



# Federal Sentencing: The Basics


**UNITED STATES SENTENCING COMMISSION**



## U.S. Sentencing Commission

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**Federal Sentencing: The Basics**

The Commission offers a companion eLearning series providing an overview of the federal sentencing system in four parts. After completing the series, you will be familiar with the basic functions of the Commission, the sentencing process and influencing factors, as well as how the sentencing guidelines are applied.

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September 2020

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# INTRODUCTION

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

## EVOLUTION OF FEDERAL SENTENCING SINCE THE 1980s

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

In response to both concern regarding sentencing disparities and a desire to promote transparency and proportionality in sentencing, Congress created the United States Sentencing Commission, a bipartisan expert agency located in the judicial branch.<sup>5</sup>

The Commission is composed of up to seven voting members, including a chair, who are nominated by the President and must be confirmed by the Senate. No more than four Commissioners can be from the same political party, and at least three Commissioners must be federal judges.<sup>6</sup>

The SRA directs the Commission to establish sentencing policies and practices in two primary ways: (1) by promulgating (and regularly amending) the federal sentencing guidelines, and (2) by issuing reports to Congress that recommend changes in federal legislation related to sentencing. The SRA also directs the Commission to establish a data collection and research program for the purpose of serving as “a clearinghouse and information center” concerning sentencing-

related issues and to establish a training branch to provide education about federal sentencing practices to federal judges, prosecutors, defense counsel, and probation officers.<sup>7</sup> The Commission’s staff of approximately 100 attorneys, social scientists, and other professionals with expertise in criminal justice and sentencing reflects these various statutory functions and includes, among others, the Offices of General Counsel (OGC), Research and Data (ORD), Education and Sentencing Practice (OESP), and Legislative Affairs (OLA).

The SRA and contemporaneous federal sentencing legislation created a fundamentally different sentencing system from the prior system, with the guidelines being the central feature and with parole no longer available for offenders convicted of offenses committed on or after November 1, 1987.<sup>8</sup> Congress specifically directed the Commission to create guidelines that increased existing penalties for “many” types of cases, such as “serious” white-collar offenses and violent offenses.<sup>9</sup> Before the initial set of guidelines was promulgated, Congress also enacted statutes creating mandatory minimum penalties for several commonly prosecuted drug-trafficking and firearms offenses<sup>10</sup> and prohibiting probation for certain offenders.<sup>11</sup>

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

## Seven Factors to be Considered at Sentencing



the nature and circumstances of the offense and the history and characteristics of the defendant;



the need for the sentence imposed to reflect the four primary purposes of sentencing, *i.e.*, retribution, deterrence, incapacitation, and rehabilitation;



the kinds of sentences available (*e.g.*, whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute);



the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines;



any relevant "policy statements" promulgated by the Commission;<sup>12</sup>



the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and



the need to provide restitution to any victims of the offense.



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

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

In the SRA as enacted, courts were required to sentence defendants within the applicable guideline range unless either the Commission had created a permissible basis for a “departure” from the range or there existed “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence” outside of the applicable range.<sup>20</sup> Departures from the range were limited in order to reflect Congress’s desire for general uniformity in sentencing of similarly situated offenders, without consideration of several offender characteristics deemed irrelevant to the sentencing decision, including “socio-economic status.”<sup>21</sup>



The Guidelines App is a web-based application that provides easy access to the full content of the Guidelines Manual and its appendices. Use the Guidelines App to find the applicable sentencing guideline or convert multiple drug types and weights to a single offense level.

To use the Guidelines App, visit:  
**[guidelines.uscourts.gov](https://www.guidelines.uscourts.gov)**

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

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

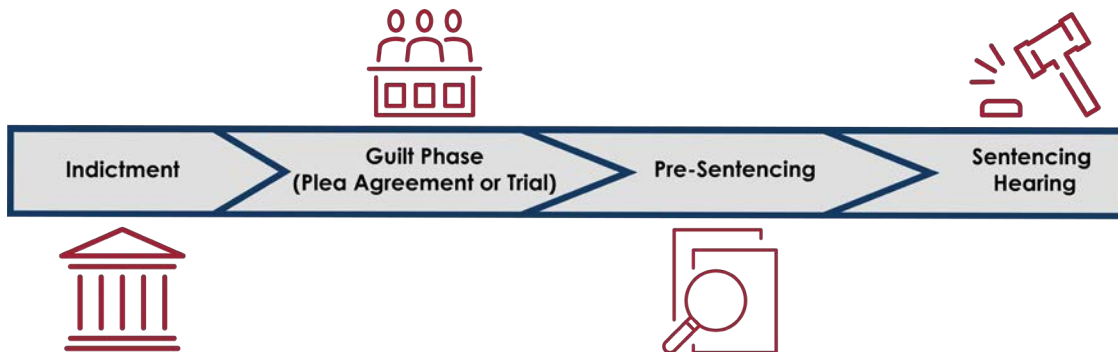
The Court repeatedly has stressed that the advisory guidelines remain the “starting point and the initial benchmark” in the federal sentencing process and, moreover, “district courts must . . . remain cognizant of them throughout the sentencing process.”<sup>27</sup> As the Court has stated, “[t]hese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

Consistent with the Court’s description of the role of the guidelines after *Booker*, the guidelines have proved to be “the lodestone of sentencing” in federal court.<sup>30</sup> Sentencing data show that three-quarters of cases are sentenced within the guidelines system, including more than half that are sentenced “within-range” and approximately one-quarter that are sentenced outside the guideline range as the result of departures specifically recognized by the *Guidelines Manual*.<sup>31</sup> Such departures include, for example, defendants’ “substantial assistance to the authorities” or guilty pleas pursuant to an “early disposition” program (departures discussed in more detail below). Moreover, the average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*.<sup>32</sup>

According to a 2014 survey of federal district judges, most judges find that the guidelines generally have increased certainty and fairness in meeting the purposes of punishment and have reduced unwarranted sentencing disparities. A majority of judges also favor the current guideline system over alternative systems.<sup>33</sup>

By 2020, over 1.9 million defendants have been sentenced under the guidelines.<sup>34</sup> There also have been tens of thousands of federal appeals involving the guidelines and nearly three dozen Supreme Court decisions concerning the guidelines.<sup>35</sup> It is no exaggeration to say that the guidelines are a central feature of the federal criminal justice system.

## OVERVIEW OF THE FEDERAL SENTENCING PROCESS



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

### Guilty Pleas and Plea Bargains

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

At the guilty plea hearing, the court must advise the defendant of not only the statutory range of punishment but also “the court’s obligation to calculate the applicable sentencing guideline range and to consider that range, possible departures under the Sentencing

Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).”<sup>38</sup> Many defendants who plead guilty do so as the result of plea agreement with the prosecution, and some plea agreements contain the parties’ agreement about the application of the sentencing guidelines in a defendant’s case.<sup>39</sup> Unlike civil cases, where district judges may participate in settlement discussions, a judge in a federal criminal case “must not participate in [plea bargain] discussions” between the parties, although the “parties must disclose the plea agreement in open court when the plea is offered . . . .”<sup>40</sup> The court must decide whether to accept or reject the proposed plea agreement, including whether to be bound by any plea agreement pursuant to Rule 11(c)(1)(C) that specifies a particular sentence. To the extent that a plea agreement contains stipulations relevant to sentencing, such stipulations must not be misleading and instead must “set forth the relevant facts and circumstances of the actual offense conduct.”<sup>41</sup> The Commission “recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report,” which typically is prepared after the guilty plea hearing and which often will provide a more fulsome recitation of the facts relevant to the sentencing guidelines calculation and the other section 3553(a) factors.<sup>42</sup>

## Presentence Interview

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

Counsel for the defendant must be given notice of and the opportunity to attend the presentence interview.<sup>44</sup> A defendant may invoke his or her constitutional right to remain silent during the

interview,<sup>45</sup> although failure to provide truthful information about the offense or offenses of conviction may result in denial of credit for “acceptance of responsibility”<sup>46</sup> at sentencing,<sup>47</sup> an issue discussed in more detail below.

## Presentence Report and Objections

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

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

## Sentencing Hearing

Although not as formal as trial proceedings, federal sentencing hearings are adversarial proceedings governed by procedural rules contained primarily in Rule 32 of the Federal Rules of Criminal

Procedure and Chapter Six of the *Guidelines Manual*. A district court must allow the defendant and counsel for both parties—and, in appropriate cases, victims<sup>55</sup>—to provide input before a sentence is imposed.<sup>56</sup> Furthermore, in the court’s discretion, it may allow the parties to call witnesses and present evidence about disputed facts or other matters (*e.g.*, mitigating or aggravating factors).<sup>57</sup>

If a court is contemplating “departing” from the applicable guideline range, sufficient pre-sentence notice to the parties is required (whether from the court, in the PSR, or in pleadings). However, such specific pre-sentence notice is not required if the court “varies,” rather than “departs,” from the applicable range based on information contained in the PSR or otherwise known to the parties.<sup>58</sup> The difference between a “departure” and a “variance” is explained in more detail below.

