Research

NOTES

Offense Type & Sentencing Guideline Analysis Issues Prior to Fiscal Year 2018

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This edition of research notes explains the methodology the Commission used prior to fiscal year 2018 to create two key variables that classified offenders' federal offenses and report information to the public.[1] Researchers need to understand the differences between these two variables and how to choose between them for use in any analysis of Commission data. This issue will describe how offenders' statutes of conviction and sentencing guidelines are used to classify these offenses. It will also discuss analytical issues that may arise when using each of the two variables, and will use fiscal year 2017 data as examples.

Office of Research and Data

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To conduct its research and data activities, the United States Sentencing Commission relies on sentencing documents submitted by the courts. Within 30 days after entry of judgment in a federal criminal case, the chief judge of the district is required by statute to ensure the Commission is provided copies of (1) the judgment and commitment order (J&C); (2) a written Statement of Reasons (SOR) for the sentence imposed; (3) any plea agreement; (4) the indictment or other charging document; (5) the Presentence Report (PSR); and (6) any other information the Commission finds appropriate.[2] During fiscal year 2017, the federal courts submitted 66,873 individual original cases to the Commission, consisting of 311,724 documents.[3]

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Research Notes give background information on the technical details of the Commission's data collection and analysis process. They are designed to help researchers use the Commission's datafiles by providing answers to common data analysis questions.

DETERMINATION OF PRIMARY OFFENSE TYPE

OFFTYPSB
Offense type determination is primarily statute based. In cases with multiple statutes of conviction, a **decision tree** is used.

HIGHEST STATUTORY MAXIMUM

HIGHEST STATUTORY MINIMUM
If counts of conviction have the same statutory maximum, the count with the highest statutory minimum is used as primary offense type.

NOTE THE FIRST COUNT
If statutory minimums are "tied," the first count listed on the judgment and commitment order is used as the primary offense type.

For questions about using a decision tree to determine Primary Offense Type, contact AskORD@ussc.gov.

Variable Creation

The Commission creates two variables about an offender's instant offense from information contained in these documents that researchers should consider when conducting research with Commission data. For both variables, if an offender is convicted of multiple types of offenses they are still only classified into one category. Each variable has rules to determine how to classify the offenses.

The first variable **used to classify an offender's offense is called the primary offense type.**

This variable name is [OFFTYPSB] and is broken down into 32 categories. In all datasets prior to fiscal year 2018, primary offense type is based on the offenders' counts of conviction. If an offender has one count of conviction, that is classified into [OFFTYPSB]. If there are multiple counts of conviction, certain criteria determine which will be used to classify into [OFFTYPSB]. Initially, the count used is the one with the highest statutory maximum. However, if two or more different counts of conviction have the same statutory maximum, the count with the highest statutory minimum is used as the primary offense type. If the statutory minimums are "tied" as well, the first count listed is used as the primary offense type. The J&C contains information about the offender's count(s) of conviction. All 66,873 cases in fiscal year 2017 had a value for [OFFTYPSB] as the Commission always receives a J&C for each case.

The second variable **used to classify an offender's offense is based on the primary or "high" guideline which is the guideline used to sentence the defendant.**

The *Guidelines Manual* contains all the federal sentencing guidelines, which are rules for calculating a final offense level[4] for each type of federal offense. This final offense level, in conjunction with an offender's Criminal History Category, determines the guideline range as found in the Sentencing Table in the *Manual*. Offenders may have one or multiple guideline computations, depending on the counts of conviction and elements of the offense. Initially, the guideline to be used is determined by the statute(s) of conviction, as noted in Appendix A of the manual. These guidelines can reference other guidelines, depending on elements of the offense. Ultimately, the primary guideline and its final offense level are used to sentence the defendant.[5] The variable for the primary guideline is called [GDLINEHI]. However, each guideline for an offender is collected and is available in the Commission's annual datasets, as represented by the variables [GDLINE1] through [GDLINEX], where X represents the total number of guideline computations for that case.

In cases where only one guideline is applied, that guideline is [GDLINEHI]. If the court applies multiple guidelines, the guideline with the highest adjusted offense level[6] is [GDLINEHI]. In fiscal year 2017, the substantial majority (96.1%) of offenders had one guideline computation.[7] The adjusted offense level is the sum of the base offense level associated with the guideline, all relevant specific offense characteristics (SOCs) for the guideline, and Chapter Three adjustments such as victim-related adjustments, role in the offense, and obstruction and related adjustments. Chapter Three adjustments for multiple counts and acceptance of responsibility are not included in this computation. The PSR contains these computations, and the SOR indicates whether the court changed the applicable guideline.

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96.1% of offenders had one guideline computation in fiscal year 2017.

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While all offenders have a value for [OFFTYPSB], information can be missing for [GDLINEHI] for various reasons. In addition, for some offenders, primary guideline information is available from the PSR but due to documentation problems on the SOR it cannot be confirmed that this information reflects what the court did in the guideline application. When using [GDLINEHI] an important variable is [SOURCES]. [SOURCES] indicates whether guideline information is available for the case and whether the guideline information that is available represents known court findings, as reflected in the SOR. The court will indicate on the SOR whether it adopts the PSR as it is or if it made changes to the PSR. For the substantial majority (92.6%) of the 66,873 offenders sentenced in fiscal year 2017, guideline information is available and the details of the guideline computation in the PSR and any changes made by the court are consistent with the final guideline range found in the SOR.

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Guideline information is available for 92.6% of the 66,873 offenders sentenced in fiscal year 2017.

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For these cases [SOURCES]=1. For 1.3 percent of the offenders sentenced that year the available guideline information could not be reconciled.

Researcher Impact: When it is not possible to reconcile the court's findings in the SOR with the information on the PSR, [SOURCES]=3. When doing analyses involving guideline application, it is important to select for cases in which the guideline information represents the court's findings.

The remaining 4,106 offenders were missing information for [GDLINEHI] in fiscal year 2017. For most of these offenders (88.4%) the PSR was missing and therefore guideline information was unavailable. Courts may waive preparation of the PSR in some cases, and this is often the cause of the missing guideline information.[8] The PSR tends to be waived or missing for offenders convicted of lower level offenses, such as simple possession of drugs (29.7% of cases with a missing/waived PSR), some types of immigration offenses (28.5%), and traffic violations and other miscellaneous offenses (20.6%).

Researcher Impact: Offenders can have a different type of offense for [OFFTYPSB] than they do for [GDLINEHI] due to the different classification methods for each variable.[9] This is especially true of offenders with a conviction for 18 U.S.C. § 924(c) and a conviction for another charge.

As the statute provides for penalties when using or possessing firearms in furtherance of drug trafficking or crimes of violence, offenders receiving a conviction for 18 U.S.C. § 924(c) often also have a count of conviction for drug or violent offenses. The substantial majority (86.3%) of the 2,108 offenders with an 18 U.S.C. § 924(c) also had another conviction count. Because 18 U.S.C. § 924(c) counts always have a statutory maximum of life and statutory minimum of 60/80/120, etc. months, firearms will often be the most serious offense type under the rules for classification for the [OFFTYPSB] variable. However, as noted earlier, 18 U.S.C. § 924(c) counts do not have a guideline computation. Therefore, [GDLINEHI] will be based on computations for other counts of conviction. This often creates a mismatch between [OFFTYPSB] and [GDLINEHI].

Researcher Impact: Mismatches between [GDLINEHI] and [OFFTYPSB] can also occur when there is only one count of conviction. This is because primary offense type accounts for the statute under which the offender was convicted while the guidelines account for all of the offender's *relevant conduct in the offense.*

Offenders can have a different type of offense for [OFFTYPSB] than they do for [GDLINEHI] due to different classification methods for each variable.

Relevant conduct under the federal sentencing guidelines specifies the conduct for which a defendant may be held accountable in the determination of the offense level. The conduct may not have been formally charged or proved at trial, so long as the sentencing court finds the facts by the preponderance of the evidence. Relevant conduct may include the defendant's conduct as well as the conduct of others under certain circumstances.[10] For example, a case could have a single count of conviction for a drug offense that would cause the primary offense type being classified as drug trafficking and would *initially* go to §2D1.1, the primary drug trafficking guideline. However, §2D1.1(d) provides that if a first or second-degree murder occurred during the commission of the offense, §2A1.1 (first degree murder) or §2A1.2 (second degree murder) applies instead if the resulting offense level is greater than that determined under §2D1.1. The offender does not need to be convicted of a murder statute for this to occur. In this situation, [GDLINEHI] becomes one of the murder guidelines while [OFFTYPSB] remains drug trafficking.

For 7.1 percent of offenders missing [GDLINEHI] the only statute(s) of conviction was 18 U.S.C. § 924(c) (relating to using or possessing firearms in furtherance of drug trafficking or crimes of violence). These offenders do not have a guideline computation as the relevant guideline (§2K2.4(b)) provides that the guideline sentence for an offender convicted of an offense under section 924(c) "is the minimum term of imprisonment require by statute." Offenders who only have section 924(c) as their only count of conviction will be missing on [GDLINEHI], as there are no guideline computations associated with this statute. Similarly, offenders with 18 U.S.C. § 1028A, the aggravated identity theft statute with a mandatory minimum, as their only count of conviction are 3.4 percent of offenders missing on [GDLINEHI]. As with "section 924(c) only" offenders, the relevant guideline for "section 1028A only" offenders (§2B1.6) says the guideline sentence is the statutory minimum.

Comparisons of [OFFTYPSB] and [GDLINEHI] provide the magnitude of the mismatch between the two variables for different offenses.[11] For example, of the 237 offenders with first degree murder (§2A1.1) in [GDLINEHI] as their primary guideline, only 8.4 percent were classified in the murder category in [OFFTYPSB] due to the different rules of classification. Almost half (45.2%) of §2A1.1 were classified in the extortion/racketeering category in [OFFTYPSB], followed by firearms (27.9%), and drug trafficking (11.0%).

Similarly, of the 1,523 offenders with the robbery guideline §2B3.1 as their primary guideline in fiscal year 2017, only 38.2 percent were classified as robbery offenders in [OFFTYPSB]. A total of 35.8 percent were classified as firearms offenders in [OFFTYPSB] and 21.6 percent were classified as extortion/racketeering offenders, as those were the statutes under which the offenders were convicted.

18,935 offenders were classified as drug trafficking offenders (§2D1.1as their primary sentencing guideline) in fiscal year 2017. Drug trafficking had a comparatively high match rate between offense type and guideline, as 93.4 percent of §2D1.1 [GDLINEHI] offenders were classified as drug trafficking offenders in [OFFTYPSB]. A total of 657 (3.5%) were classified as firearms offenders as their primary offense type, because those offenders also were convicted of a firearms offense in connection with their drug trafficking offense.

In fiscal year 2017 all offenders have a value for [OFFTYPSB], including offenders with only 18 U.S.C. § 924(c) or 18 U.S.C. § 1028A counts of conviction, which do not have guideline computations and are therefore missing on [GDLINEHI]. If the research being conducted requires analysis of these cases specifically, [GDLINEHI] cannot be used for these offenders. Also, as noted above, guideline information for other offenders is either missing or cannot be verified. Lower level offenses are overrepresented among these cases, so if research is focused on offenders with those offenses, [GDLINEHI] cannot be used.

However, if the research is focused on examining the sentencing process and the court's actions, the [GDLINEHI] variable must be used to compare similarly situated offenders. Aside from statutory mandatory minimums, the primary guideline and guideline related variables explain the sentence. As each [OFFTYPSB] category contains offenders with different primary guidelines, these offenders cannot meaningfully have their sentencings compared, including sentence length and rate of departures and variances from the guidelines. In addition, most of the guidelines have SOCs specific the guideline that document elements of the offender's offense. These SOCs can be found under the "Specific Offense Characteristics" of the guideline. Any analysis examining the presence or absence of certain SOCs must use [GDLINEHI] in the analysis. Again, the [SOURCES] variable is important to use in conjunction with [GDLINEHI] to verify that the primary guideline, final offense level, SOCs and other elements of the offense accurately reflect court findings.

Key Offense Variables

[OFFTYPSB]	Indicates primary offense type.
[GDLINEHI]	Indicates primary, or "high", guideline used to sentence defendant.
[GDLINE1] to [GDLINEX]	The Chapter Two guideline(s) applied in a case. "X" represents number of total guideline computations.
[SOURCES]	Indicates whether guideline information is available and represents known court findings.

Endnotes

1   Beginning with the fiscal year 2018 dataset the Commission has changed the way it determines offense type. For more information about that change, see the Introduction to the 2018 Sᴏᴜʀᴄᴇʙᴏᴏᴋ ᴏғ Fᴇᴅᴇʀᴀʟ Sᴇɴᴛᴇɴᴄɪɴɢ Sᴛᴀᴛɪsᴛɪᴄs (2019).

2   *See* 28 U.S.C. § 994(w)(1)(A)-(F). The Commission collects sentencing information only for cases in which at least one of the counts of conviction are classified as a felony or Class A misdemeanor because the federal sentencing guidelines do not apply to petty offenses (*see* Uɴɪᴛᴇᴅ Sᴛᴀᴛᴇs Sᴇɴᴛᴇɴᴄɪɴɢ Cᴏᴍᴍ'ɴ, *Guidelines Manual*, §1B1.9 (Nov. 2018) (hereinafter USSG)).

3   The Commission also receives documents for resentencings and revocations. For more information on resentencings, *see* Uɴɪᴛᴇᴅ Sᴛᴀᴛᴇs Sᴇɴᴛᴇɴᴄɪɴɢ Cᴏᴍᴍ'ɴ, Oᴠᴇʀᴠɪᴇᴡ ᴏғ Fᴇᴅᴇʀᴀʟ Cʀɪᴍɪɴᴀʟ Cᴀsᴇs Fɪsᴄᴀʟ Yᴇᴀʀ 2018 (2019).

4   The variable for final offense level is [XFOLSOR].

5   For further information on the Commission's guideline coding system, see the Introduction of the Variable Codebook for Individual Offenders, located here: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY17.pdf

6   The variables for adjusted offense level are [ADJOFL1- ADJOFLX] where "X" represents the total number of guideline computations for an offender.

7   The variable [NOCOMP] provides the number of guideline computations for each defendant.

8   Fᴇᴅ. R. Cʀɪᴍ. P. 32(c).

9   Beginning with data for offenders sentenced in fiscal year 2018, the Commission changed its methodology for determining OFFTYPSB to address this issue. For that year and following years, the offense type will be determined primarily by the guideline high involved in the case, although the statute(s) of conviction will still be considered in some instances, such as when the PSR is missing.

10   See USSG §1B1.3 for more information on relevant conduct.

11   The following analyses are limited to [SOURCES]=1 cases.