plea rates for such offenders were 95.2% and 94.0%, respectively. In addition, the substantial assistance rate for crack cocaine offenders was 27.8% in the fiscal year before the 2007 amendment took effect and 25.3% and 25.6% in the two fiscal years after the 2007 amendment took effect.

³⁴⁷ In 2010, Congress enacted the Fair Sentencing Act, which reduced the ratio between crack and powder cocaine from 100-to-1 to 18-to-1. The Commission's emergency amendment implementing the Fair Sentencing Act "conform[ed] the guideline penalty structure for crack cocaine offense to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set on the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32." Commission, *Supplement to the 2010 Guidelines Manual* 43 (2010).

³⁴⁸ See PROTECT Act, § 103.

³⁴⁹ USSG App. C., amend. 665 (effective Nov. 1, 2004).

³⁵⁰ See *id.*

that count] is the minimum term of imprisonment required by statute.”³⁵¹ Guidelines applicable to other offenses carrying a consecutive mandatory penalty, such as aggravated failure to register as a sex offender³⁵² and aggravated identity theft³⁵³ operate similarly.³⁵⁴

For some offenses carrying a mandatory minimum penalty the Commission does not reference those offenses to any particular guideline in Appendix A of the *Guidelines Manual*, often because the mandatory minimum penalty is too infrequently applied to warrant a specific guideline.³⁵⁵ In such cases, and to ensure the guidelines’ consistency with federal law, the Commission has promulgated guideline provisions to ensure that the guideline range at least reaches any applicable mandatory minimum penalty. USSG §5G1.1 provides that “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”³⁵⁶ Moreover, the Commission has promulgated guidelines to ensure that no portion of an offender’s guideline range falls below an applicable mandatory minimum penalty. Thus, where some but not all of the guideline range falls below the mandatory minimum penalty, the mandatory minimum penalty becomes the bottom of the guideline range.³⁵⁷

As discussed in Chapter 2, *supra*, the guidelines also incorporate the two methods for relief from an applicable mandatory minimum: substantial assistance and the safety valve. USSG §5K1.1, consistent with the requirements of the Commission’s organic statute,³⁵⁸ authorizes a departure from the guideline range if the offender has provided substantial assistance to law enforcement, just as 18 U.S.C. § 3553(e) authorizes a sentence below a statutory mandatory minimum for substantial assistance. The complementary provisions operate to give the offender the full benefit of substantial assistance cooperation. For defendants who qualify for relief from the mandatory minimum penalty pursuant to the statutory safety valve, 18 U.S.C. § 3553(f), the guideline at §5C1.2 directs the court to “impose a sentence in accordance

³⁵¹ USSG §2K2.4(b) (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).

³⁵² 18 U.S.C. § 2250(c).

³⁵³ 18 U.S.C. § 1028A.

³⁵⁴ See USSG §§2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) & 2B1.6 (Aggravated Identity Theft).

³⁵⁵ See, e.g., 2 U.S.C. § 390, 12 U.S.C. § 617, 18 U.S.C. § 1122.

³⁵⁶ USSG §5G1.1(b) (Sentencing on a Single Count of Conviction).

³⁵⁷ See USSG §5G1.1(c)(2) (“In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not less than any statutorily required minimum sentence.”).

³⁵⁸ See 28 U.S.C. § 994(n) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

with the applicable guidelines without regard to any statutory minimum sentence.”³⁵⁹ USSG §2D1.1 also provides for a two-level decrease if the defendant meets the safety valve subdivision criteria listed at §5C1.2.³⁶⁰

D. COMPARING THE GUIDELINES AND MANDATORY MINIMUM PENALTIES

The guidelines and mandatory minimum penalties both determine sentences by referencing certain facts in order to measure the severity of the offense and the culpability of the offender. Often, the guidelines and mandatory minimum penalties consider the same facts to be aggravating circumstances that warrant lengthier sentences, so that similar conduct produces higher penalties under both. For the most common offense types, these facts include the type and quantity of a controlled substance, the use of a firearm in connection with a violent crime or drug trafficking offense, and an offender’s criminal history. In this regard, the guidelines and mandatory minimum penalties are broadly consistent with each other.