Neither the Federal Rules of Evidence<sup>59</sup> nor constitutional provisions related to evidentiary matters (*e.g.*, the Confrontation Clause of the Sixth Amendment) apply at sentencing.<sup>60</sup> Therefore, the court may consider hearsay and other types of information that would not be admissible during a trial.<sup>61</sup> However, the Commission has stated that information considered by a court at sentencing must have “sufficient indicia of reliability to support its probable accuracy.”<sup>62</sup> Under Federal Rule of Criminal Procedure 32, the court “must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.”<sup>63</sup> In resolving factual disputes, the court ordinarily applies the preponderance of the evidence standard.<sup>64</sup>

After the court orally pronounces sentence, the court must complete two documents—the “Judgment in a Criminal Case” and the “Statement of Reasons” (SOR) (both of which are contained in AO Form 245B)—that memorialize what the judge orally pronounced in court. The judgment specifies the sentence (the term of probation or imprisonment, any term of supervision release following imprisonment and the conditions thereof, and any financial penalties). The judgment is entered into the record as a publicly accessible document. The SOR,

which in the vast majority of districts is a sealed part of the record and thus is not publicly accessible, provides information about whether the court's sentence was within or outside of the applicable guideline range and also provides the specific reasons for a sentence imposed outside of that range (including whether the defendant provided substantial assistance to the prosecution in the investigation or prosecution of another person).<sup>65</sup>

At the conclusion of the sentencing hearing, the court must advise the defendant of his right to appeal, including the right to proceed *in forma pauperis* on appeal and the right to appointed appellate counsel in the event the defendant is indigent.<sup>66</sup> A defendant may waive the right to appeal as part of a voluntary plea agreement, which will generally be enforced on appeal (resulting in a dismissal of the appeal).<sup>67</sup>

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

## THE NATURE OF A FEDERAL SENTENCE

*What follows is a discussion of the nature of a federal sentence in felony and Class A misdemeanor cases<sup>69</sup>—first with respect to the statutory framework governing sentencing and then with respect to the guidelines framework.*

### Types of Sentences Available by Statute

#### ***Probation or Prison***

There are a variety of components of a federal sentence, one or more of which apply in every case. The primary component—some form of deprivation of liberty, either probation or incarceration—is imposed in over 99 percent of cases.<sup>70</sup> Where probation is authorized,



the maximum term allowable is five years and, in the case of a felony offense, a minimum one-year term is required.<sup>71</sup> Various conditions of probation exist, including certain “mandatory” conditions (*e.g.*, a defendant may not illegally possess a controlled substance) and a long list of potential “discretionary” conditions, which must be “reasonably related” to the nature of the offense, the defendant’s history and characteristics, or the relevant purposes of punishment.<sup>72</sup>

The majority of federal penal statutes do not require a term of imprisonment and, instead, authorize either a term of probation or a term of imprisonment. There are two exceptions: (1) penal statutes carrying a mandatory minimum term of imprisonment<sup>73</sup> (unless one of two exceptions applies—a “substantial assistance” departure or application of the “safety valve”—discussed below); and (2) penal statutes expressly prohibiting probation, even though they do not require imposition of a particular term of imprisonment.<sup>74</sup> Federal penal statutes that provide for potential terms of imprisonment are classified according to the maximum term available—ranging from Class A felonies (with a maximum punishment of life imprisonment) to Class E felonies (with a maximum of five years of imprisonment or less but more than one year), and Class A misdemeanors (with a maximum of one year of imprisonment) to Class C misdemeanors (with a maximum of 30 days of imprisonment).<sup>75</sup>

Although the Sentencing Reform Act of 1984 prospectively abolished parole, federal prisoners may earn “good-time credit,” which can reduce an offender’s term of imprisonment by up to 54 days for each year the offender has engaged in appropriate behavior in federal prison.<sup>76</sup> In order to be eligible for such credit, an offender must receive a prison sentence in excess of 12 months.<sup>77</sup> For that reason, it is not uncommon for courts to impose a prison sentence of 12 months and one day (which, with good-time credit, will result in an actual term served of a little more than ten months).<sup>78</sup> The First Step Act of 2018 provides that offenders may earn additional good-time credit based on participation in specified rehabilitation programs.<sup>79</sup>

In addition to allowing early release based on good-time credit, the Bureau of Prisons also may allow offenders (other than deportable aliens and certain other classes of offenders) to serve the final portion of their sentences—up to 12 months—in a halfway house and/or in

home detention (with a maximum period of six of the 12 months, or ten percent of the offender’s sentence, whichever is less, in home detention).<sup>80</sup> Eligible non-violent offenders with substance abuse histories also may have their prison sentences reduced by up to one year (depending on the length of their sentences) if they successfully complete a 500-hour residential drug abuse program (RDAP).<sup>81</sup> Finally, on motion of the Director of the Bureau of Prisons or the defendant, the sentencing court may release a prisoner before the end of his or her term of imprisonment in limited situations related to the prisoner’s advanced age, terminal illness, family circumstances, or other “extraordinary and compelling” circumstances.<sup>82</sup>

### ***Mandatory Minimum Sentences and Available Relief***

Approximately one-quarter of all federal defendants are convicted of an offense that carries a mandatory minimum prison sentence.<sup>83</sup> Such offenses include drug-trafficking crimes involving certain types and quantities of drugs, the use of a firearm during a crime of violence or drug-trafficking offense, a felon’s illegal possession of a firearm after having been convicted of three violent felonies or serious drug-trafficking offenses, and certain child pornography and sex offenses.<sup>84</sup> In creating sentencing guidelines applicable to such offenses, the Commission accounted for congressionally-mandated minimum penalties in formulating corresponding sentencing guideline ranges.<sup>85</sup>

There are two ways that a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum: (1) if the prosecution files a motion<sup>86</sup> based on the defendant’s “substantial assistance” to the prosecution in the investigation or prosecution of another person, pursuant to 18 U.S.C. § 3553(e); and, (2) in certain drug-trafficking cases, if the defendant qualifies for the statutory “safety valve” contained in 18 U.S.C. § 3553(f). Unlike a substantial assistance departure—which applies to all types of federal offenses carrying a mandatory minimum penalty—the safety value statute only applies in cases in which a defendant



The Commission has published numerous research reports on Mandatory Minimums.

To review these publications, visit:

**[ussc.gov/research/topical-index-publications#mandmin](https://ussc.gov/research/topical-index-publications#mandmin)**

faces a mandatory minimum penalty after being convicted of certain types of drug-trafficking offenses.

Section 3553(f) contains the five criteria governing a court's decision whether a defendant qualifies for the safety valve.<sup>87</sup> In the First Step Act, Congress increased the pool of eligible offenders by expanding the criteria related to the defendant's criminal history. Before the First Step Act, a defendant who had more than one criminal history point could not qualify for safety valve relief.<sup>88</sup> After the First Step Act, defendants with up to "four criminal history points, excluding any points resulting from a 1-point offense" are eligible.<sup>89</sup> If a defendant qualifies for the statutory safety valve, the court may sentence the defendant "without regard to any statutory minimum sentence."<sup>90</sup>

In addition to the statutory safety valve, the guidelines contain a related but separate safety valve provision, which requires a court to reduce an eligible drug-trafficking offender's guideline offense level by two levels if the defendant satisfies the criteria in the guideline safety valve provision.<sup>91</sup> Unlike the statutory safety valve, the guideline safety valve provision applies even if a defendant has not been convicted of one of the drug-trafficking offenses in section 3553(f) that carries a mandatory minimum.<sup>92</sup>

## **Financial Penalties**

Federal law provides for three primary types of financial penalties—fines, restitution, and special assessments—which can be imposed in addition to imprisonment or probation.<sup>93</sup> In cases in which a statute does not require imprisonment, a fine may be imposed as a stand-alone sentence.<sup>94</sup>

Unless a particular penal statute provides for a specific maximum fine, the maximum amount depends on the class of felony or misdemeanor in the count(s) of conviction.<sup>95</sup> Restitution in a criminal case is different from restitution in a civil case. In a criminal case, restitution refers to compensatory damages for a victim's losses, while restitution in a civil case seeks to disgorge a defendant's unjust enrichment.<sup>96</sup> A special assessment is a standard fee assessed for each

count of conviction (*e.g.*, \$100 per felony count and \$50 per Class A misdemeanor count).<sup>97</sup> In certain cases, criminal restitution, where applicable, is mandatory, as is the special assessment.<sup>98</sup> Upon motion of the prosecution, however, the court may remit a fine or special assessment.<sup>99</sup>

### ***Supervised Release***

As noted, a major change brought about by the SRA was the prospective abolition of parole in the federal system. Defendants convicted of an offense committed on or after November 1, 1987, are required to serve their federal prison sentences without parole.<sup>100</sup> In the place of parole, Congress created supervised release as a form of “post-confinement monitoring.”<sup>101</sup> However, unlike parole—which was substituted for a portion of the term of imprisonment imposed by the court—a supervised release term is served *in addition to* the term of imprisonment.<sup>102</sup> Congress did not create supervised release as a form of punishment and, instead, primarily intended to protect the public and “facilitate the reintegration of the defendant into the community.”<sup>103</sup> With certain statutory exceptions, which require terms of supervised release,<sup>104</sup> courts have “the freedom to provide . . . supervision for those, and only those, who need[] it” upon release from prison.<sup>105</sup> Like terms of probation, terms of supervised release have both mandatory and discretionary conditions of supervision.<sup>106</sup>

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

### ***Apprendi and its Progeny***

The Supreme Court’s landmark 2000 decision in *Apprendi v. New Jersey*<sup>107</sup> and its progeny have had a significant impact on the statutory (and guideline) framework governing federal sentencing. In *Apprendi*, which was a precursor to the Court’s 2005 decision in *Booker*<sup>108</sup> discussed above, the Court held that: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime

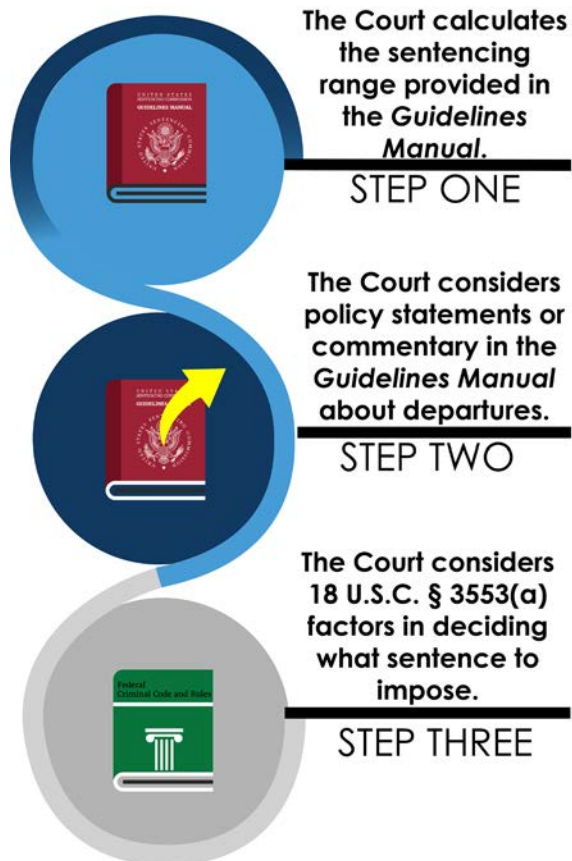
beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” or admitted by the defendant in his plea of guilty.<sup>109</sup> Thus, facts such as the quantity of drugs in a drug-trafficking case or the defendant’s use of a dangerous weapon during a robbery—which can raise the statutory maximum punishment<sup>110</sup>—must be charged in an indictment and proved to a jury beyond a reasonable doubt (or admitted by the defendant in pleading guilty) in order to raise the statutory maximum penalty. The Court has extended its holding in *Apprendi* to facts that trigger a mandatory minimum sentence of imprisonment<sup>111</sup> and facts that raise a statutory maximum fine.<sup>112</sup> Therefore, any fact (except a defendant’s prior conviction) that raises the statutory minimum or maximum penalty otherwise applicable must be proved to a jury beyond a reasonable doubt unless the defendant admits to that fact during his or her guilty plea.

