Research NOTES
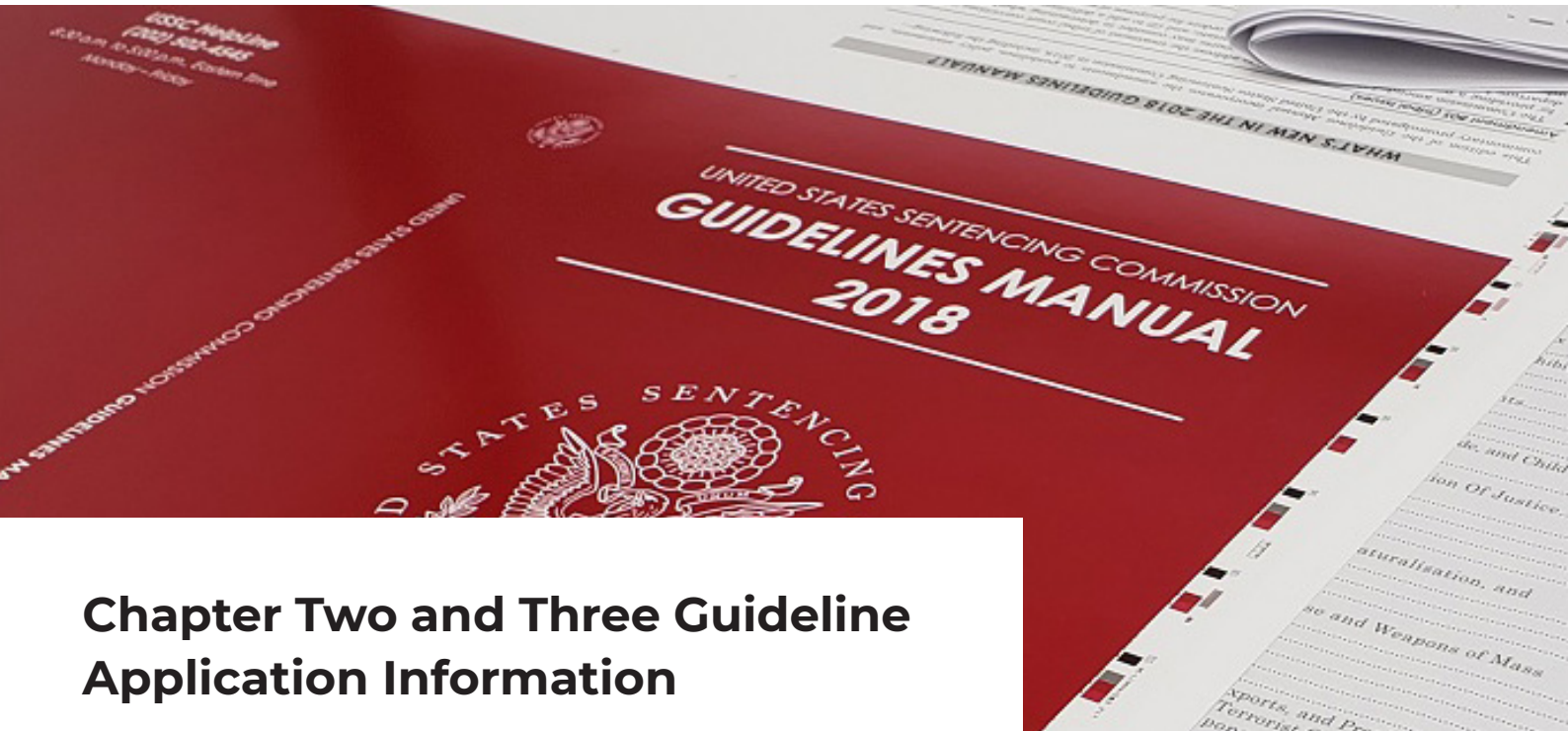
Chapter Two and Three Guideline Application Information

By: Christine Kitchens, M.A., Senior Research Associate

This paper explains how the United States Sentencing Commission collects and reports information on the Chapter Two and Three guideline application for individual offenders.[1] In addition, it discusses analytical issues that may arise when using the Commission's data.[2] The key variables in the Commission's individual offender datafile are noted in all capital letters inside of brackets throughout the text.

The United States Sentencing Commission is an independent agency in the judicial branch of the federal government. The Commission's primary responsibility is to promulgate and amend the federal sentencing guidelines. The Commission has other responsibilities, including (1) establishing a data collection, analysis, and research program to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices; (2) publishing data concerning the sentencing process; (3) collecting and disseminating information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a); and (4) collecting and disseminating information regarding the effectiveness of sentences imposed.[3]

Office of Research and Data

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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.

Documents Received and Data Collected

To meet these responsibilities, the Commission receives and collects data from sentencing documents sent directly from the federal courts.[4] Commission staff review these documents and collect guideline application information for every computation for each offender. The Commission collects information about which guidelines are applied as well as guideline application such as which Base Offense Levels (BOLs), Specific Offense Characteristics (SOCs) and Chapter Three adjustments were applied. Generally, the user records the guideline application information in the Pre-Sentence Report (PSR). The courts are also required to submit a Statement of Reasons form (SOR) which details any changes made to the guideline calculations at the time of sentencing. Later in this paper, issues regarding reconciling these documents will be discussed.

Documents Received
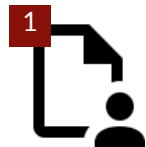
1 An **Indictment** is a written statement of the essential facts constituting the offenses charged by a grand jury.
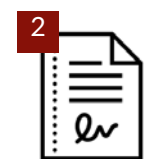
2 A **Plea Agreement (Plea)** is a written agreement between the government and the defendant in which the defendant agrees to plead guilty to one or more of the charged offenses, often in return for the government's agreement to dismiss other charges or to support a specific sentence.

3 A **Presentence Report (PSR)** is prepared by a probation officer and contains information about the offense and offender, the statutory range of punishment, the guideline calculation, and any bases for imposing a sentence above or below the guideline range.

4 The **Judgment and Commitment Order (J&C)** is a written record of the defendant's conviction(s) and the sentence the court imposes.
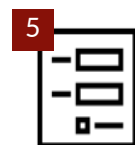
5 The **Statement of Reasons (SOR)** is a form on which judges explain the reasons for imposing the sentence outside the guidelines range.