There are significant structural differences, however, in *how* the guidelines and mandatory minimum penalties use these aggravating facts to determine the appropriate sentence. The guidelines employ a modified real offense approach that considers each aggravating fact in conjunction with other relevant offense- and offender-specific facts to produce a sentencing range. The guidelines are designed to be flexible and therefore assign varying weight to aggravating and mitigating factors in the context of the offense and the guidelines as a whole.

Mandatory minimum penalties, by contrast, rely on the presence of a narrow set of facts, (or even just a single fact), to establish minimum sentences that may be much longer than they otherwise would be without the presence of those facts. The application of a mandatory minimum depends solely on whether the statutorily enumerated factors are proven or agreed to, without regard to other aggravating or mitigating facts. The structural differences between the guidelines and mandatory minimum penalties result in different outcomes in terms of both uniformity and proportionality.

In comparing the guidelines to mandatory minimum penalties, it is useful to keep in mind that the guideline sentencing table is structured so that a two-level increase to the offense level represents a 25 percent increase to the otherwise applicable guideline range. A four-level increase therefore represents a 50 percent increase to the otherwise applicable guideline range, and a six-level increase roughly doubles the otherwise applicable guideline range.

One illustration of mandatory minimum penalties and the guidelines enhancing sentences based on similar aggravating facts is the treatment of offenders who illegally possess firearms. An offender who possesses a firearm after having received three convictions of a violent felony or a serious drug offense is subject to a mandatory minimum penalty of 15 years of

³⁵⁹ See USSG §5C1.2(a). For offenders whose mandatory minimums were at least five years in length, the new offense level cannot be lower than 17. See USSG §5C1.2(b).

³⁶⁰ See USSG §2D1.1(b)(16).

imprisonment, pursuant to the Armed Career Criminal Act (ACCA).³⁶¹ Similarly, the applicable guideline, §2K2.1, assigns a base offense level of 20 if the offender had one prior felony conviction of either a crime of violence or a controlled substance offense. Section 2K2.1 assigns a base offense level of 24 if the offender had two prior such convictions, representing a 50 percent increase in the otherwise applicable guideline range. The guideline does not provide any additional offense level enhancements for a third such prior conviction.³⁶² Even assuming that an offender with three such prior convictions is in the highest available criminal history category (VI), a base offense level of 24 yields a guideline range of 100 to 125 months – well below the 15-year mandatory minimum penalty. The guidelines nonetheless account for the 15-year mandatory minimum penalty at §4B1.4 (Armed Career Criminal), which establishes increased offense levels and criminal history categories for offenders who qualify as armed career criminals under ACCA.

The guidelines also provide for incremental sentence increases based on other aggravating facts that the mandatory minimum penalty does not consider. In addition to enhancements for prior convictions, the guidelines provide enhancements for felon-in-possession offenses if the firearm possessed was particularly dangerous (*e.g.*, a machinegun, a firearm equipped with a silencer, or a short-barrel shotgun), was stolen, had an obliterated serial number, or was a destructive device. The guidelines provide further enhancements, ranging from two- to 10-levels, depending on the number of firearms involved in the offense.³⁶³ These additional aggravating facts are highly relevant to determining the sentence under the guidelines, but they are not material to the application of the mandatory minimum penalty.

By drawing a broader range of distinctions among offenders, the guidelines' flexibility increases the likelihood that similar offenders will receive similar sentences and that dissimilar offenders will receive different sentences. The guidelines measure offense severity using a variety of facts and, as a result, draw more precise distinctions among offenders. Mandatory minimum penalties are unable to draw these fine distinctions, potentially increasing the likelihood that dissimilar offenders will receive similar sentences because they apply broadly to cases that, aside from a few facts, may otherwise involve very different offenders.