## **The Booker Three-Step Process in Sentencing**

After the Supreme Court’s decision in *Booker*, just as before it, a sentencing court must correctly calculate a defendant’s guideline range and then consider whether there is any basis set forth in the *Guidelines Manual* to “depart” from the range. However, the practical effect of *Booker* was to add a third step in the sentencing process—namely, the court’s decision whether, after considering *all* of the factors in 18 U.S.C. § 3553(a), a sentence outside of the applicable guideline range should be imposed as a “variance.”<sup>113</sup> This *Booker* “three-step process” requires “respectful consideration”<sup>114</sup> of the *Guidelines Manual* in all three steps:

- (1) in initially calculating the sentencing range;
- (2) in considering policy statements or commentary in the *Guidelines Manual* about departures from the guideline range; and
- (3) in considering *all* of the § 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the *Guidelines Manual*) in deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or as both).<sup>115</sup>

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



## “Relevant Conduct” as the “Cornerstone” of the Guideline System

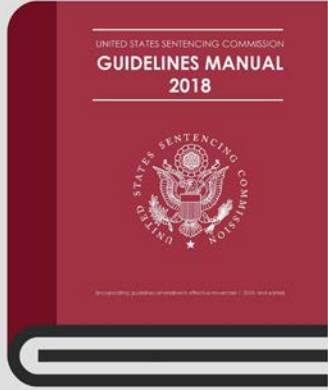
Before elaborating on the three-step process, it is important to understand what has become known as a “cornerstone” of the federal sentencing system—“relevant conduct.”<sup>116</sup> Relevant conduct is a defendant’s actual conduct—and not simply the conduct for which he or she was convicted—that is considered, along with the defendant’s conduct reflected in the count or counts of conviction, to calculate his or

her sentencing guideline range.<sup>117</sup> “The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant’s actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.”<sup>118</sup> The Commission’s decision to factor in relevant conduct into the guidelines system is consistent with the pre-guidelines practice of federal sentencing judges<sup>119</sup> and was intended to reduce the effect of prosecutorial charging decisions that do not reflect the defendant’s actual conduct on the court’s sentencing decision.<sup>120</sup>









Relevant conduct specifically encompasses a defendant’s “real offense conduct” (and certain types of conduct of coconspirators, whether or not charged as such) before, during, and after the commission of the offense or offenses of conviction. For most types of federal offenses, relevant conduct also includes other offenses committed as part of the “same course of conduct or common scheme or plan.”<sup>121</sup> Such conduct need not have been formally charged or proved at a trial (or admitted by a defendant in a guilty plea), so long as the sentencing judge finds the relevant conduct by a preponderance of the evidence using information that has sufficient indicia of reliability.<sup>122</sup> Such relevant conduct is considered in the application of various factors in the *Guidelines Manual*—such as in determining whether a defendant used a dangerous weapon during a bank robbery;<sup>123</sup> in calculating the amount of loss in the fraud guideline<sup>124</sup> and the drug quantity in the drug-trafficking guideline;<sup>125</sup> and in determining whether a felon who unlawfully possessed a firearm used the firearm in connection with another felony offense.<sup>126</sup>

## BASIC GUIDELINE APPLICATION

The Guidelines Manual has eight chapters, which are summarized below. Chapter Two — which contains guidelines for hundreds of federal offenses — is the longest portion of the Guidelines Manual.



The image shows the front cover of the 2018 United States Sentencing Commission Guidelines Manual. The cover is red with white text and the official seal of the United States Sentencing Commission. The text on the cover reads: "UNITED STATES SENTENCING COMMISSION", "GUIDELINES MANUAL", and "2018".

-  **Chapter 1:** Definitions, Application Instructions, and General Policies
-  **Chapter 2:** Offense-Specific Guidelines
-  **Chapter 3:** Adjustments for General Aggravating and Mitigating Factors and Adjustments for Multiple Counts of Conviction
-  **Chapter 4:** Criminal History Calculation Rules and "Overrides"
-  **Chapter 5:** Departures and Sentencing Options (including the Sentencing Tables)
-  **Chapter 6:** Sentencing Procedures
-  **Chapter 7:** Revocation of Probation and Supervised Release
-  **Chapter 8:** Sentencing of Organizations



## Application Instructions

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

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

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

- Determine which Chapter Two offense guideline applies by consulting Appendix A of the *Guidelines Manual*. After the proper Chapter Two guideline is identified, calculate the "offense level" from that guideline through consideration of the applicable "Base Offense Level" (BOL) combined with any "Specific Offense Characteristics" (SOCs) (which are aggravating and mitigating factors related to a particular offense type). Chapter One's provisions concerning "relevant conduct" are usually used to determine the BOL and any SOCs.
- Determine whether there are any additional "adjustments" to the offense level based on the provisions in Chapter Three, which addresses general aggravating and mitigating factors that are common across offense types. Relevant conduct also must be considered in determining whether any Chapter Three adjustments apply. Chapter Three also has provisions for adjusting a defendant's offense level based on multiple counts of conviction in certain types of cases.

- Calculate the defendant’s “criminal history points” according to Chapter Four’s provisions. Based on the criminal history score, the defendant is placed in the appropriate “Criminal History Category” (CHC).<sup>127</sup>
- Identify the sentencing guideline range in the Chapter Five’s Sentencing Table by locating the cell in the table that is at the intersection of the defendant’s offense level and CHC. (The Sentencing Table is set forth as Attachment A, *infra*.) Chapter Five’s provisions also address what types of sentences a court may impose (*e.g.*, probation or imprisonment), according to the location of the defendant’s applicable sentencing range in one of the four Zones (A–D) of the Sentencing Table.<sup>128</sup>
- Finally, consider possible grounds for a “departure” or “variance” from the applicable guideline range.<sup>129</sup> Departures and variances are further discussed below.

The SRA requires a court to use the version of the *Guidelines Manual* in effect on the date of sentencing.<sup>130</sup> One exception to the rule is that the Ex Post Facto Clause of the Constitution prevents retroactive application of amended guidelines that increased the applicable sentencing range after the offense was completed.<sup>131</sup> In such a case, the version of the guidelines in effect on the date of the offense must be used.<sup>132</sup> The determination of whether the earlier version of the *Manual* carries a lower penalty range is made under the “one-book rule.” That rule compares the guideline range for the version of the *Manual* in effect at sentencing with the version of the *Manual* in effect on the last date of the offense of conviction, applying each *Manual* in its entirety rather than applying portions of different versions of the *Manual*.<sup>133</sup>

## Applying the Guidelines

What follows is an illustration of the application of the *Guidelines Manual* to a short hypothetical case involving a defendant convicted of a single count of bank robbery in violation of 18 U.S.C. § 2113(a), which carries a statutory maximum of 20 years of imprisonment but does not carry any mandatory minimum penalty. See the illustration on page 23 for the facts of the case.

# A Hypothetical Bank Robbery

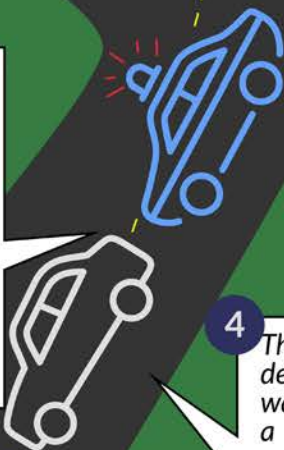
**1** The defendant entered a federally-insured bank and approached a teller while brandishing a realistic-looking toy gun. He demanded all the money that she and other tellers had and handed the teller a bag in which to place the money. The teller gave the defendant \$25,000. No one was injured during the robbery. Nor did the defendant physically restrain anyone or force anyone to move to a different location within or outside the bank.



**2** After the teller gave the defendant the bag of money, the defendant ran out of the bank and got into a car being driven by another person, who drove away from the bank at a normal rate of speed.



**3** Shortly thereafter, based on an eyewitness's description of the getaway car, police officers stopped the car without a chase and arrested the defendant and the getaway driver. Both individuals confessed to their roles in the bank robbery. The police officers recovered the \$25,000 and returned it to the bank.



**4** The co-defendant, the defendant's nephew, was determined to be a 16-year old juvenile and was not prosecuted in federal court.

**5** A federal grand jury indicted the defendant for a single count of bank robbery. At the time of the robbery, the defendant had two prior state convictions for offenses committed as an adult: (1) a conviction for felony assault, for which he had received a six-month jail sentence 11 years before the robbery; and (2) a felony conviction for distributing a small amount of cocaine to an undercover officer one year before the robbery, for which he had received a five-year term of probation.

The defendant pleaded guilty to the charge without the benefit of a plea agreement with the prosecution.



<p><b>Determine the Applicable Chapter Two Guideline</b> The first step in applying the guidelines is to identify the applicable Chapter Two guideline by looking at Appendix A.</p>
<p><b>Calculate the Chapter Two Offense Level</b> Determine the appropriate BOL and whether any SOCs apply, including consulting any commentary.</p>
<p><b>Calculate the Offense Level after Chapter Three Adjustments</b> A sentencing court determines whether Chapter Three adjustments apply based on the conduct for which a defendant was convicted and any relevant conduct.</p>
<p><b>Determine the Criminal History Category</b> Calculate the defendant's criminal history points by applying the criminal history rules in Chapter Four of the Guidelines Manual.</p>
<p><b>Determine the Guideline Sentencing Range from the Sentencing Table</b> Use the Offense Level and Criminal History Category to determine the applicable range from the sentencing table in Chapter Five. This could be impacted by statutory minimums or maximums.</p>

## **Determine the Applicable Chapter Two Guideline**

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

## **Calculate the Chapter Two Offense Level**

Turning to §2B3.1, the next step is to determine the appropriate BOL. Some guidelines contain multiple BOLs, although §2B3.1 contains a single BOL of 20. Next, determine whether any SOCs apply, including consulting any pertinent commentary in the application notes following the guideline,<sup>134</sup> which may offer interpretive aids regarding the SOCs. Based on the facts in this hypothetical case, the following three SOCs in §2B3.1 apply:

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

The determination that a toy gun qualifies as a “dangerous weapon” is made by reference to the commentary following §2B3.1, which states that the definition of “dangerous weapon” includes “an object” that “closely resembles an instrument capable of inflicting death or serious bodily injury.”<sup>135</sup> Note that, although the indictment in this case did not charge the defendant with using a dangerous weapon during the robbery (which, if it had, would have raised the statutory maximum to 25 years under 18 U.S.C. § 2113(d)), the sentencing

court must apply the SOC if the court finds by a preponderance of the evidence that the defendant in fact brandished a toy gun during the robbery.<sup>136</sup> Although the \$25,000 was returned to the bank, it still qualifies as “loss” for purpose of the guideline because the guideline’s commentary states that, “[l]oss means the value of the property *taken*, damaged, or destroyed.”<sup>137</sup> Assuming no other SOC’s apply, the defendant’s total Chapter Two offense level would be 26 (20 + 2 + 3 + 1).

### **Calculate the Offense Level after Chapter Three Adjustments**

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

Because the defendant had recruited and directed an accomplice (the getaway driver) before the robbery, the defendant receives a 2-level upward adjustment pursuant to §3B1.1(c) (Aggravating Role)<sup>138</sup>— bringing his offense level to 28.

Because the defendant used a minor as the getaway driver, two additional levels are added pursuant to §3B1.4 (Using a Minor to Commit a Crime),<sup>139</sup> which brings the defendant’s offense level to 30.

If the defendant has “accepted responsibility” for the offense by pleading guilty in a timely manner and admitting the conduct constituting the offense of conviction, his offense level is reduced by either 2 or 3 levels under §3E1.1 (Acceptance of Responsibility). The third level of reduction requires a motion from the prosecution pursuant to §3E1.1(b). Assuming he receives a 3-level downward adjustment, the defendant’s final offense level would be 27.

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

## **Determine the Criminal History Category**

After determining the hypothetical robbery defendant's offense level, the next step is to calculate the defendant's criminal history points, which in turn determine his Criminal History Category, by applying the criminal history rules in Chapter Four of the *Guidelines Manual*. As a general rule, criminal history points are based on the length of a sentence imposed for a prior conviction in a local, state, or federal court<sup>140</sup> and whether the defendant committed the instant federal offense while still serving a sentence in another case (*e.g.*, the defendant was on probation or parole).<sup>141</sup> There are certain exceptions to these general rules, though. Some prior offenses fall outside of the Chapter Four's time limits,<sup>142</sup> several types of minor offenses are excluded from consideration,<sup>143</sup> and prior convictions for juvenile offenses may be counted only if they occurred within five years of the defendant's commission of the instant federal offense.<sup>144</sup>

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

- He would receive no criminal points for his assault conviction because it falls outside Chapter Four's time limits (as he received a six-month sentence over ten years before committing the bank robbery).<sup>145</sup>
- Because his prior drug-trafficking conviction falls well within the time limits, it would receive one point based on the length of sentence imposed (*i.e.*, less than 60 days) and an additional two points based on the fact that the defendant was on supervision (*i.e.*, probation) at the time of the bank robbery offense.<sup>146</sup>

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

## **Determine the Guideline Sentencing Range from the Sentencing Table**

Based on an offense level of 27 and a CHC of II, the applicable guideline sentencing range is 78–97 months, as reflected in the guidelines’ Sentencing Table, which is attached as Attachment A to this paper. Note that the guideline sentencing range is well within the broader statutory range of punishment of 0–240 months (0–20 years) under the statute of conviction, 18 U.S.C. § 2113(a). In some other cases, a defendant’s guideline range is constrained by either a statutory mandatory minimum penalty (raising the “floor”) or a statutory maximum penalty (lowering the “ceiling”).<sup>147</sup> Because the robbery defendant’s range falls in Zone D of the Sentencing Table, the only type of sentence provided under the guidelines is a term of imprisonment as opposed to any alternative to imprisonment.<sup>148</sup>

## **Chapter Four “Overrides”**

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

engaged in as the defendant's livelihood and ensures a minimum offense level if not achieved by application of Chapters Two and Three. The sole Chapter Three override is the terrorism adjustment (§3A1.4), which impacts both the offense level and the Criminal History Category. If a defendant's guideline range resulting from one of the override provisions is higher than the range otherwise applicable, the override range applies.

## Departures and Variances

After determining the defendant's guideline sentencing range, the court must determine whether one or more "departure" factors set forth in the guideline commentary or policy statements in the *Guidelines Manual* warrant consideration for imposing a sentence outside of the range. Departures—upward and downward—are addressed in various places in the *Guidelines Manual*. Many offense-specific bases for departures are in the commentary following the guidelines in Chapter Two;<sup>149</sup> bases for departures concerning an offender's criminal history are addressed in Chapter Four;<sup>150</sup> and many generic bases for departure are set forth in policy statements in Chapter Five.<sup>151</sup> A complete list of departure provisions in all chapters is set forth at the very end of the *Guidelines Manual* (immediately following the Index). These provisions specify the circumstances under which a departure would be appropriate as a discretionary act by the court.

Grounds for departure typically are either "discouraged" or "encouraged."<sup>152</sup> The *Guidelines Manual* also provides that certain bases for departure are prohibited.<sup>153</sup> A court has broad discretion to depart based on "encouraged" grounds, has more limited discretion to depart based on "discouraged" grounds (*i.e.*, may only do so within the limits set forth in the policy statements), and has no discretion to depart based on a prohibited basis. Finally, §5K2.0(a)(1) provides that, with the exception of certain offense types (such as sexual offenses against children), a court may depart based on an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration" by the Commission in "formulating" the



guidelines that, “in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different” from that called for by the *Guidelines Manual*.

Two of the most common grounds for downward departures, both before and after *Booker*, are ones that the prosecution must raise by way of a motion for downward departure (and thereby differ from other grounds for downward departure, which can be raised by the defense, the prosecutor, or by the court *sua sponte*).

#### **Government-Sponsored Departures**

- (1) the defendant provided the prosecution with “substantial assistance in the investigation or prosecution of another person” (§5K1.1);<sup>154</sup> and
- (2) the defendant participated in an “Early Disposition” (or “fast-track”) program, in a district in which the Attorney General and the district’s United States Attorney have authorized such a departure (§5K3.1).

In recent years, a “substantial assistance” or “fast-track” downward departure (or both) have occurred in around one-fifth of all federal cases.<sup>155</sup> Such below-range sentences are not only sponsored by the prosecution but also explicitly authorized by the *Guidelines Manual*.

The final step of the three-step process is for the court to consider *all* of the applicable factors in 18 U.S.C. § 3553(a)—including the first two steps (*i.e.*, the guideline range and any bases for departure in the *Guidelines Manual*)—“taken as a whole,” and impose a sentence.<sup>156</sup> As the Supreme Court has observed, “[t]he fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”<sup>157</sup>

A final guiding principle is for a court to impose a sentence that is “sufficient, but not greater than necessary” to accomplish the goals of sentencing.<sup>158</sup> This provision in the SRA is referred to as the “parsimony” clause.<sup>159</sup> It is explicitly set forth in the Introductory Commentary in Chapter 5, Part A of the *Guidelines Manual*.

## Fines

In addition to addressing whether a court should impose a sentence of probation or imprisonment, the *Guidelines Manual* also provides that “[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay a fine.”<sup>160</sup> The fine guideline also contains a table containing fine ranges that correspond to the final guidelines offense level applicable to a defendant.<sup>161</sup>

Under the guidelines, a fine-only sentence is authorized only for a defendant whose sentencing range is zero to six months.<sup>162</sup> However, the guidelines recommend that, “[i]f . . . the fine is not paid in full at the time of sentencing, . . . the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation.”<sup>163</sup>

## Supervised Release under the Guidelines

The guidelines provide that, if a defendant receives a term of imprisonment in excess of one year, the court generally should impose a term of supervised release, even if not required by statute.<sup>164</sup> The guidelines also specify ranges of supervised release depending on the class of the offense of conviction.<sup>165</sup> With respect to non-citizen defendants—who, as explained in the discussion on federal offenses and offenders, have been approximately 40 percent of all federal offenders in recent years<sup>166</sup>—the Commission recommends that courts not impose a term of supervised release for such defendants if they likely will be deported after serving their terms of imprisonment, unless required by statute.<sup>167</sup> For sex offenders, the Commission recommends the maximum statutory term of supervision available, which for most sex offenders is a life term of supervised release.<sup>168</sup>

## APPELLATE REVIEW OF SENTENCES

Before the Sentencing Reform Act of 1984, there was virtually no appellate review of federal sentences.<sup>169</sup> Along with creating the sentencing guideline system, the SRA provided for significant appellate review of guideline sentences.<sup>170</sup> Since the guidelines went into effect, tens of thousands of federal defendants have appealed their sentences, while prosecution appeals have occurred in a much smaller number of cases.<sup>171</sup>

After *Booker*, a federal appellate court reviews a sentence for “reasonableness” using an abuse of discretion standard.<sup>172</sup> Such reasonableness review actually encompasses two types of review—“procedural” reasonableness review and “substantive” reasonableness review. As the Supreme Court has explained:

“*Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. . . . [In the case of a sentence imposed outside of the guideline range, the appellate court] may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.*”<sup>173</sup>

As a part of its review for “procedural” reasonableness, if the appellant properly preserved the issue for appeal, an appellate court engages in *de novo* review of pure legal questions concerning guideline application and reviews the district court’s underlying findings of fact for “clear error.”<sup>174</sup> In order for a sentence to be deemed procedurally reasonable, the district court should have properly calculated the applicable guideline range (as the “starting point” in the *Booker* three-step process) and addressed all of the parties’ “nonfrivolous arguments” about why a sentence should have been imposed outside the range.<sup>175</sup> Even if a defendant did not properly preserve a guidelines application issue for appeal, federal appellate courts ordinarily must deem a guideline miscalculation as reversible “plain error” if the district court sentenced the defendant based on an incorrectly calculated guideline range.<sup>176</sup>

Regarding “substantive” reasonableness, the Supreme Court has permitted (but not required) federal circuit courts to apply a rebuttable “presumption of reasonableness” in reviewing a district court’s decision to impose a sentence within the applicable guidelines range.<sup>177</sup> “[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case.”<sup>178</sup> Such a presumption of reasonableness is applicable only to a federal appellate court’s review of a district court’s sentence; it may not be applied by a district court in determining whether to impose a within-range sentence.<sup>179</sup>

Furthermore, the fact that a district court imposed a sentence outside of the applicable guideline range does not trigger a presumption of unreasonableness on appeal.<sup>180</sup> The Court also has stated that “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when it is based on the particular facts of a case” as opposed to a general disagreement with a particular “policy” embodied in a provision of the *Guidelines Manual*.<sup>181</sup>

## VIOLETIONS OF THE CONDITIONS OF PROBATION AND SUPERVISED RELEASE

In Chapter Seven of the *Guidelines Manual*, the Commission promulgated policy statements addressing a district court’s decision of whether to revoke or modify a defendant’s term of probation or supervised release upon a finding of a violation of one or more conditions of supervision. Chapter Seven classifies violations of the conditions of supervision (as grade “A,” “B,” or “C” violations), recommends when courts should revoke the term of supervision,<sup>182</sup> and recommends terms of imprisonment for the different grades of violations, in the event a court revokes.<sup>183</sup> The Revocation Table used in revocation cases—set forth in §7B1.4—is different from the more complex Sentencing Table appearing in Chapter Five that governs original sentencings. The Revocation Table contains two axes—one based on the seriousness of the violation (*i.e.*, the grade) and the other based on the offender’s original Criminal History Category (as determined at the original sentencing hearing).<sup>184</sup>

At a revocation hearing, a court is governed by the preponderance of the evidence standard and may find that an offender committed a new law violation as a basis for revocation even if the offender was not convicted of the new offense.<sup>185</sup> In deciding whether to revoke and, if so, whether to impose a sentence of imprisonment as recommended by Chapter Seven’s policy statements, a court must consider not only those policy statements but also the factors in 18 U.S.C. § 3553(a), to the extent that they are applicable.<sup>186</sup>

In cases where offenders have allegedly violated the conditions of their supervision, district courts are governed by statutory provisions<sup>187</sup> that, at times, operate in a different manner than Chapter Seven’s policy statements. In particular, those statutory provisions may require revocation in certain cases that Chapter Seven does not, such as when an offender possessed a controlled substance or refused to take a court-ordered drug test.<sup>188</sup> For violations of supervised release, the statutory maximum term of imprisonment upon revocation depends on the classification of the underlying offense of conviction at the original sentencing proceeding.<sup>189</sup> For violations of probation, the maximum term of imprisonment upon revocation is the statutory

maximum of the underlying offense of conviction at the original sentencing hearing.<sup>190</sup>

On appeal, a district court's sentence imposed upon revocation is reviewed with at least as much deference as exists in appellate review of a court's imposition of an original sentence.<sup>191</sup> A district court abuses its discretion by not considering Chapter Seven's policy statements in a revocation proceeding, yet a court need not follow the policy statements' recommendations regarding revocation or sentence length.<sup>192</sup>

## GUIDELINE AMENDMENT PROCESS

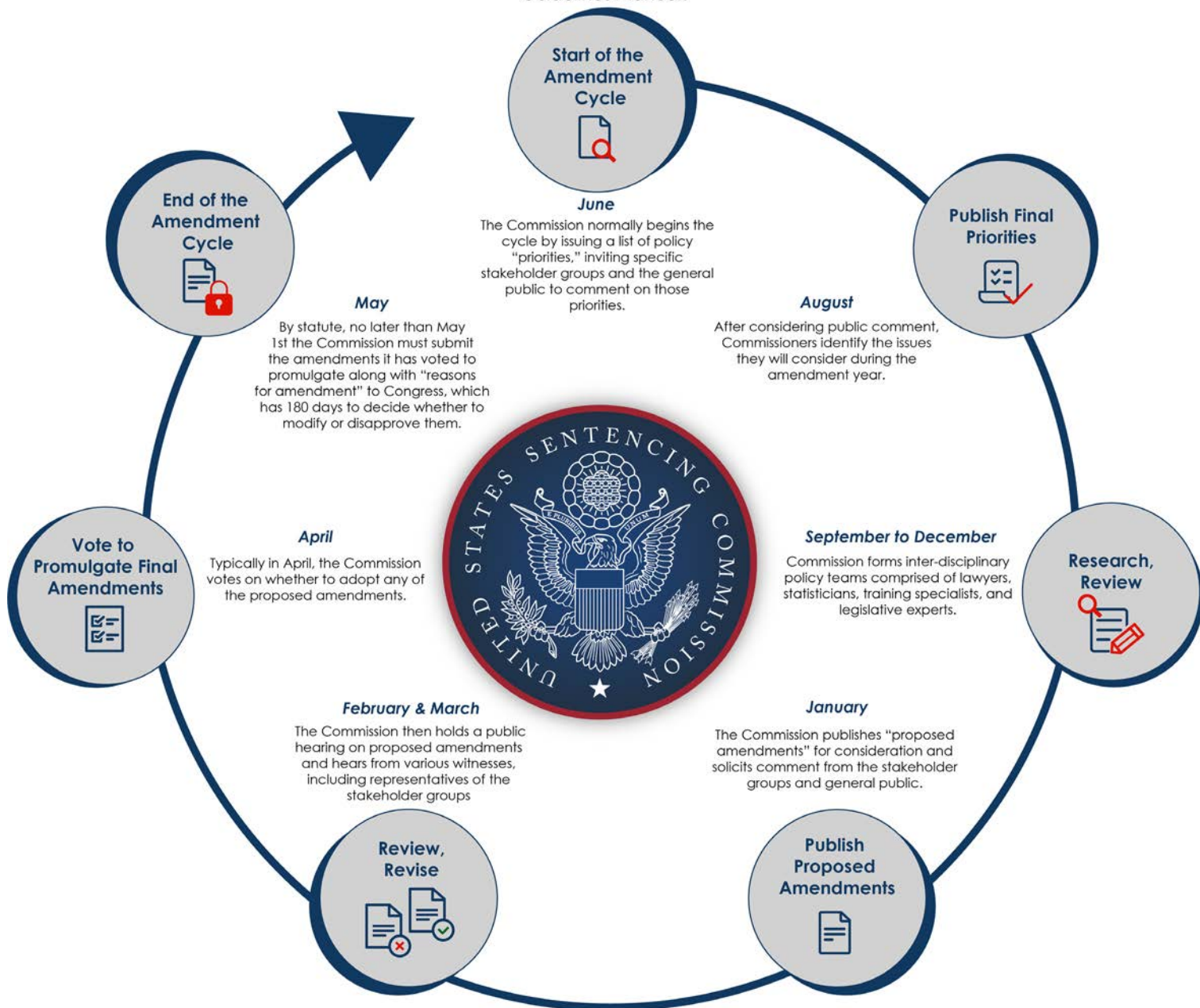
*In enacting the SRA, Congress envisioned that the Commission would regularly amend the guidelines to reflect various changes in circumstances.<sup>193</sup> Since the guidelines went into effect in 1987, the Commission has promulgated more than 800 amendments to the Guidelines Manual.<sup>194</sup>*

### The Amendment Cycle

The guideline “amendment cycle” begins in the late spring of each year. The Commission normally begins the cycle by issuing a list of policy “priorities”—published in the Federal Register (FR) and also made available on the Commission's website ([www.ussc.gov](http://www.ussc.gov))—and invites specific stakeholder groups (*e.g.*, the Criminal Law Committee of the Judicial Conference, the Federal Public Defender community, the Criminal Division of the United States Department of Justice, and the Commission's various advisory groups) as well as the general public to comment on those priorities. Thereafter, the Commission publishes “proposed amendments” for consideration and solicits comment from the stakeholder groups and general public.<sup>195</sup> The Commission then holds a public hearing on proposed amendments and hears from various witnesses, including representatives of the stakeholder groups. Thereafter, typically in April, the Commission votes on whether to adopt any of the proposed amendments.

## AMENDMENT CYCLE

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



By statute, no later than May 1st, the Commission must submit the amendments it has voted to promulgate along with “reasons for amendment” (contained in Appendix C to the *Guidelines Manual*) to Congress, which has 180 days to decide whether to modify or disapprove them. If Congress does not pass legislation (signed by the President) modifying or disapproving amendments by November 1st, the amendments become effective on that date. On rare occasions, Congress authorizes the Commission to promulgate “emergency amendments” which can be passed on an expedited basis outside of the regular amendment cycle.<sup>196</sup> Since 1987, Congress has enacted legislation rejecting only two guideline amendments promulgated by the Commission.<sup>197</sup>

## Retroactivity of Amendments

If an amendment to the guidelines potentially lowers the sentencing range for offenders, the Commission must decide whether to apply the amendment retroactively to offenders already serving sentences of imprisonment.<sup>198</sup> If the Commission votes for retroactivity of such an amendment, the eligible offenders can apply to their original sentencing courts for the benefit of such retroactive amendment.<sup>199</sup> Courts are afforded discretion in deciding whether to grant the offenders’ petitions seeking to benefit from a retroactive amendment, but, if they choose to exercise that discretion, must reduce the offender’s sentence within the limits imposed by §1B1.10. The Supreme Court has held that, when a court elects to reduce an offender’s sentence based on a retroactive guideline amendment, the court may not engage in a full-fledged resentencing under 18 U.S.C. § 3553(a) and, instead, must impose a new sentence that modifies the original sentence in a manner consistent with the retroactive amendment.<sup>200</sup> As of 2020, the Commission has voted to give retroactive effect to 30 of its over 800 amendments.<sup>201</sup>



## A BRIEF OVERVIEW OF SENTENCING DATA

### The Commission’s Collection and Analysis of Sentencing Data

The SRA requires the Commission to “establish a research program for the purpose of serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices” and also to “collect systematically and disseminate information concerning [federal] sentences actually imposed.”<sup>202</sup> The Commission, through its Office of Research and Data, has carried out these duties in a variety of ways, including by publishing annual *Sourcebooks of Federal Sentencing Statistics* and several other publications concerning federal sentencing.<sup>203</sup> The Commission’s data analysis results from its collection of sentencing documents in virtually all federal cases in which a sentence was imposed after a judge applied the *Guidelines Manual*.<sup>204</sup> Commission staff analyze such documentation and create an annual data file of numerous data-points about guidelines use and offender and offense characteristics from which the Commission may engage in empirical research about offender and offense characteristics as well as federal sentencing practices.<sup>205</sup>

### Snapshot of Federal Offenses and Offenders

In recent years, approximately 67,000 to slightly more than 86,000 federal offenders have been sentenced for felonies and Class A (non-petty) misdemeanor offenses annually.<sup>206</sup>

In fiscal year 2019, nearly 40 percent were convicted of immigration offenses (*e.g.*, illegally returning to the United States after being deported or smuggling aliens into the country). More than one-quarter were convicted of drug-trafficking offenses (usually involving marijuana, methamphetamine, powder cocaine, crack cocaine, or heroin). Fraud and other “white-collar” offenses make up

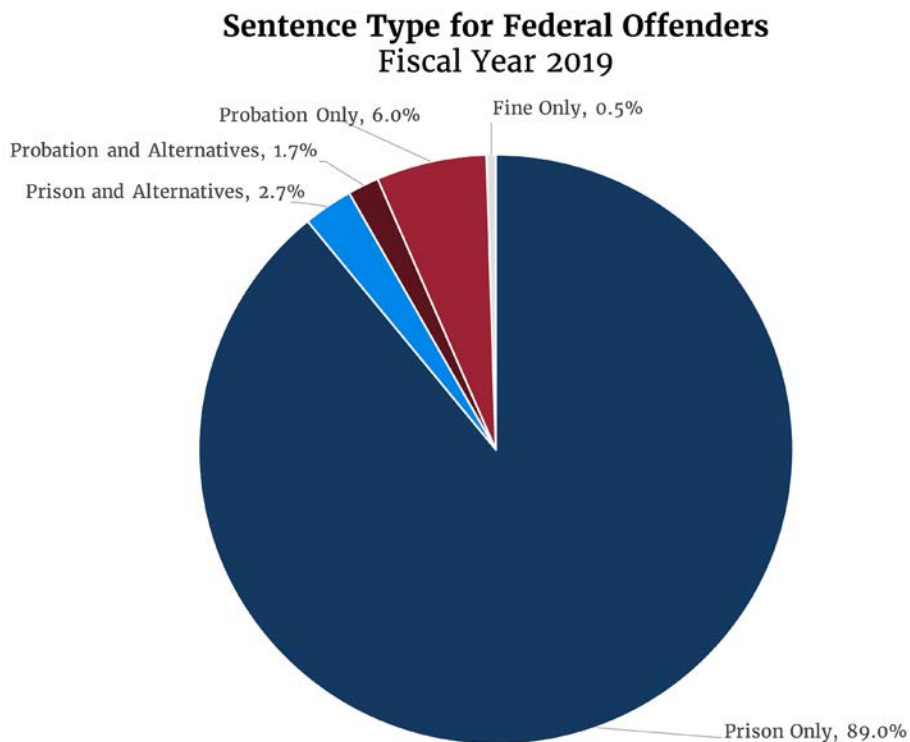


The Interactive Data Analyzer (IDA) is an online tool that can be used to explore, filter, customize, and visualize federal sentencing data for research, policymaking, and sentencing purposes.

To use IDA, visit:  
[ida.ussc.gov](http://ida.ussc.gov)

approximately ten percent of federal offenses today, and firearms offenses (*e.g.*, being a felon in possession of a firearm or using a firearm in connection with a drug-trafficking or violent offense) account for approximately 11 percent of cases. Sex offenses (*e.g.*, sexual assaults and child pornography offenses) and violent offenses (*e.g.*, bank robbery) make up a relatively small percentage of the federal caseload.<sup>207</sup>

Approximately nine out of ten federal offenders received sentences of imprisonment, while one out of ten was sentenced to probation (including probation with a condition of home detention or community confinement).<sup>208</sup> The average prison sentence for federal offenders was 46 months.<sup>209</sup> The average prison sentence for offenders convicted of an offense carrying a mandatory minimum penalty was 141 months, while the average prison sentence for offenders convicted of an offense not carrying a mandatory minimum penalty is 24 months.<sup>210</sup>



Source: U.S. Sentencing Commission, 2019 Datafile, USSCFY19

Of those offenders who receive terms of imprisonment, 80.0 percent also received terms of supervised release. Of those offenders who received terms of supervised release, on average they received a 50-month term of supervised release.<sup>211</sup>

Federal offenders, other than in their gender (almost nine out of ten are males), are a diverse group in terms of demographic characteristics. With respect to racial identity, in 2019, 19.9 percent of offenders were White, 20.2 percent were Black, and 56.3 percent were Hispanic. At the time of sentencing, nearly half of federal offenders had not completed high school, while one-fifth had at least some college education. The average age of federal offenders at the time of sentencing was 36 years.<sup>212</sup> In recent years, over 40 percent of all federal offenders have been non-citizens, who generally face deportation after their release from federal custody.<sup>213</sup> Nearly two-thirds of all federal offenders had a prior criminal record counted under Chapter Four of the *Guidelines Manual*, and nearly 30 percent of all federal offenders had significant criminal records (defined as six or more criminal history points).<sup>214</sup>

## CONCLUSION

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



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

To review these resources, visit:  
**ussc.gov**

## ENDNOTES

- 1 Pub. L. No. 98–473, 98 Stat. 1987 (1984).
- 2 *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989) (describing the federal sentencing system before the SRA).
- 3 *Peugh v. United States*, 569 U.S. 530, 535 (2013).
- 4 S. REP. NO. 98–225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3222. The Senate Judiciary Committee’s report [hereinafter SENATE REPORT] is the primary legislative history of the Sentencing Reform Act of 1984 (the “SRA”). *See Mistretta*, 488 U.S. at 366.
- 5 *See Dorsey v. United States*, 567 U.S. 260, 265 (2012) (“ . . . [T]he Sentencing Reform Act of 1984 . . . sought to increase transparency, uniformity, and proportionality in sentencing.”); *see also Mistretta*, 488 U.S. at 379 (“Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”).
- 6 *See* 28 U.S.C. § 991(a). Biographies of the current Commissioners are available at <https://www.ussc.gov/commissioners>. A list of past Commissioners is available at <https://www.ussc.gov/about/who-we-are/commissioners/former-commissioner-information>.
- 7 *See* 28 U.S.C. § 994; *see also* 28 U.S.C. § 995(a)(12)–(20). Henceforth, unless otherwise noted, all citations to the United States Code (U.S.C.) and United States Sentencing Guidelines (USSG) will be to the 2019 edition of the U.S.C. and the 2018 edition of the USSG. This paper follows the citation form for guidelines citations set forth in the *Guidelines Manual*.
- 8 *Mistretta*, 488 U.S. at 368–69.
- 9 28 U.S.C. § 994(m); *see also* SENATE REPORT, *supra* note 4, at 76–79, 116, 177–78.
- 10 The Anti-Drug Abuse Act of 1986, which created mandatory minimum prison sentences for many drug-trafficking offenses—*see* 21 U.S.C. § 841(b)—went into effect for offenses committed on or after October 27, 1986. Pub. L. No. 99–570, 100 Stat. 3207 (1986). The Armed Career Criminal Act, *see* 18 U.S.C. § 924(e), which created a 15-year mandatory minimum prison sentence for certain recidivist felons who possess firearms, was enacted along with the Sentencing Reform Act on October 12, 1984. Pub. L. No. 98–473, 98 Stat. 2185 (1984). Section 924(c) of title 18, which

created mandatory minimum penalties ranging from five to 30 years for offenders who use firearms during drug-trafficking offenses or crimes of violence, went into effect in 1984 (for violent offenses) and 1986 (for drug-trafficking offenses). Pub. L. No. 98–473, 98 Stat. 2138 (1984); Pub. L. No. 99–308, 100 Stat. 449 (1986).

11 See 18 U.S.C. § 3561(a)(1) (prohibiting probation for offenders convicted of Class A and B felonies). Section 3561 was enacted as part of the SRA. See *United States v. Daiagi*, 892 F.2d 31, 32 (4th Cir. 1989).

12 The SRA mentions both “guidelines” and “policy statements.” The Commission incorporated both in the *Guidelines Manual*, along with interpretive “commentary” (concerning both the guidelines and policy statements). See *Stinson v. United States*, 508 U.S. 36, 41 (1993).

13 18 U.S.C. § 3553(a)(1)–(7).

14 See 28 U.S.C. § 991(b)(1)(A) (requiring the Commission to consider the § 3553(a) factors in promulgating guidelines and policy statements).

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

16 SENATE REPORT, *supra* note 4, at 168; see also *id.* at 169 (directing that the guidelines should “reflect every important factor relevant to sentencing”).

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

18 See 28 U.S.C. § 994(b)(2).

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

20 18 U.S.C. § 3553(b)(1); see also *Mistretta v. United States*, 488 U.S. 361, 367

(1989) (noting that the SRA “ma[de] the Sentencing Commission’s guidelines binding on the courts”).

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

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

23 *See infra* page 27.

24 543 U.S. 220 (2005).

25 *Id.* at 245–46.

26 *Id.* at 264–65.

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

28 *Peugh v. United States*, 569 U.S. 530, 542, 545 (2013) (citation and internal quotation marks omitted).

29 *Id.* at 536–37.

30 *Id.* at 544.

31 *See* U.S. SENTENCING COM’N, 2019 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 (Tbl. 29) (2020) [hereinafter 2019 SOURCEBOOK], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> (noting that 75.0% of all sentences were within the guidelines system, including 51.4% that fell within the applicable guideline range); 2018 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 (Tbl. 29) (2019), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> (noting that 75.0% of all sentences were within the guidelines system, including 51.0% that sentences fell within the applicable guideline range).

32 *See* U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, PART A, 60 (2012), <https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>; *see also* *Peugh*, 569 U.S. at 544 (“[T]he Sentencing Commission’s data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.”).

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

34        *See* Patti B. Saris et al., Lessons Learned from Thirty Years Ago, 45 HOFSTRA L. REV. 1163, 1166 (2017) (noting “1.7 million offenders” were sentenced under the guidelines through fiscal year 2016). Over 200,000 additional offenders have been sentenced since January 1, 2017. *See* 2019 SOURCEBOOK, *supra* note 31, at 47 (Fig. 3) (66,873 defendants sentenced in FY 2017, 69,425 defendants sentenced in FY2018, and 76,538 offenders sentenced in FY2019).

35        In recent years, there have been approximately six to more than eight thousand criminal appeals in a given year. *See, e.g.*, 2019 SOURCEBOOK, *supra* note 31, at 176 (Fig. A) (6,830 criminal appeals); U.S. SENTENCING COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 55 [hereinafter 2015 SOURCEBOOK], <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2015> (8,159 criminal appeals). The Commission reports on these criminal appeals in its annual Sourcebook, including a breakdown of the number of appeals that involved sentencing issues and those that involved only issues related to the defendant’s conviction.

36        *See, e.g.*, 2019 SOURCEBOOK, *supra* note 31, at 56 (Tbl. 11) (noting that 97.6% of federal offenders who were sentenced under the guidelines pleaded guilty); 2015 SOURCEBOOK, *supra* note 35, at Tbl. 10 (noting that 97.1% of federal offenders who were sentenced under the guidelines pleaded guilty).

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

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

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

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

(C) . . . that a specific sentence or sentencing range is the appropriate

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

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

40 FED. R. CRIM. P. 11(c)(2)–(4).

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

42 USSG §6B1.1, comment.

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

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

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

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

47 *See, e.g.*, *United States v. Cohen*, 171 F.3d 796, 805–06 (3d Cir. 1999) (citing *Corbitt v. New Jersey*, 439 U.S. 212 (1978)). According to the commentary following USSG §3E1.1, a defendant need only “truthfully admit[]” the “conduct comprising the offense(s) of conviction” and need not admit relevant conduct beyond the offense(s)



of conviction. However, a defendant should not receive credit for acceptance of responsibility if he or she “falsely denies” or “frivolously contests” any relevant conduct for which the defendant is accountable. USSG §3E1.1, comment. (n.1). Yet “the fact that a defendant’s challenge [to relevant conduct] is unsuccessful does not necessarily establish that it was either a false denial or frivolous.” *Id.*

48        See FED. R. CRIM. P. 32(c)(1)(A) (“The probation officer must . . . submit a report to the court before it imposes sentence . . .”); see generally *Guide to Judiciary Policy, Vol. 8, Pt. D* (Probation and Pretrial Services) (commonly called “Monograph 107”).

49        See FED. R. CRIM. P. 32(d).

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

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

52        FED. R. CRIM. P. 32(e)(3).

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

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

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

56        See FED. R. CRIM. P. 32(i).

57        *Id.*

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

59        FED. R. EVID. 1101(d)(3).

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

61        18 U.S.C. § 3661; see also *Pepper v. United States*, 562 U.S. 476, 480 (2011) (“This Court has long recognized that sentencing judges ‘exercise a wide discretion’ in

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

62 USSG §6A1.3(a).

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

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

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

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

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

68 28 U.S.C. § 994(w)(1).

69 The guidelines do not apply to petty misdemeanor offenses (*i.e.*, offenses carrying a statutory maximum term of incarceration of six months or less). *See* USSG §1B1.9. Petty misdemeanor cases are typically handled by federal magistrate judges pursuant to 28 U.S.C. § 636(a)(4).

70 *See* 2019 SOURCEBOOK, *supra* note 31, at 61 (Fig. 6) (noting that probation or imprisonment was imposed in 99.4% of cases in fiscal year 2019).

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

72 *See* 18 U.S.C. § 3563(b).

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

penalties for drug-trafficking involving certain types and quantities of drugs).

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

75        *See* 18 U.S.C. § 3559(a).

76        *See* 18 U.S.C. § 3624(b); *see also* *Barber v. Thomas*, 560 U.S. 474 (2010).

77        *See* 18 U.S.C. § 3624(b)(1).

78        *See, e.g.*, *United States v. Steele*, 682 Fed. App'x 100, 101 (3d Cir. 2017).

79        Pub. L. No. 115–391, § 102(a), 132 Stat. 5194 (2018) (amending 18 U.S.C. § 3621 to add subsection (h)). The First Step Act also clarified that offenders could receive the full 54 days of good-time credit. Although section 3621 allowed offenders to receive up to 54 days of good-time credit for each year of incarceration, prior to the First Step Act, the government's interpretation of the statute had the practical effect of allowing inmates only 47 days per year. *See Barber v. Thomas*, 560 U.S. 474 (2010) (upholding the government's interpretation of section 3624). The First Step Act amended section 3624 to clarify that offenders can earn up to 54 days of good-time credit for each year of sentence imposed (rather than 47 days) and can earn that credit during the first year of imprisonment (rather than only at the end of the first year). *Id.* § 102(b).

80        *See* 18 U.S.C. § 3624(c). The First Step Act also amended 34 U.S.C. § 60541(g) to continue and expand the Family Reunification Pilot Program, which allows certain elderly and terminally ill offenders to serve portions of their sentence in home detention until their term expires. Pub. L. No. 115–391, § 603(a).

81        *See* 18 U.S.C. § 3621(e)(2); 28 CFR § 550.55; *see also* *Lopez v. Davis*, 531 U.S. 230 (2001).

82        *See* 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t); USSG §1B1.13. This mode of early-release is referred to as “compassionate release.” The First Step Act amended section 3582(c)(1)(A) to allow the *defendant* to file a motion in federal court seeking compassionate release after the defendant has exhausted administrative appeals, or a failure of the Bureau of Prisons (BOP) to bring a motion on the defendant's behalf or 30 days from the warden's receipt of a request, whichever is earlier. Pub. L. No. 115–391, § 603(b). Previously only the Director of the BOP was so authorized.

83        The percentage of offenders convicted of an offense carrying a mandatory

minimum penalty has increased over the past few years. It was 21.9% in fiscal year 2016, 21.8% in fiscal year 2017, 24.7% in fiscal year 2018, and 26.1% in fiscal year 2019. *See* U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) (21.9% in 2016); U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY17.pdf) (21.8% in fiscal year 2017); U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY18.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY18.pdf) (24.7% in fiscal year 2018); U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY19.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY19.pdf) (26.1% in fiscal year 2019).

84 *See* 18 U.S.C. § 924(c) & (e) (firearms offenses); 21 U.S.C. § 841(b) (drug-trafficking offenses). Child pornography and sex offenses are scattered throughout chapters 109A and 117 of title 18, United States Code.

85 *See* U.S. SENTENCING COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 53 (2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> (“Congress charged the Commission with promulgating guidelines that are ‘consistent with all pertinent provisions’ of federal law and with providing sentencing ranges that are ‘consistent with all pertinent provisions of title 18, United States Code.’ To that end, the Commission has incorporated mandatory minimum penalties into the guidelines since their inception, and has continued to incorporate new mandatory minimum penalties as enacted by Congress.”) (citing 28 U.S.C. § 994(a) & (b)).

86 *See* *Melendez v. United States*, 518 U.S. 120 (1996) (requiring prosecutor to specifically move for a downward departure under section 3553(e) in order for a court to have authority to impose a sentence below the statutory mandatory minimum penalty; holding that the mere filing of a request for downward departure from the applicable guideline range pursuant to USSG §5K1.1 does not authorize a departure below the statutory minimum).

87 Those five criteria are:

- (1) the defendant does not have more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f).

88 18 U.S.C. § 3553(f) (2018).

89 Pub. L. No. 115–391, § 402 (Dec. 21, 2018) (amending 18 U.S.C. § 3553(f)). The First Step Act also extended application of the safety valve to maritime cases under 46 U.S.C. §§ 70503, 70606.

90 18 U.S.C. § 3553(f).

91 *See* USSG §2D1.1(b)(18).

92 USSG §2D1.1, comment. (n.21). Note that the guideline provision has not yet been amended in response to the First Step Act. Therefore, under the guidelines, a defendant does not qualify for the guidelines’ 2-level reduction if the defendant has more than one criminal history point. If the defendant qualifies for the statutory safety valve, but does not meet the guidelines criteria, the court may, in its discretion, apply a 2-level reduction as a departure under §5K2.0 (Grounds for Departure (Policy Statement)) or as a variance under 18 U.S.C. § 3553(a).

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

- 94 United States v. Elliot, 971 F.2d 620, 622 (10th Cir. 1992).
- 95 See 18 U.S.C. § 3571(b) (generally providing that, for felonies, the maximum fine amount is \$250,000, and for Class A misdemeanors the maximum fine amount is \$100,000); *but cf.*, *e.g.*, 21 U.S.C. § 841(b)(1)(A) (providing for a maximum fine of \$10,000,000 for a defendant convicted of certain drug-trafficking offenses).
- 96 See United States v. Amato, 540 F.3d 153, 156 (2d Cir. 2008).
- 97 A special assessment goes into a crime victim compensation fund. See United States v. Munoz-Flores, 495 U.S. 385, 398 (1990).
- 98 See 18 U.S.C. §§ 3663A (providing for mandatory restitution in some types of cases) & 3013 (providing for mandatory special assessments).
- 99 18 U.S.C. § 3573.
- 100 Johnson v. United States, 529 U.S. 694, 696–97 (2000).
- 101 *Id.*
- 102 U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1–2 (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722\\_Supervised\\_Release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf).
- 103 United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995) (quoting USSG §5D1.1, comment. (n.2) (1992)).
- 104 Some penal statutes specify that terms of supervised release are mandatory and also specify the minimum length of such terms. See, *e.g.*, 21 U.S.C. § 841(b)(1) (A) (mandating a minimum eight-year term of supervised release for certain drug-trafficking offenses).
- 105 *Johnson*, 529 U.S. at 709. In cases where supervised release is not mandatory, the relevant statutes set forth maximum terms only. See 18 U.S.C. § 3583(b) (setting forth authorized terms of supervised release for federal offenses according to the class of the offense; unless otherwise provided in a different statute; for a Class A or Class B felony, a term not more than five years; for a Class C or Class D felony, a term of not more than three years; and for a Class E felony, or for a misdemeanor (other than a petty offense), a term of not more than one year).
- 106 See 18 U.S.C. § 3583(d).
- 107 530 U.S. 466 (2000).

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

109 *Apprendi*, 530 U.S. at 490. A defendant’s prior conviction may be found by a sentencing judge by a preponderance of the evidence as a basis to enhance the defendant’s statutory maximum. *See* Almendarez-Torres v. United States, 523 U.S. 224 (1998).

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

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

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

113 USSG §1B1.1, comment. (backg’d).

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

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

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

117 *See* USSG §1B1.3.

118 Wilkins & Steer, *supra* note 116, at 497; *see also id.* at 502 (“The parameters of . . . ‘Relevant Conduct’ . . . are potentially much broader than the minimum necessary to satisfy the elements of the convicted offense.”); *see generally* USSG Ch.1, Pt.A.4(a) (Real Offense vs. Charge Offense Sentencing).

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

120 *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 513 (1992) (“By not adopting a pure offense-of-

conviction-charge system, the guidelines protect the system from the unintended transfer of discretion from courts to prosecutors.”).

121 *See* USSG §1B1.3(a)(2). The formal definition of “relevant conduct” includes:

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

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

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; [and]

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

USSG §1B1.3(a).

122 *See* USSG §6A1.3, comment.

123 *See* USSG §2B3.1(b)(2).

124 *See* USSG §2B1.1(b)(1).

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

126 *See* USSG §2K2.1(b)(6).

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



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

129     *See* USSG §1B1.1(a)–(c).

130     18 U.S.C. § 3553(a)(4)(A)(ii).

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

132     USSG §1B1.11(b)(1).

133     USSG §1B1.11(b)(2).

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

135     *See* USSG §2B3.1, comment. (n.2) (referencing USSG §1B1.1, comment. (n.1(E))).

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

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

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

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

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

141     *See* USSG §4A1.1(d).

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

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

144 *See* USSG §4A1.2(d)(2).

145 *See* USSG §4A1.2(e).

146 *See* USSG §4A1.1(c) & (d).

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

148 *See* USSG §5C1.1(f).

149 *See, e.g.*, USSG §§2B1.1, comment. (n.20) (listing possible bases for upward and downward departures in fraud and theft cases); 2D1.1, comment. (n.27) (listing possible bases for upward and downward departures in drug cases); and 2L1.2, comment. (nn.6–8) (listing possible basis for upward and downward departures in illegal reentry immigration cases).

150 *See* USSG §4A1.3.

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

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

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

154 There are two varieties of “substantial assistance” motions filed by the prosecution—the first seeks a downward departure below the applicable *guideline range*, and the second seeks a downward departure below a statutory mandatory minimum sentence. *Compare* USSG §5K1.1, *with* 18 U.S.C. § 3553(e). Substantial

assistance motions permitting a sentencing court to depart below a statutory mandatory minimum penalty are discussed previously in the publication.

155 *See, e.g.*, 2019 SOURCEBOOK, *supra* note 31, at 84 (Tbl. 29) (19.0% of cases—9.6% substantial assistance departures and 9.4% fast-track departures).

156 *See* USSG §1B1.1(c). The factors in section 3553(a) are set forth *supra* at page 4.

157 *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007).

158 18 U.S.C. § 3553(a).

159 *See United States v. Narvaez-Soto*, 773 F.3d 282, 289 (1st Cir. 2014).

160 USSG §5E1.2(a).

161 *See* USSG §5E1.2(c).

162 USSG §5C1.1, comment. (n.2).

163 USSG §5E1.2, comment. (n.1).

164 *See* USSG §5D1.1.

165 *See* USSG §5D1.2(a) (providing for “[a]t least two years but not more than five years for a defendant convicted of a Class A or B felony”; “[a]t least one year but not more than three years for a defendant convicted of a Class C or D felony”; and “[o]ne year for a defendant convicted of a Class E felony or a Class A misdemeanor”).

166 2019 SOURCEBOOK, *supra* note 31, at 52 (Tbl. 9) (44.6%); 2015 SOURCEBOOK, *supra* note 35, at Tbl. 9 (41.5%).

167 *See* USSG §5D1.1(c). As the Commission noted in the commentary to this guideline: “Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution [for illegal reentry by previously deported alien under 8 U.S.C. § 1326].” USSG §5D1.1, comment. (n.5).

168 *See* USSG §5D1.2(b); *see also* 18 U.S.C. § 3583(j).

169 *See Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (in the pre-SRA era, stating “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”).

170 18 U.S.C. § 3742(a) & (b); *see also* *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (“[The SRA] permits a defendant to appeal a sentence that is above the [guideline] range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline.”).

171 In 2019, appeals of original sentences by defendants occurred in 3,347 cases, while government appeals of original sentences occurred in only 62 cases. *See* 2019 SOURCEBOOK, *supra* note 31, at 180, 183 (Tbls. A-2 & A-3).

172 *United States v. Booker*, 543 U.S. 220, 261–62 (2005).

173 *Gall v. United States*, 552 U.S. 38, 51 (2007).

174 *See, e.g., United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006).

175 *Rita v. United States*, 551 U.S. 338, 357 (2007).

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

177 *Rita*, 551 U.S. at 355–56. Seven out of the 12 circuits (the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits) employ such a presumption of reasonableness, while five (the First, Second, Third, Ninth, and Eleventh) do not. *See* *United States v. Carty*, 520 F.3d 984, 993–94 & nn.9 & 10 (9th Cir. 2008) (en banc) (collecting cases).

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

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

180 *Rita*, 551 U.S. at 354–55.

181 *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

182 Chapter Seven recommends revocation for Grade A and Grade B violations as well as for repeated Grade C violations where an offender had not been revoked after

a court's finding of the initial Grade C violation. *See* USSG §7B1.3 & comment. (n.1).

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

184 *See* USSG §7B1.4.

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

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

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

188 18 U.S.C. §§ 3565(b) & 3583(g). There is a limited exception to the requirement that a court incarcerate an offender for possessing drugs: if a failed drug test constitutes the sole evidence of drug possession, and if the court finds that an offender would benefit from “an appropriate substance abuse treatment program,” the court may substitute drug abuse treatment for imprisonment. 18 U.S.C. §§ 3563(e) & 3583(d).

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

190 18 U.S.C. § 3565(a)(2).

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

2007) (discussing the approaches of different circuits).

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

193 *See* 28 U.S.C. § 994 (o), (p) & (x); *see also* *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”).

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

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

196 *See generally* U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE, Pts. IV & V (2016), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice\\_procedure.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf).

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

198 28 U.S.C. § 994(u); *see also* U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE, Rule 4.1A (2016), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice\\_procedure.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf).

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

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

201 *See* USSG §1B1.10(d) (listing the retroactive amendments). Sometimes an amendment to the guidelines is merely intended to be “clarifying” rather than to work a “substantive” change. In such a case, the amendment would be given effect to a defendant whose case is still pending on direct appeal, even if the Commission does not vote to apply the amendment retroactively. Such a clarifying amendment,

however, may not be given retroactive effect to a defendant who already has concluded his direct appeal or who did not file a direct appeal, unless the Commission has voted to give retroactive effect to that amendment. *See, e.g., United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003); *United States v. Drath*, 89 F.3d 216, 217–18 (5th Cir. 1996).

202 28 U.S.C. § 995(a)(12)–(16).

203 Such publications are available on the Commission’s website at <https://www.ussc.gov/research>.

204 *See* 28 U.S.C. § 994(w).

205 *See* Christine Kitchens, US. SENTENCING COMM’N, FEDERAL SENTENCING DATA AND ANALYSIS ISSUES (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100825\\_Federal\\_Sentencing\\_Data\\_Analysis.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100825_Federal_Sentencing_Data_Analysis.pdf).

206 In recent years, the number of federal offenders sentenced under the guidelines has ranged from 86,201 (in 2011) to 76,538 (in 2019). *See* 2019 Sourcebook, *supra* note 31, at 47 (Fig. 3).

207 *Id.* at 45 (Fig. 2).

208 *Id.* at 61 (Fig. 6).

209 *Id.* at 64 (Tbl. 15).

210 QUICK FACTS: 2019 MANDATORY MINIMUM PENALTIES, *supra* note 83.

211 U.S. Sentencing Comm’n, 2019 Datafile, USSCFY2019.

212 2019 SOURCEBOOK, *supra* note 31, at 48–52 (Tbls. 5–9).

213 *Id.* at 52 (Tbl. 9) (44.6%); 2015 SOURCEBOOK, *supra* note 35, at Table 9 (41.5%).

214 2019 SOURCEBOOK, *supra* note 31, at 77 (Tbl. 23).

## Attachment A

### SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
<b>Zone A</b>	0-6	0-6	0-6	2-8	4-10	6-12
	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
	4-10	6-12	8-14	12-18	18-24	21-27
<b>Zone B</b>	6-12	8-14	10-16	15-21	21-27	24-30
	8-14	10-16	12-18	18-24	24-30	27-33
<b>Zone C</b>	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
	70-87	78-97	87-108	100-125	120-150	130-162
<b>Zone D</b>	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life



## Attachment B

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### §2B3.1. Robbery

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

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

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

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

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- (7) If the loss exceeded \$20,000, increase the offense level as follows:

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

(c) Cross Reference

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

**Commentary**

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

**Application Notes:**

1. “**Firearm**,” “**destructive device**,” “**dangerous weapon**,” “**otherwise used**,” “**brandished**,” “**bodily injury**,” “**serious bodily injury**,” “**permanent or life-threatening bodily injury**,” “**abducted**,” and “**physically restrained**” are defined in the Commentary to §1B1.1 (Application Instructions).  
  
“**Carjacking**” means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.
2. Consistent with Application Note 1(E)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).
3. “**Loss**” means the value of the property taken, damaged, or destroyed.
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.
5. If the defendant intended to murder the victim, an upward departure may be warranted; see §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).

**§2B3.2**

6. “A threat of death,” as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as “Give me the money or I will kill you”, “Give me the money or I will pull the pin on the grenade I have in my pocket”, “Give me the money or I will shoot you”, “Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)”, or “Give me the money or you are dead” would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

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

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

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

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