6 Any other information the Commission finds appropriate.[5]

Determining the *Guidelines Manual* Year

Chapter One, Part B (General Application Principles) in the *Guidelines Manual* explains how the federal sentencing guidelines are to be applied.[6] The first decision is which annual version of the *Guidelines Manual* should be applied.[7] Generally, the manual in effect at the time of sentencing is the one applied. The manual is usually revised each year, and amendments usually go into effect on November 1. Amendments generally apply to cases sentenced on or after that date until the next year's manual goes into effect. However, due to *ex-post facto* concerns, if the manual in effect at the time of sentencing is more punitive than the manual in effect at the time the offense was committed, then the manual that is most beneficial to the offender during the span of the offense conduct is the one that is used.[8] The sentencing judge makes the final decision with regards to which guideline manual is used to create the offender's calculations.[9]

> "
> Almost every year, the Commission makes changes to the *Guidelines Manual.*

How Are Amendments Promulgated?

MAY — DELIVER AMENDMENTS TO CONGRESS

APRIL — VOTE TO PROMULGATE FINAL AMENDMENTS

JUNE — PUBLISH PROPOSED PRIORITIES

FEBRUARY to MARCH — REVIEW & REVISE

AUGUST — PUBLISH FINAL PRIORITIES

JANUARY — PUBLISH PROPOSED AMENDMENTS

SEPTEMBER to DECEMBER — RESEARCH & REVIEW
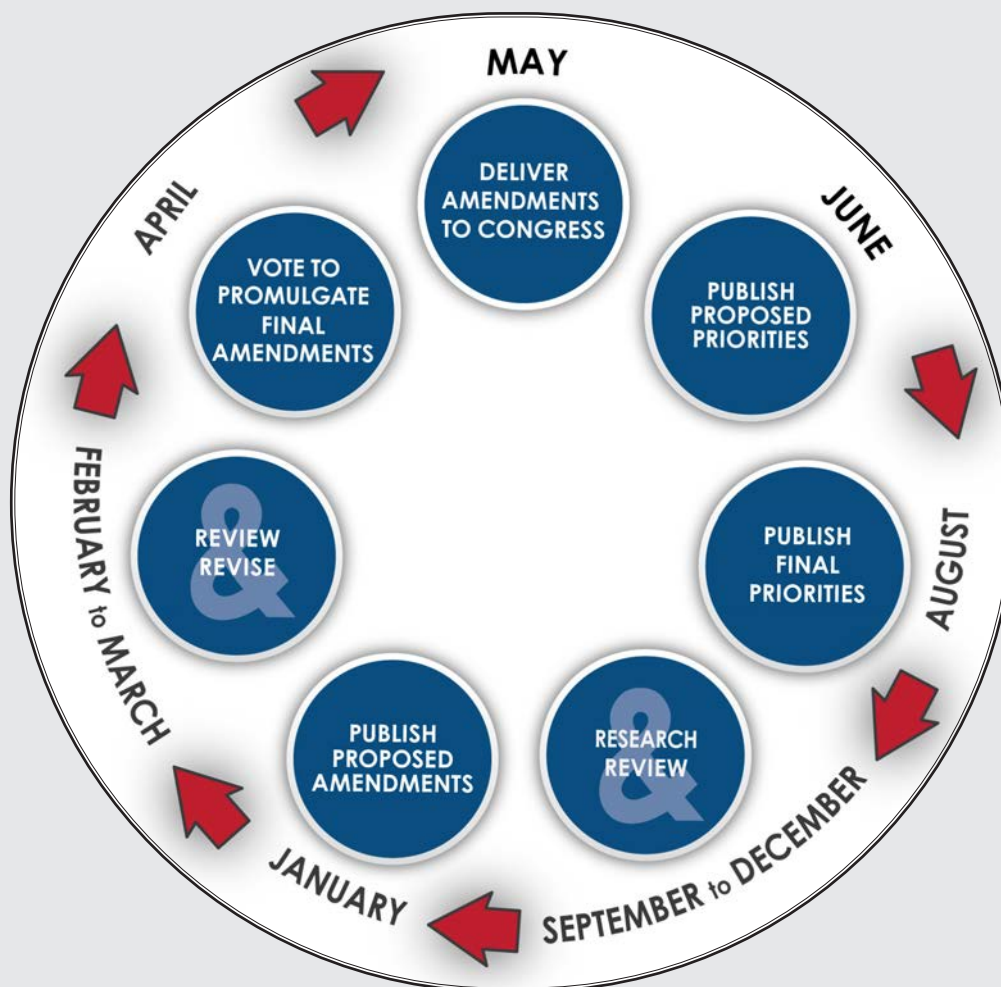
The Commissioners review information from various sources such as Commission data on how crime has changed, comments from Members of Congress, recommendations from the Department of Justice and defense attorneys, circuit conflicts within the court system, etc. and decide which topics need to be researched by staff. During the amendment cycle process, staff will present the data and research to the Commissioners. In January of each year, the Commission publishes notice of proposed amendments to sentencing guidelines, policy statements, and commentary in the *Federal Register* and solicits public feedback to the changes. After reviewing all the information presented to them, the Commissioners vote on these changes. On May 1, the Commission delivers the new *Guidelines Manual* changes to Congress. If Congress does not vote to disapprove the amendments to the *Guidelines Manual,* then the new provisions take effect on November 1 of that year.

Sometimes the Commission makes changes to the Manual in addition to the regularly scheduled November 1 date.

These changes may be directed by Congress under emergency amendment authority or may occur for other time-sensitive reasons. When the Commission needs to act more quickly than the annual amendment cycle, the result is a *Supplemental Guidelines Manual* which details the new guideline(s) and adjustment(s). For example, the Commission published a *Supplement to the* 2015 *Guidelines Manual* effective August 1, 2016, which incorporated amendment changes.[10] Offenders who were sentenced on or after August 1, 2016, were eligible to have these changes incorporated into their guideline application.

Researcher Note The Commission datafile does not specifically note that the *Supplement to the* 2015 *Guidelines Manual* was used. Instances where the court applied these amendment year changes are coded as having a later amendment year *(i.e.,* in our above example the amendment year would be recorded as 2016). Researchers would be able to see if offenders used the *Supplement to the* 2015 *Guidelines Manual* based on the sentencing month and the manual applied.