These differences are apparent in drug trafficking cases, where both the guidelines and the applicable mandatory minimum penalties rely on drug type and quantity to determine the sentence. Unless an offender meets all of the criteria for the statutory safety valve,³⁶⁴ the five- and 10-year mandatory minimum penalties established at 21 U.S.C. § 841(b) may apply to all offenses that involve a particular drug type and quantity, without regard to other aggravating or mitigating circumstances.³⁶⁵ The guidelines, however, use multiple offense- and offender-

³⁶¹ See 18 U.S.C. § 924(e)(1).

³⁶² See USSG §2K2.1(a)(2), (a)(4) (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

³⁶³ See generally USSG §2K2.1(a) & (b).

³⁶⁴ For a discussion of the statutory safety valve, see *supra* Chapter 2.

³⁶⁵ See 21 U.S.C. §§ 841(b)(1)(A) – (B).

specific characteristics in addition to drug type and quantity to determine the sentencing range, including whether the offense involved death or bodily injury, whether the offender had an aggravating or mitigating role in the offense; whether the offense involved a dangerous weapon; whether the offender has accepted responsibility; and the seriousness of the offender's criminal history.³⁶⁶

Furthermore, the application of section 841(b) turns primarily on two quantity thresholds for each drug type, corresponding to the statute's five- and 10-year mandatory minimum penalties.³⁶⁷ The guidelines use the type and quantity of drugs involved in the offense to determine the base offense level according to the Drug Quantity Table at §2D1.1(c), which uses 17 different quantity thresholds.³⁶⁸ Thus, for example, in an offense involving 495 grams of powder cocaine, the guidelines assign a base offense level of 24, which for an offender in Criminal History Category I yields a guideline range of 51 to 63 months. At 500 grams, the base offense level increases to 26, yielding an incrementally higher guideline range of 63 to 78 months. The guidelines' incremental approach recognizes that an offender whose offense involved 500 grams is only marginally more culpable than an offender whose offense involved 495 grams. However, under the applicable mandatory minimum penalty, 21 U.S.C. § 841(b), offenses involving 495 grams of powder cocaine do not carry a mandatory minimum penalty, while offenses involving at least 500 grams of powder cocaine carry a five-year mandatory minimum penalty.³⁶⁹ Thus, the mandatory minimum penalty prescribes divergent minimum sentences for offenders who, but for five grams of powder cocaine, are similarly situated.³⁷⁰

The structural differences between the guidelines and mandatory minimum penalties also result in different outcomes with respect to the degree to which a particular fact increases an offender's sentence. For example, 21 U.S.C. § 841 establishes enhanced mandatory minimum penalties if an offender commits a drug trafficking offense in violation of section 841(a) after having previously been convicted of a "felony drug offense."³⁷¹ Having only one prior felony drug offense conviction doubles the mandatory minimum penalty: the otherwise applicable five-year mandatory minimum penalty becomes a 10-year mandatory minimum penalty, and the 10-

³⁶⁶ See USSG §2D1.1(b); USSG Ch. 3, Pt. B (Role in the Offense); USSG §3E1.1 (Acceptance of Responsibility); USSG Ch. 4, Pt. A (Criminal History).

³⁶⁷ See 21 U.S.C. § 841(b)(1)(A)-(B).

³⁶⁸ See USSG §2D1.1(a) & (c). The Commission's method for calculating the quantity of a drug for purposes of the guidelines sometimes differs from the statutes. See Appendix E(A)(2) of this Report.

³⁶⁹ See 21 U.S.C. § 841(b)(1)(B)(ii).

³⁷⁰ The 1991 COMMISSION REPORT referred to this effect as a sentencing "cliff." See 1991 COMMISSION REPORT at 30-31.

³⁷¹ See 21 U.S.C. §841(b)(1)(A), (b)(1)(B). "The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44).

year mandatory minimum penalty becomes a 20-year mandatory minimum penalty.³⁷² The drug trafficking guideline, by contrast, does not contain an enhancement for a single prior felony drug offense conviction, though such a conviction may incrementally increase the guideline range by producing a higher criminal history score.³⁷³ At no point on the sentencing table, however, does having only one prior conviction double the otherwise applicable guideline range.

The mandatory minimum penalties established at 18 U.S.C. § 924(c) further illustrate the structural differences between the guidelines and mandatory minimums penalties. Section 924(c) establishes mandatory minimum penalties for conduct involving a firearm in violent felonies and drug trafficking offenses. These mandatory minimum penalties require five years of imprisonment for possessing, using, or carrying a firearm during and in relation to a crime of violence or drug trafficking crime; seven years of imprisonment if a firearm was brandished; and ten years of imprisonment if a firearm was discharged. The penalties increase to 10 years of imprisonment if the firearm was a short-barreled rifle, a short-barreled shotgun, or a semiautomatic assault weapon; and to 30 years of imprisonment if the firearm was a machinegun, a destructive device, or was equipped with a silencer or muffler.³⁷⁴ The mandatory minimum penalties provided by section 924(c) must be imposed consecutively to each other and to any term of imprisonment imposed for the underlying offense.³⁷⁵

Several guidelines provide for offense level enhancements if a firearm is involved in a violent or drug trafficking offense. Unlike section 924(c), the length of the enhancement under the guidelines increases or decreases in proportion to the severity of the underlying offense (as represented by the total offense level) and the offender's criminal history. For example, §2B2.1 provides a base offense level of 17 for burglary of a residence, with a two-level enhancement if the offense involved the possession of a dangerous weapon (including a firearm).³⁷⁶ Similarly, §2D1.1 provides for a two-level enhancement in drug trafficking offenses involving a dangerous weapon (including a firearm).³⁷⁷ By contrast, §2B3.1 establishes a base offense level of 20 for robbery offenses, with a seven-level enhancement if a firearm was discharged, a six-level

³⁷² See 21 U.S.C. §841(b)(1)(A), (b)(1)(B).

³⁷³ See USSG §4A1.1. A prior felony drug offense conviction will increase the offender's criminal history score if it meets the recency, age, and other requirements of Chapter Four, Part A of the *Guidelines Manual*. If the offender has two or more prior felony convictions of either a crime of violence or a controlled substance offense, he or she may qualify as a career offender pursuant to §4B1.1 (Career Offender), which may significantly increase the guideline range.

³⁷⁴ See 18 U.S.C. §§ 924(c)(1)(A) – (B).

³⁷⁵ See 18 U.S.C. § 924(c)(1)(D)(ii) (“Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”).

³⁷⁶ USSG §2B2.1(a)(1), (b)(4) (Burglary of a Residence or a Structure Other than a Residence).

³⁷⁷ USSG §2D1.1(b)(1).

enhancement if a firearm was otherwise used, and a five-level enhancement if a firearm was brandished or possessed.³⁷⁸

The structural differences between mandatory minimum penalties and the guidelines are particularly striking in the case of “stacking” penalties for multiple violations of section 924(c). A second or subsequent violation of section 924(c) carries a mandatory minimum penalty of 25 years of imprisonment, or life if the firearm involved was a machinegun, a destructive device, or was equipped with a silencer or muffler.³⁷⁹ These additional penalties must be imposed consecutively to the sentence for the underlying offense and consecutively to the other section 924(c) penalties, so that an offender convicted of two or more section 924(c) counts faces an especially severe penalty. By contrast, because the guidelines treat the use of a firearm as an enhancement to the underlying offense, the guidelines grouping rules generally will apply so that the offender receives no, or only incremental, sentence increases for using a firearm on multiple occasions.³⁸⁰ Thus, any increases to the offender’s sentence for conviction of multiple counts result primarily from the commission of additional underlying offense (*e.g.*, the second offense increased the total of amount of loss, involved additional quantities of drugs, or was otherwise more serious), and not from the additional use of the firearm itself—the single fact triggering the stacking of penalties. In sum, mandatory minimum penalties structurally are unable to draw the fine distinctions among offenders and offenses that can be made under the guideline system.

³⁷⁸ USSG §2B3.1(a) & (b)(2) (Robbery).

³⁷⁹ 18 U.S.C. § 924(c)(1)(C). For a more detailed discussion of the case law concerning stacking mandatory minimum penalties under section 924(c), *see infra* Appendix E(B)(1) of this Report.

³⁸⁰ *See* USSG Ch. 3, Pt. D. (Multiple Counts).

