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# **An Introduction to Federal Sentencing**

## **Twelfth Edition**

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# An Introduction to Federal Sentencing

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For over a quarter century, sentencing has been the major source of litigation in federal criminal practice. The battles began with the Sentencing Reform Act of 1984, which replaced traditional judicial discretion with far more limited authority, controlled by a complex set of mandatory federal sentencing guidelines promulgated by the U.S. Sentencing Commission. Sentencing practice was again fundamentally altered by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which excised the mandatory-guideline provisions of the Sentencing Reform Act, rendering them merely advisory.

While *Booker* returned discretion to the sentencing judge, it left open many questions about the scope of that discretion, and it did not address the changes in sentencing procedure that the newly advisory guidelines might require. The Supreme Court has begun to answer these questions in a series of important decisions about post-*Booker* sentencing practice, the effects of which are emerging in sentencing courts around the country. What does this mean for defense counsel? That we must be prepared to practice in a time of potential change, and great opportunity.

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DESPITE THE FUNDAMENTAL POLICY CHANGE that *Booker* represents, its impact on federal sentencing is still evolving. Judges now enjoy far more sentencing discretion, but many still choose to impose sentences within the sentencing guideline range. Nevertheless, the fact that the guidelines are now advisory rather than mandatory can have a tremendous effect on a particular defendant's sentence. The effect can be either positive or negative, and defense counsel must be prepared to gauge the potential benefits and risks of the advisory guidelines at every stage of a federal criminal case. The starting point is a thorough understanding of the federal sentencing process.

This paper sets out the statutory basis of guideline sentencing, as altered by the Supreme Court in *Booker*, followed by an overview of the guidelines themselves. It then attempts to place the guidelines in the larger context of federal sentencing advocacy, a context that demonstrates the need for counsel to be ready, when necessary, to challenge the guidelines' underlying assumptions and their appropriateness in an individual case. The paper concludes with special sections on plea bargaining and traps for the unwary practitioner. This treatment is far from exhaustive; it provides no more than an overview to facilitate a

working knowledge of advisory guideline sentencing as it now stands.<sup>1</sup>

## The Basic Statutory System

The Sentencing Reform Act created determinate sentences: by eliminating parole and greatly restricting good time credit, it ensured that defendants would serve nearly all of the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission, an independent expert body located in the judicial branch. This delegation of authority to the Commission did not, however, end congressional or judicial involvement. Over the years, Congress has mandated particular punishment for certain offenses, specifically directed the Commission to promulgate or amend particular guidelines, and even drafted guidelines itself. Meanwhile, the courts have repeatedly reviewed and interpreted the Act, culminating in the judicial excisions of *Booker*. The Act's original requirements and its current provisions are described below.

**The Act's Original Requirements.** As originally written, the Sentencing Reform Act directed the sentencing court to consider a broad variety of purposes and factors, including "guidelines" and "policy statements" promulgated by the Commission. 18 U.S.C. § 3553(a)(4)(A), (a)(5); *see also* 28 U.S.C. § 994(a)(1), (a)(2). But while it provided for a broad range of sentencing considerations, the Act did not allow an equally broad range of sentencing discretion. Instead, the Act cabined the court's discretion within a grid of sentencing ranges specified by the guidelines, ranges that were mandatory absent a valid ground for departure. *See* 18 U.S.C. § 3553(b)(1), (b)(2) (2004). A departure from the applicable range was authorized only when the court found "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 different from that described." § 3553(b)(1). In determining whether a circumstance was adequately considered, the court's review was restricted to the Commission's guidelines, policy statements, and official commentary. § 3553(b)(1).

***Booker* and the Advisory Guidelines.** The Supreme Court's decision in *Booker* fundamentally changed 18 U.S.C. § 3553. Applying a line of recent constitutional decisions,<sup>2</sup> *Booker* held that the mandatory guidelines system created by § 3553(b)(1) triggered the Sixth Amendment right to jury trial with respect to sentencing determinations. 543 U.S. at 226, 243–44. Rather than require jury findings, however, the Court excised § 3553(b)(1). *Id.* at 226, 245. The result was a truly advisory guidelines system.

After *Booker*, the sentencing court must consider the Commission's guidelines and policy statements, but it need not follow them. They are just one of the many sentencing factors to be considered under § 3553(a), along with the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities and provide restitution, and others. *Booker*, 543 U.S. at 259–60. The only restriction § 3553(a) places on the sentencing court is the "parsimony" provision, which requires the court to "impose a sentence sufficient, but not greater than necessary," to achieve a specific set of sentencing purposes:

- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- to afford adequate deterrence to criminal conduct;
- to protect the public from further crimes of the defendant; and

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1. For additional materials on federal sentencing defense, consult the Sentencing Resource page on the Office of Defender Services Training Branch website, <http://www.fd.org>.

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2. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring that fact, other than prior conviction, that increases statutory maximum penalty must be proved to jury beyond reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 303–08 (2004) (applying *Apprendi* to state guideline system).

- to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner.

§ 3553(a)(2). Beyond this requirement, and the procedural requirement that the court give reasons for the sentence it selects, § 3553(c), the Sentencing Reform Act as modified by *Booker* places no restriction on the sentence the court may impose within the limits of the statute of conviction. And the sentence the court chooses is subject to appellate review only for “unreasonableness.” 543 U.S. at 261.

The text of § 3553(a) is appended to this paper. