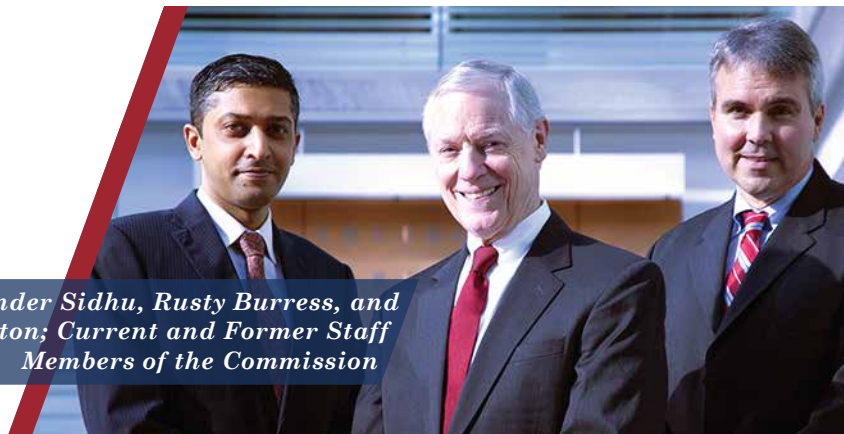


ESP INSIDER EXPRESS



(l-r) Dawinder Sidhu, Rusty Burgess, and Brent Newton; Current and Former Staff Members of the Commission

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Sentencing Guidelines Turn 30 Event at Hofstra Law School Commemorates Anniversary

Three decades ago this past November, the first set of federal sentencing guidelines went into effect. The United States Sentencing Commission, which was created by the Sentencing Reform Act of 1984, initially met in the Fall of 1985 and spent the following 18 months creating guidelines to send to Congress by the statutory deadline in the Spring of 1987. Congress then had 180 days to review the Commission's work. Without any congressional modification, the initial guidelines went into effect on November 1, 1987.

During the past three decades, the guidelines have become a central feature of the federal criminal justice system. More than 1.7 million federal offenders have been sentenced

under the guidelines. Countless federal judges, probation officers, and attorneys have been daily users of the annual Guidelines Manuals. During the past three decades, the manual has been amended over 800 times and doubled in length. It has seen many changes in the federal criminal justice system – including significant changes in the types of cases, as reflected on the next page.

To mark the thirtieth anniversary of the guidelines, Brent Newton and Dawinder Sidhu – current and former staff members of the Commission – published *The History of the Original United States Sentencing Commission* in the Summer 2017 edition of *Hofstra Law*

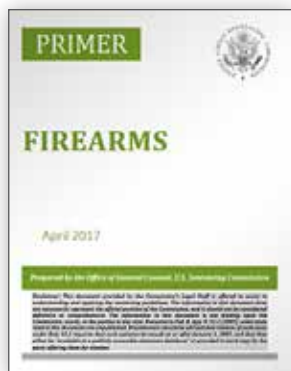
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Primer on Firearms Useful Information at Your Fingertips

The purpose of this primer is to provide a general overview of the major statutes, sentencing guidelines, issues, and case law relating to firearms offenses and enhancements for possession or use of firearms related to other offenses.

The primer delves into the substantive offenses involving firearms, and the sentencing enhancements at §§2K2.1 and 2K2.4 as well as those found in §§2D1.1 and 2B3.1. The standard of proof section explores case law as well as application issues pertaining to 18 U.S.C. §924(c).

Although the primer identifies some applicable cases and concepts, it is not intended as a comprehensive analysis of all issues relating to federal firearms law and sentencing.



HELPLINE! Who's Calling & What's the Buzz?

Helpline: (202) 502-4545

QUESTIONS OF THE QUARTER

Have a look at how we address recent questions. Be sure to give our Helpline a call, we're here for you! And who knows, your call may be featured right here in our quarterly Newsletter!

The caller has a defendant who was convicted of two counts: Possession of a Sawed-off Shotgun by a Felon (§2K2.1), and Theft of a Firearm from a Licensed Dealer (§2K2.1). Since §2K2.1 is the guideline applicable to both counts, should the defendant receive the increase for stolen gun based upon the defendant's conviction under 18 U.S.C. §922(u)?

Yes. The defendant is subject to a base offense level (BOL) of 20 because the sawed-off shotgun qualifies as a 26 U.S.C. §5845 firearm. Therefore, §2K2.1 App. Note 8 does not apply. The increase for a stolen firearm is not applied if the BOL is determined under (a)(7). But, that is not the case here because the additional count of conviction rendered a higher BOL.

...

A caller to the helpline had a question about application of the trafficking-in-firearms enhancement at §2K2.1(b)(5). The person to whom the firearms were transferred does not meet the definition of "individual whose possession or receipt of the firearm would be unlawful." As such, is the 4-level enhancement still applicable?

The application of §2K2.1(b)(5), pursuant to App. Note 13, requires two things: 1) the defendant transferred two or more firearms and 2) the defendant knew or had reason to believe the individual whose possession or receipt of the firearm would be unlawful OR the individual intended to use or dispose of the firearm unlawfully. The application note specifies an either/or; not that both prongs must be met. As a result, if the defendant meets the second criterion, then the enhancement may be applicable.

...

The caller has a defendant who was convicted of two counts: 18 USC § 922(a)(6) (False Statements to Obtain a Firearm) and 18 USC § 922(g) (Prohibited Person in Possession of a Firearm). This defendant was on the FBI's radar screen due to pro-ISIS posts on social media. The government did not proceed with any terrorism charges against the defendant. Should the SOC at §2K2.1(b)(6)(B) be applied based on his pro-ISIS statements?

A review of §2K2.1, App. Note 14(A), shows that you must determine if the firearm "facilitated, or had the potential of facilitating another felony offense." The court must determine by a preponderance of evidence standard, if the defendant's pro-ISIS statements on social media rise to the level of providing material support for terrorists, and if the possession of a firearm facilitated that felony offense. This one is up to the Court to decide.

1986

26.4%
DRUG OFFENSES

13.5%
NON-FRAUD
WHITE COLLAR

13.3%
FRAUD

13.5%
DWI/TRAFFIC

9.3%
LARCENY

Federal Criminal Caseloads What a Difference 30 Years Makes!

Approximately one-half of federal sentences imposed in 1986 had a term of incarceration and approximately one-half had non-incarceration sentences, typically probation. The average length of incarceration was 64.6 months. However, most offenders served between one-third and one-half of the sentence as a result of parole or good time allowances.

2016

31.9%
DRUG OFFENSES

29.3%
IMMIGRATION

11.3%
OTHER

10.5%
FRAUD

10.0%
FIREARMS

SCOTUS UPDATE

Rosales-Mireles v. United States - The presentence report in this case mistakenly counted one prior conviction twice, resulting in a higher criminal history category (VI instead of V). Rosales-Mireles did not object at sentencing, but raised the issue on appeal. The government conceded error and the Court of Appeals agreed. Although the Court had discretion to correct the “plain error” (one not raised before the district court), the Court declined to do so. It said it would only correct the kinds of errors that “seriously affect the fairness, integrity or public reputation of judicial proceedings,” which are “ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.” In this case, the sentence imposed (78 months) fell within the range that should have applied (70 to 87 months). In agreeing to hear the case, the Supreme Court will consider whether the “shock the conscience” test used by the Fifth Circuit is the correct standard, or whether a more lenient standard for correcting plain errors should apply.

Sessions v. Dimaya - On October 2, 2017, the Supreme Court heard (for the second time) argument about whether “18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act’s (INA) provisions governing an alien’s removal from the United States, is unconstitutionally vague.” Dimaya argued that section 16(b)’s definition of a “crime of violence” is indistinguishable from the residual clause of the ACCA, which the Court found unconstitutionally vague in *Johnson v. United States*. The government argued that the criminal vagueness standard should not apply to an immigration proceeding, but that, even under that standard, the textual differences between section 16(b) and the ACCA’s residual clause make *Johnson* inapplicable to Dimaya’s case. The Supreme Court had previously heard argument in the same case back in January, under the name *Lynch v. Dimaya*.

DID YOU KNOW?

In 2016, there were 5,391 offenders convicted of Felon in Possession of a Firearm.

The average age of these offenders was 34.

The average sentence length for all 922(g) offenders was 66 months.

26% of these offenders were in criminal history category VI.

In 2016, there were 1,976 offenders convicted under 18 U.S.C. §924(c).

The average age of these offenders was 32.

The average sentence length for all 924(c) offenders was 151 months.

30% of these offenders were in criminal history category I.



Looking ahead, fentanyl & synthetic cannabinoids will be the focus of our 3rd hearing on synthetic drugs. More info: bit.ly/2yvQ9Lc

— [SentencingCommission \(@TheUSSCgov\)](https://twitter.com/TheUSSCgov)
October 18, 2017

Guidelines Issue of the Quarter

Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System Key findings of the Commission's study. Released July 2017.

- The average sentence length for federal offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016 was 110 months, nearly four times the average sentence (28 months) for offenders whose offense did not carry a mandatory minimum.
- More than half (55.7%) of federal inmates in custody as of September 30, 2016 were convicted of an offense carrying a mandatory minimum.
- Over one-third (38.7%) of federal offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016 received relief from the mandatory minimum at sentencing.
- Hispanic offenders continued to represent the largest group of federal offenders (40.4%) convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016.

- White offenders had the longest average sentence (127 months) among federal offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2016, which is a shift from fiscal year 2010 when Black offenders convicted of an offense carrying a mandatory minimum penalty had the longest average sentence (127 months).
- The gap between the average sentence length for Black offenders and White offenders has narrowed from a difference of 11.6 percent longer for Black offenders in fiscal year 2010, to 3.2 percent longer in fiscal year 2016.



**UPCOMING
PROGRAMS**

Probation Officers
and Judges,
New York, New York

Probation Officers
Milwaukee,
Wisconsin

Defense Attorneys
Montgomery,
Alabama

**RECENT
PROGRAMS**

New Probation Officers
FLETC, Charleston,
South Carolina

Court Family,
Dallas & Lubbock,
Texas

Fourth Circuit
Staff Attorneys
Richmond,
Virginia

Guidelines Turn 30

Continued from Page 1

Review. Their article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031995. The article discusses the original seven Commissioners and several key Commission staff members, the process that the Commission employed to develop guidelines, and the many key policy decisions that the Commission made in creating the initial guidelines. The original Guidelines Manual is available here: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual-1987/manual-pdf/1987-Guidelines_Manual_Full.pdf.

“As the guidelines remain the ‘lodestone’ of federal sentencing thirty years later, and as improving the criminal justice system continues to be an important national bipartisan aspiration, a thorough exploration of the history of the original Commission is both timely and important.”

In conjunction with publishing the article, Hofstra Law School hosted an event on October 23, 2017, to commemorate the guidelines’ thirtieth anniversary. The event had two panels as well as a keynote address by Supreme Court Justice Stephen Breyer, who was one of the original Commissioners in the 1980s (before his appointment to the Supreme Court). The first panel included three original Commission staff members who helped create the initial guidelines – Rusty Burress, Paul Martin, and John Steer – as well as Second Circuit Judge Jon Newman, who consulted with the original Commissioners. That panel discussed the Commission’s creation of the original guidelines in the mid-1980s. The second panel, which addressed the guidelines from their effective date in 1987 until the present, included two former chairs of the Commission – Chief Judge Patti Saris from Massachusetts and Judge Ricardo Hinojosa from Texas – as well as current Commissioner,

Judge Charles Breyer from California, and Professor Kate Stith from Yale Law School.

In addition to Newton and Sidhu’s Hofstra Law Review article, an article by the Commission’s current Acting Chair, Eleventh Circuit Judge William Pryor – published in the Fall 2017 edition of Federal Probation – commemorates the guidelines’ thirtieth anniversary. Judge Pryor’s article, The Integral Role of Federal Probation Officers in the Guidelines System, discusses the critical role of federal probation officers in helping the original Commission create and implement the new guidelines. Of particular note, federal probation officers provided detailed data about 10,500 federal cases from 1985 which allowed the Commission to model much of the original guidelines on “past practices.” An important exception to that modeling were the guidelines for federal drug-trafficking offenses. The Commission based those guidelines on the statutory penalties created by Congress in the Anti-Drug Abuse Act of 1986.

Judge Pryor’s article notes that Rusty Burress came to the Commission in late 1985 on a “detail” from his job as a Federal Probation Officer in the District of South Carolina. What was supposed to be a temporary detail turned into what has become a distinguished 30-year career as the Principal Training Advisor at the Commission. Virtually every federal district judge on the bench today was trained about how to use the guidelines by Burress.

ESP TRAINING HIGHLIGHTS



- The U.S. Sentencing Commission will hold its 2018 National Seminar on the Federal Sentencing Guidelines at the Grand Hyatt, San Antonio, Texas from Wednesday, May 30 to Friday, June 1. Sessions will include 2018 Guideline Amendments, Bureau of Prisons Issues, Advanced Guidelines Application, Emerging Technologies in Cybercrime, Case Law Update, and Ethics, among others. Sessions are interactive and are focused on teaching complex principles through the use of real-world scenarios.

- Be sure to check out the Commission’s website at www.ussc.gov/education/ for the seminar materials and PowerPoint Presentations presented at the two National Seminars held in Baltimore, Maryland and Denver, Colorado, in 2017. You can now review the Teacher’s Edition for the 2017 seminar series, which includes all of the scenarios and an explanation of answers.

Downloadable Link:

https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2017/ANS_WorkbookAnswers.pdf