Steps to Collecting Chapter Two and Three Variables

1 Determine *Guidelines Manual Year*

2 Determine Applicable Guideline

3 Calculate Tot Offense Leve
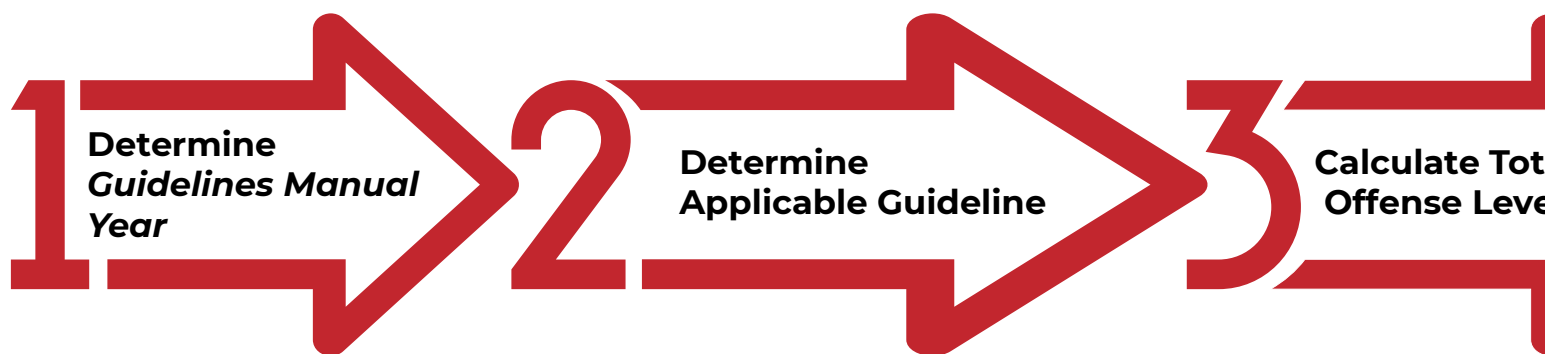
Researcher Impact Because the *Guidelines Manual* is amended almost every year, it is critical for researchers to understand the amendment year recorded in the datafile [AMENDYR]. Changes based on an amendment year may include: 1) guidelines added or deleted, 2) BOLs changed, added, or deleted, 3) SOCs added, deleted, the order changed, or values modified, and 4) the Chapter Three and Four adjustments added, deleted, or the values modified.[11] During any given sentencing year, the courts will apply several yearly editions of the *Guidelines Manual*. The number of different versions applied can be verified by running a frequency of the [AMENDYR] variable. Failing to take the amendment year into account during a guideline-based analysis will often result in the researcher accidentally including unwanted or incorrect values. Therefore, any researcher who is using guideline application components such as BOL, SOCs, Chapter Three adjustments, or Chapter Four Criminal History Points/Enhancements in an analysis should review the manuals used during the analysis time period to determine if any changes were made to the variable(s) of interest and ensure that the analysis accounts for these changes or selects only amendment years in which the guideline application values are the same.

For example, if a researcher was interested in studying loss amounts under USSG §2B1.1, then reviewing all the guideline manuals would show that the loss table was changed in the 2001 *Guidelines Manual* and again in the 2015 *Guidelines Manual*.[12] In addition, a separate fraud guideline (USSG §2F1.1, Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments) and the larceny guideline (USSG §2B1.1, Theft, Embezzlement, and Receipt of Stolen Property) were combined in the 2001 *Guidelines Manual*. If researchers want to analyze all the fraud cases, then

any cases sentenced under the "old" fraud guideline (USSG §2F1.1) would need to also be included in any analysis. Researchers can use the variable [AMENDYR] to select the older manuals and then select the "older" fraud guideline (USSG §2F1.1).

Determining the Applicable Guideline

Upon review of Chapter One, Part B (General Application Principles), the year of the *Guidelines Manual* is determined, and the next step is to determine the applicable guideline for the offense of conviction. The Statutory Index in Appendix A of the *Guidelines Manual* lists the federal criminal statutes in numeric order and the corresponding guideline or guidelines which are applicable to each specific statute. The user reviews the guideline(s) listed for each of the statutes, and then determines the most appropriate guideline for each count of conviction. The initial guideline referenced by Appendix A of the manual is the statutory guideline. The Commission records this information in the individual offender datafiles as the 1st through Xth statutory guideline computations (see Appendix A of this publication for more information about the statutory guideline variable names). Note that if the offender has multiple counts of conviction, then the process is repeated for each count of conviction. The user must also determine if any of the counts of conviction will be grouped together for guideline calculation purposes.[13] Chapter Three, Part D of the *Guidelines Manual* (Multiple Counts) addresses multiple counts of conviction. Crimes that are of a similar nature and for which the guidelines are generally

> The Commission collects complete
> guideline application information for
> up to guideline computations.

applied in an aggregate nature are grouped together into one computation (*e.g.*, multiple counts of drug trafficking or fraud). These guidelines "hold an offender accountable" for multiple counts by adding in all the relevant drug types/weights or loss amounts together which can increase the offense level within a single computation. However, for more serious offenses that have an individual victim, such as bank robbery or sex offenses, each count of conviction receives its own computation and then, in many cases, the offender receives additional multiple count units.[14] These multiple count units are then converted to additional offense levels and added to the highest computation, increasing the Final Offense Level (FOL) to account for the additional crimes.

For each guideline applied, the applicable BOL for the statutory guideline, along with the Chapter Two SOCs which are unique to each guideline, are determined. The user will determine if any cross-references to other guidelines are applicable. Once the BOL, SOCs, and any cross-references are applied, the user will then review the Chapter Three adjustments to determine applicability of each Chapter Three adjustment.[15] Once all of the guideline computations are completed, the sentencing guideline computation with the highest adjusted offense level will be designated as the primary sentencing guideline.[16] Next, any applicable multiple count units are applied, and the Acceptance of Responsibility adjustment is applied. In most cases, this concludes the determination of the FOL.[17]

The Commission collects complete guideline application information for up to four guidelines applied as part of each computation to capture the various guidelines applied under the cross-reference application. After the initial (statutory) guideline is applied, any other guidelines applied in the same computation are considered to be cross-reference guidelines from the original but, for ease of discussion, they are referred to as the statutory guideline, the reference guideline, the cross-reference guideline, and the underlying guideline in the Commission's datafiles.[18] In a scenario where multiple guidelines are applied in a single computation via the cross-reference system, then the Chapter Two guideline that is "last touched" to add or subtract levels to the computation becomes the sentencing guideline.[19] See Appendix A for more information about the variable names for each guideline.

The rest of this paper will discuss the variable names associated with the primary sentencing guideline computation [GDLINEHI]. This is the "most serious computation" and this field is used in the vast majority of the Commission's guideline-based analyses.[20] However, the Commission's datafile contains all the guideline application information for each of the four guidelines for each computation and researchers may want to search through all the guideline computations depending upon the research question(s).[21]

> [GDLINEHI] is the "most serious" computation
> and the variable used most often in the
> Commission's guideline-based analyses.

Calculating the Total Offense Level

Base Offense Level

The applicable BOL for the primary sentencing guideline is [BASEHI]. Some guidelines have only one BOL and some have multiple BOL options. The BOL is the basic punishment for that type of offense and reflects the seriousness of that offense in its most basic form.[22] The BOL options for various guidelines are proportional to the severity of the crime and currently range from levels 4 through 43 on the Sentencing Table.[23] For example, first degree murder is penalized in USSG §2A1.1 and has a BOL of 43, whereas simple possession of marijuana is penalized in USSG §2D2.1 and has a BOL of 4.

When a guideline has more than one BOL listed, the user must decide which BOL is most applicable, depending upon the specific type of conduct involved in the offense. One of the most commonly applied guidelines with multiple BOLs is USSG §2D1.1 (Drug Trafficking). The BOL options in USSG §2D1.1 are generally based on drug type and amount. These BOL options are even numbers ranging from six through 38 depending upon the type of drugs and the amount of each drug involved in the offense. Additionally, USSG §2D1.1 has other BOL options for when death or serious bodily injury occurs or when the mitigating role cap is applied. When more than one BOL is available in a guideline, there is a line number associated with the various BOL options in the Commissions dataset.[24] The line number of the BOL [BASLNHI], refers to the subsection number under the BOL in the *Guidelines Manual* (note the BOL is always designated with the letter "(a)" and the various BOL options go from "(1)" through the Xᵗʰ option). An example of the line number options in USSG §2D1.1 (Drug Trafficking) are lines one through four (*i.e.*, [BASLNHI] is equal to 1, 2, 3, or 4). These are the BOLs that provide enhanced penalties for death or bodily injury. The fifth BOL line number in USSG §2D1.1 (*i.e.*, the variable [BASLNHI] has a value of "5") is reserved for offenders whose BOL is determined using the drug quantity table.

Some BOL line numbers have more than one subsection and are designated with different labels. The BOL label variable is called [BASELHI]. The BOL labels enable researchers to distinguish among the different BOL application options that may be available under a single BOL line number. One example of the BOL label is the mitigating role cap associated with a capped BOL in the USSG §2D1.1 (Drug Trafficking) guideline. A drug offender with 90 kilograms of heroin would normally have received a BOL 38 based on drug type and the amount of drugs involved. However, if the offender receives an adjustment under §3B1.2 (Mitigating Role), the BOL is "capped" at 34. In this scenario, the guideline [GDLINEHI] is "2D1.1", the BOL [BASEHI] is "34," the BOL line number [BASLNHI] is five, and the BOL label [BASELHI] is "B3."[25]

Researcher Note Not all BOL differences are specified with labels. Researchers will have to review the data for the specific guideline of interest to determine which BOL labels exist.[26]

Specific Offense Characteristics

After the most appropriate BOL is determined, the user reviews all the Specific Offense Characteristics (SOCs) within the selected guideline to determine which should be applied. Each guideline has a unique set of SOCs associated with it (variable names are [ADJ_BHI] through [ADJ_UHI] for the first through twentieth SOCs as of the 2018 *Guidelines Manual*).[27] The SOCs help to customize the punishment depending upon the unique characteristics of the offense and the offender.[28] For example, robbery offenses are punished under USSG §2B3.1 and all offenders receive a BOL of 20. However, additional levels are added to the BOL if the property of a financial institution or post office was taken, if a firearm was involved, if bodily injury occurred, if loss occurred, etc. If the offense did not involve conduct associated with any of the SOCs, the offense level would still be 20 after application of §2B3.1.[29] However, in an offense where the robbery was from a bank where a gun was discharged, serious injury resulted, and $100,000 was stolen, the offense level would be 35 after the BOL and SOCs were applied.[30] Because the second scenario involves more severe conduct, the resulting offense level is higher after the SOCs are added to the BOL. In this way, offenders who engage in aggravating behaviors associated with each type of crime (or guideline) have levels added, resulting in a higher offense level and a higher guideline range; offenders who engage in mitigating behaviors associated with each type of crime (or guideline) have levels subtracted, resulting in a lower offense level and a lower guideline range.[31]

> **"**
> Each guideline has a unique set of SOCs that help to customize the punishment depending upon the characteristics of the offense and the offender.

When a Specific Offense Characteristic has more than one option listed, a label is recorded in a similar way to the BOL labels. The SOC label variables [ADJL_BHI through ADJL_UHI] denote which option was the reason why the offender received that SOC. One example of a SOC with labels is found in the second SOC under the §2B1.1 guideline in the 2018 *Guidelines Manual*. The variable name for the second SOC is [ADJ_CHI] and the variable name for the corresponding label for that SOC is [ADJL_CHI]. Under this SOC, offenders receive an additional two levels if the offense involved ten or more victims, was committed through mass marketing, or resulted in substantial financial hardship to one or more victims. Four levels are added to the offense level (instead of two levels) if the offense resulted in substantial hardship to five or more victims; six levels are added to the offense level (instead of two or four levels) if the offense resulted in substantial hardship to 25 or more victims.[32] When the offender has received the 2-level increase due to mass marketing, the value of this SOC label [ADJL_CHI] is "A2."[33]

Researcher Note   Not all SOC differences are specified with labels. Researchers will need to examine the applicable *Guidelines Manuals* for the analysis and then compare the labels in the *Guidelines Manual* with the labels from the datafile. Some labels contain only letters while others contain letters and numbers which are as consistent as possible with the labeling scheme displayed in the corresponding *Guidelines Manual*.

Cross Reference Guidelines

A user must read through the entire guideline and application instructions to determine if only the initial guideline applies, or if a reference to another guideline or a cross-reference guideline, is applicable. Some guidelines contain directions to go to a second guideline, either to determine the underlying conduct or to determine if the application of the cross-reference results in a higher offense level. Section 4(a) of Part A in Chapter One of the *Guidelines Manual* discusses how the guidelines resolved the conflict between real offense conduct and charging conduct. The guideline cross-reference system is one way the federal sentencing guidelines take relevant conduct into account in addition to the charged conduct. Although the user starts out applying the guideline based on the offense of conviction, the user may be instructed during the guideline application process to cross-reference to another guideline if the relevant conduct supports the application, even if the offender has not been convicted of this conduct. [34]

The variable name for the initial "statutory" guideline for the most serious computation is [GDSTATHI]. The first cross-reference guideline for the most serious computation is [GDREFHI].[35] An example of a cross-reference from the statutory guideline prior to the application of the BOL and SOCs is the §2D1.2 guideline (Drug Offenses Near Protected Locations). This guideline directs the user to first determine the offense level (BOL plus SOCs) under USSG §2D1.1 (Drug Trafficking) and then come back to USSG §2D1.2 to add additional adjustments to that BOL because the offender sold the drugs to pregnant or underage customers. In this scenario, there is only one computation, but two guidelines are applied. The §2D1.2 guideline is the statutory guideline [GDSTATHI] and USSG §2D1.1 is the reference guideline [GDREFHI]. Because the last Chapter Two guideline in which levels are added or subtracted levels is USSG §2D1.2, it becomes the primary sentencing guideline [GDLINEHI]. The BOL adjustment applied under USSG §2D1.2 is recorded under the variable [BASADJHI].[36]

Occasionally, the statutory guideline directs the user to a reference guideline which also contains a cross-reference to a third guideline. The variable name for the third guideline is [GDCROSHI]. An example of a case in which there would be three guidelines applied is when an offender is convicted under 18 U.S.C. § 4. The underlying offense is money laundering, the profits of trafficking drugs. In this scenario, there is only one computation, but three guidelines are applied. The statutory guideline [GDSTATHI] will be USSG §2X4.1 (Misprision of Felony). This guideline directs the user to determine the underlying offense and then subtract nine levels.[37] The underlying offense is money laundering, so the reference guideline [GDREFHI] would be USSG §2S1.1. That guideline then directs the user to another guideline to determine the underlying conduct. In this scenario, it is USSG §2D1.1 (Drug Trafficking). The USSG §2D1.1 computation is recorded as the cross-reference guideline [GDCROSHI]. Because the last Chapter Two guideline that adds or subtracts levels is USSG §2X4.1, this guideline also becomes the primary sentencing guideline [GDLINEHI]. The BOL adjustment applied under USSG §2X4.1 (subtracting nine levels) is recorded under the variable [BASADJHI].

Researcher Note   Most computations do not contain any cross-reference guidelines. If a guideline cross-reference was not applied, then all the reference guideline fields ([GDREFHI], [GDCROSHI], and [GDUNDRHI]) will be recorded as blank on the datafile to reflect that they were not applicable.

Chapter Three Adjustments

After all the decisions have been made about the guideline cross-reference application, the user reviews the Chapter Three adjustments in Parts A through C of the *Guidelines Manual*.[38] The adjustments in these sections can apply to any offense, so the user needs to consider the application of these adjustments in every case. These adjustments provide increases or decreases in the offense level due to offense characteristics related to victims of the offense, the offender's role in the offense, and obstruction-related aspects of the offense.[39] The Commission records complete application information for each of the four types of guidelines recorded (statutory, reference, cross-reference, and underlying). See Appendix B for a list of all the Chapter Three adjustments and the corresponding variable names.

Once all the Chapter Two SOCs and Chapter Three adjustments through Part C have been applied, each guideline at this point has a subtotal referred to as the "adjusted offense level." The adjusted offense level variable for the primary sentencing guideline computation is [ADJOFLHI].

When the initial federal sentencing guidelines were written, Congress specified in 28 U.S.C. § 994, that one of the Commission's duties was to determine penalties for offenders who had committed multiple offenses. The result was the creation of the multiple computations section of the *Guidelines Manual*. In the small percentage of cases where there is more than one count of conviction, the user must determine whether the counts of conviction are to be grouped together, whether units should be assigned, or some combination of these two (it is possible for some counts to group together and other counts not to group in a single case). Chapter Three, Part D of the *Guidelines Manual* provides guidance on which types of offenses should be grouped, when offenses are not grouped, and how multiple count units should be applied. The multiple count units are totaled and then additional levels are added to the highest adjusted offense level [ADJOFLHI] to account for the extra harm of the additional offenses. The multiple count process in Chapter Three, Part D ensures that offenders receive incremental punishment for significant other offenses and allows the user to calculate a single combined adjusted offense level from multiple guideline computations.

The Commission's datafiles capture the multiple count units in the field [TOTUNIT]. After the multiple count units are determined, the subtotal of the highest adjusted offense level [ADJOFLHI] and the number of levels derived from the application of the multiple count units in §3D1.4 of the *Guidelines Manual* results in a single combined adjusted offense level [COADJLEV].

The final Chapter Three adjustment (USSG §3E1.1) is the application of Acceptance of Responsibility [ACCTRESP]. Once the Acceptance of Responsibility adjustment has been applied, then the FOL [XFOLSOR] is determined (unless certain Chapter Four (Criminal History) overrides in the *Guidelines Manual* apply). The FOL [XFOLSOR] and the Criminal History Category (CHC) [XCRHISSR] are the two axes of the Sentencing Table.[40] The place of intersection of these two data points on the Sentencing Table provides the user with the sentencing table minimum [XMINSOR] and maximum [XMAXSOR] penalties.[41]

Final Guideline Application Changes at Sentencing

The judge reviews the guideline application information in the PSR prior to each sentencing. In addition, both the defense counsel and the prosecuting attorney also receive a copy of the PSR to review. The current SOR form has places on the first page to record any changes the court makes at sentencing, providing separate sections for the court to describe the specific changes to the Chapters Two, Three, and Four provisions.[42] The Commission records information about the Chapter Two, Three, and Four changes and ensures that the guideline calculations reflect the final court findings whenever possible.

When the Commission receives both a PSR and a SOR for an offender, Commission staff compare the FOL and CHC in the PSR and the SOR. If either component on the SOR differs from the corresponding information in the PSR, the Commission attempts to reconcile the documents. Staff reviews the SOR to determine the SOR documented changes. When all changes are clearly

> The intersection of the Final Offense Level and Criminal History Category on the Sentencing Table provides the minimum and maximum guideline penalties.

noted and the documents are able to be reconciled, the changes are coded through onto the datafile (*e.g.*, if the PSR gave the offender a 2-level decrease for the Mitigating Role adjustment (§3B1.2) and the SOR clearly notes that at sentencing, the court changed the computation and gave the offender a 4-level decrease for the Mitigating Role adjustment, then the Commission's datafile will reflect the 4-level decrease in the Mitigating Role field if the [SOURCES] variable is "Court Findings"). If there are no documented changes, or all the changes are not clear, then the staff will review any addendums to the PSR (these note objections by the defense counsel or the government to the guideline application) as well as the plea agreement. Sometimes staff can reconcile the various case documents, and sometimes the mismatch cannot be resolved given the documentation received.

Chapter Two changes are documented in the variables [CHP2CHG1] though [CHP2CHGX] to note the 1st through Xth Chapter Two changes. As an example: if the SOR notes that the court decided to both not apply the weapon SOC and grant the offender the safety valve reduction, [CHP2CHG1] would record that the weapon SOC had been applied in the PSR but was deducted at the time of sentencing, and [CHP2CHG2] would record that the safety valve had not been applied in the PSR but was applied at the time of sentencing. If the Chapter Two change is not one of the more common choices on the menu, "other change" is coded, and the corresponding text fields, [CHP2TXT1] through [CHP2TXTX], are filled-in. Chapter Three changes are documented in similar variables [CHP3CHG1] through [CHP3CHGX] to note the 1st through Xth Chapter Three changes. If the Chapter Three change is not one of the more common choices on the menu, "other" is coded, and the corresponding text fields, [CHP3TXT1] through [CHP3TXTX], are filled in. Similar fields record the Chapter Four criminal history changes as [CHP4CHG1] through [CHP4CHGX] and [CHP4TXT1] through [CHP4TXTX].

Researcher Note   When doing a guideline-based analysis, researchers should ordinarily only include cases in which the final court findings are available (*i.e.*, the guideline application and criminal history application are both documented clearly at the time of sentencing). Selecting only cases where the [SOURCES] variable is "Court Findings" ensures that the guideline application variables of interest (*e.g.*, BOL, SOCs, criminal history points, etc.) were documented as being applied or not applied. Any guideline-based analysis involving data fields which may change between the PSR and SOR (*e.g.*, BOL, SOCs, drug amount, or criminal history points) may have data inconsistency issues if the [SOURCES] screen is not utilized. Therefore, researchers should generally utilize the [SOURCES] variable in guideline-based analyses to only keep cases designated as "Court Findings" to minimize data inconsistencies.

The Commission's annual individual offender datafiles are available for download in SAS or SPSS formats along with the corresponding codebook describing the variables and values at https://www.ussc.gov/research/datafiles/commission-datafiles.

Endnotes

1   The United States Sentencing Commission is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984, its principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues. *See* 28 U.S.C. §§ 991-994.

2   The Commission's individual offender datafiles from FY 2002–FY 2018 are available for download in either SPSS or SAS formats (the datafiles are too large to be made available in EXCEL for "viewing") at https://www.ussc.gov/research/datafiles/commission-datafiles, along with the codebook describing all of the available variables and values. Note that not all variables exist for all years that the Commission's data is available.

3   The Commission's research and data duties are described in 28 U.S.C. § 995(a)(12)–(16).

4   28 U.S.C. § 994(w)(1). For more detailed information about the Commission's data collection, see U.S. Sentencing Comm'n, Commission Collection of Individual Offender Data (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-notes/20190719_Research-Notes-Issue1.pdf.

5   28 U.S.C. § 994(w)(1).

6   For more information about how to apply the guidelines, see an example Guideline Worksheet at https://www.ussc.gov/education/training-resources/worksheets-individual-offenders.

7   Only one version of the *Guidelines Manual* should be applied when the user calculates the offender's guideline range. This is usually the guideline manual in effect at the time of sentencing. The Commission's database only allows for one amendment year to be recorded. In rare cases where more than one year was incorrectly applied and there are conflicts in choosing only one year (*i.e.*, the data analyst cannot record the correct guideline application using only one year), then a [SOURCES] value of nine (PSR is waived, missing, or multiple offense levels) is recorded and no computation is collected.

8   Peugh v. United States, 569 U.S. 530 (2013) (Defendant "was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. [At his 2009 sentencing, he argued] that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses rather than under the 2009 version in effect at the time of sentencing. Under the 1998 Guidelines, [his] sentencing range was 30 to 37 months, but the 2009 Guidelines assigned more severe consequences to his acts, yielding a range of 70 to 87 months.").

9   The court will state on the SOR form whether it accepts the guideline application in the PSR or made changes. For more information about the data fields that capture this information, see [ACCGDLN], [CHP2CHG1-CHP2CHGX], [CHP3CHG1-CHP3CHGX], and [CHP4CHG1-CHP4CHGX] in the codebook.

10   For more detailed information about the guideline changes, see U.S. Sentencing Comm'n, *Supplement to the 2015 Guidelines Manual* (Aug. 2016), https://www.ussc.gov/guidelines/guidelines-archive/supplement-2015-guidelines-manual.

11   One example of a large-scale guideline change is the 2001 *Guidelines Manual*. The USSG §2F1.1 guideline (fraud cases) was deleted and consolidated with the USSG §2B1.1 guideline (theft and embezzlement). In addition, the loss table, which is used in numerous guidelines, was changed. An example of a common SOC change is the "safety-valve" adjustment under USSG §2D1.1 (Drug Trafficking). It is the 9th SOC in the 2006 *Guidelines Manual*, it is the 11th SOC in the 2007 *Guidelines Manual*, and it is the 18th SOC in the 2018 *Guidelines Manual*.

12   Cases which received a 0-level increase in the loss table in the 2000 *Guidelines Manual* had loss amounts ranging from $0 to $100 as compared to a range of $0 to $5,000 from the 2001 through the 2014 *Guidelines Manuals*, and then a range of $0 to $6,500 starting in the 2015 *Guidelines Manual*. Therefore, if researchers do not take the amendment year changes into account, the comparison groups of offenders who received no increase for loss will contain offenders with very different loss amounts.

13   Grouping rules are discussed in Chapter 3, Part D of the *Guidelines Manual*. In general, like offenses are grouped together—for instance, if an offender has 21 counts of wire fraud, then all the counts will be grouped together, the monetary loss from each count will be added for one total loss amount, and only one computation will be done by the probation officer. If counts of conviction are grouped together, there will usually be fewer guideline computations than counts of conviction. In certain scenarios there will be more guideline computations than counts of conviction. This can occur when there is a composite offense with more than one sub-act or underlying type of offense behavior (such as in Racketeering cases) or more than one victim (such as in Child Exploitation or Child Pornography cases). The Commission's datafile contains a variable to record the total number of counts of conviction [NOCOUNTS] as well as the total number of guideline computations [NOCOMP].

14   Depending on the difference in the offense levels of each computation, the offender may receive one unit, one-half unit, or no units. See USSG §3D1.4 (Determining the Combined Offense Level) for more information.

15   The Commission collects information on the statutory guideline and up to three cross-reference guidelines for each

guideline computation. The guidelines and the underlying BOL and SOCs are only collected when the cross-reference guideline applied. Sometimes the probation officer details a cross-reference guideline application, but the offense level for that cross-reference results in a lower offense level, and thus the probation officer does not end up applying the cross reference. In that scenario, the cross-reference guideline (and underlying information) is not recorded in the Commission's datafile because it was not actually applied, but rather just explored and then discarded. See Appendix A for more information about the specific variable names. Note that the guideline variables are character fields since they do contain both letters and periods as listed in the *Guidelines Manual*.

16   The adjusted offense level consists of all the Chapter Two computations (BOL, BOL adjustments, and SOCs) as well as the Chapter Three adjustments through Part C.

17   Certain Chapter Four (Criminal History) guidelines contain "overrides" to the offender's offense level calculated in Chapters Two and Three. In some cases, the offense level will be higher than that calculated in Chapters Two and Three. See Chapter Four of the *Guidelines Manual* for more information.

18   The Commission's codebook detailing the variables and values of each variable is available for download at https://www. ussc.gov/research/datafiles/commission-datafiles#individual. An example of the various guidelines collected by USSC is if an offender was convicted of one count of conspiracy to commit money laundering. The user starts the guideline application at USSG §2X1.1 (Attempt, Solicitation, or Conspiracy) which instructs the user to go to the underlying offense. The USSG §2X1.1 guideline is the statutory guideline [GDSTAT1]. Money laundering is the first reference guideline [GDREF1] as it is the object of the conspiracy. This guideline (USSG §2S1.1) instructs the user to go to the source of the money that was laundered, which in this scenario is money derived from drug trafficking. The user goes to the drug trafficking guideline (USSG §2D1.1) to determine the offense level. This second reference guideline is the cross-reference guideline [GDCROS1]. There is not another cross-reference guideline, so the fourth guideline [GDUNDR1] collected by USSC is blank in this scenario. The user would return to USSG §2S1.1 after computing the offense level under USSG §2D1.1 to add any applicable SOCs under USSG §2S1.1. The user would then return to USSG §2X1.1 to determine if any of the SOCs would apply under USSG §2X1.1. In this example scenario, the offender does receive additional SOCs under USSG §2S1.1 and then because he completed the money laundering acts, no SOCs under USSG §2X1.1 are applied. The user also reviews the Chapter Three adjustments and determines that none apply. In this scenario, USSG §2S1.1 was the last guideline where levels were added or subtracted, so it becomes the "sentencing guideline" [GDLINE1]. Because there is only one guideline computation, all of the guideline variables in this computation will also be designated as the "high" variables as well (*i.e.*, [GDSTAT1] is also [GDSTATHI], [GDREF1] becomes [GDREFHI], and so on).

19   The sentencing guideline is always one of the four guidelines collected (statutory, reference, cross-reference, or underlying). See Appendix A for more information about the variable names for each of these guidelines and the Chapter Two computation variables.

20   Starting with FY 2018 data, the primary sentencing guideline, [GDLINEHI], is used to determine the type of crime (the guidelines are aggregated into offense type groups to assign cases to one primary offense such as "Drug Trafficking", "Firearms", etc.). For more information about the new crime type variable [OFFGUIDE], see the introduction to the FY 2018 *Sourcebook of Federal Sentencing Statistics* at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf. For additional information about the older statute-based offense types as compared to the primary sentencing guideline, see https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-notes/20191114_Research-Notes-Issue3.pdf.

21   If researchers want to concentrate their analyses on the guideline which "best explains the FOL" or the "most serious guideline," then the variable [GDLINEHI] should be used. However, if a researcher wants to create a pool of offenders where a specific guideline was applied regardless of whether it ended up being the most serious guideline applied, then a search through each of the four guideline fields for each computation is required (*i.e.*, [GDSTAT1] through [GDSTATX], [GDREF1] through [GDREFX], [GDCROS1] through [GDCROSX], and [GDUNDR1] through [GDUNDRX]). Researchers would not need to additionally search through the sentencing guideline fields [GDLINE1] through [GDLINEX] because the sentencing guideline is always one of the four original guidelines coded.

22   Cases with only BOLs applied (and no aggravating or mitigating adjustments) are referred to as "vanilla" offenses.

23   The severity scale of the federal sentencing guidelines goes from levels 1 through 43, with 43 being the most severe.

24   The line numbers in the Commission's datafiles generally are aligned with the line numbering in the corresponding guideline from the *Guidelines Manual*. However, due to changes over time, the numbering in the datafile and the numbering in the *Manual* may not always match exactly. Users should run a frequency of the line number values and compare them to the values listed in the *Guidelines Manuals* applied in the various cases based on the [AMENDYR] coded in the Commission's datafile.

25   In this example, the "B3" label denotes that the offender received the mitigating role cap under USSG §2D1.1(a)(5)(B)(iii). If the offender had received -4 levels under the Mitigating Role adjustment for being a minimal participant and the BOL was reduced to 32, then the label value would be "B4". There is not a subsection of "iv" in the BOL label option of the 2018 *Guidelines Manual*, however, in order to be able to distinguish the offenders who received this additional decrease in their BOL, the "B4" value was created in the Commission's datafile. If the offender had not received the mitigating role cap and the BOL had been based on the drug type and amount, then the label is recorded as "A" since the BOL was determined under USSG §2D1.1(a)(5)(A).

26   When using the various BOL variables, it is imperative that researchers first select a guideline and then use the

corresponding BOL variables. For example, selecting the primary sentencing guideline [GDLINEHI] as USSG §2D1.1 and then using the BOL variable for the reference guideline [BASERHI] instead of the BOL for the primary sentencing guideline [BASEHI] will provide BOL results from the reference guideline [GDREFHI] which may not be the primary sentencing guideline [GDLINEHI]. Note that the BOL label "A" is the default label and will exist for every BOL, even if it does not have more than one option.

27   One of the most frequently asked questions about the variable names for the SOCs is "Why is the first SOC named [ADJ_BHI] instead of [ADJ_AHI]"? The answer is because subsection "(b)" within each guideline is the start of the SOCs whereas the BOL was determined in subsection "(a)". Note that not all the SOCs exist in all data years. For example, the variable [ADJ_UHI] which represents the 20th SOC did not exist prior to the 2018 *Guidelines Manual*, so it does not exist on the FY 2018 datafile or earlier (the FY 2018 *Guidelines Manual* did not go into effect until November 1, 2018, which is in FY 2019 of the datafiles).

28   See Chapter One, Part A of the *Guidelines Manual* to obtain more background about the underlying principles of the guidelines. USSG Ch.1, Pt.A.

29   If a SOC or Chapter Three provision does not exist for the guideline and/or amendment year coded, then this field will be recorded as blank. If the provision exists, but the offender did not receive any increase or decrease for that SOC or Chapter Three provision, then the value will be reported as zero.

30   For this example, the 2018 *Guidelines Manual* is used to determine the calculations. The BOL for USSG §2B3.1 is 20, plus two levels for taking money from a financial institution, plus seven levels for discharging the gun, plus four levels for serious bodily injury, plus two levels for $100,000 in loss, results in offense level 35.

31   For more information about the sentencing guidelines table and determining the guideline range, see Chapter Five of the *Guidelines Manual*. USSG Ch.5.

32   An offender will only receive the highest number of levels applicable for each SOC even if more than one applies (*i.e.*, the levels are not additive within a single SOC).

33   The "A2" label denotes that the offender received the 2-level increase under USSG §2B1.1(b)(2)(A)(ii). If the offender had received the two levels due to having ten or more victims, then the label would be recorded as "A1" since the SOC was determined under USSG §2B1.1(b)(2)(A)(i).

34   Relevant conduct can be the impetus for cross-referencing to another guideline, adding in additional drug types/weight, additional loss amounts, etc., which can ultimately increase the offender's guideline range. For more information about relevant conduct and how it impacts guideline application, see both Chapter One, Part A and USSG §1B1.3 (Relevant Conduct) in the *Guidelines Manual*. See also the various training materials available on the Commission's website in relation to this topic at https://www.ussc.gov/training-topic/relevant-conduct.

35   The cross-reference may technically occur at the end of a guideline (*i.e.*, after the theoretical application of the BOL and SOCs). In this scenario, the initial guideline is not actually applied, and therefore, the BOL and SOCs are not coded. An example of this scenario would be USSG §2A1.5 (Conspiracy or Solicitation to Commit Murder), which has a cross-reference to USSG §2A1.1 (First Degree Murder) at USSG §2A1.5(c)(1), after the BOL and SOC. If USSG §2A1.1 is applied, then no BOL or SOC would be coded under USSG §2A1.5 since the application under USSG §2A1.1 is higher, although USSG §2A1.5 would be coded as the statutory guideline. However, if the guideline cross-references to another guideline and then calls for the return to the statutory guideline to further add or subtract levels, then the statutory guideline will have a BOL and any applicable SOCs coded. An example of this scenario is if the statutory guideline is USSG §2D1.2 which generally sends the user to the underlying guideline (generally USSG §2D1.1) to determine the BOL, but then instructs the user to return to the statutory guideline (USSG §2D1.2) to add levels. In that scenario, the statutory guideline would have a valid BOL coded based on the levels determined under the reference guideline, USSG §2D1.1 (and an adjustment to the BOL to denote the extra levels applied).

36   The value of the BOL for the primary sentencing guideline [BASEHI] in scenarios such as USSG §2D1.2 (Drug Offenses Occurring Near Protected Locations or Pregnant Individuals) includes the value base adjustment [BASADJHI], as the BOL for this guideline is based on the offense level from the underlying drug trafficking offense <u>plus</u> the adjustment of one or two levels.

37   This guideline also has a "floor" of four levels (*i.e.*, after the nine levels are subtracted, the result cannot be less than four) and a "ceiling" of 19 levels (*i.e.*, after subtracting the nine levels, if the resulting offense level is greater than 19, it becomes 19). *See* USSG §2X4.1.

38   *See* USSG §§3A1.1–3C1.4.

39   See Appendix B at the end of this paper for a walk-through listing of the Chapter Three adjustment fields.

40   See Chapter Five, Part A of the *Guidelines Manual* to view the Sentencing Table. USSG Ch.5, Pt.A.

41   The sentencing table minimum and maximum values do not yet take the statutory penalties into account. Once the impact of those ranges are determined, then the final sentencing range variables [GLMIN] and [GLMAX] report the range of penalties available to the sentencing judge prior to any departure or variance.

42   For more information about the J&C and SOR forms, see form AO245B at https://www.uscourts.gov/services-forms/forms.

For other editions of the Research Notes series, visit https://www.ussc.gov/research/datafiles/research-notes.

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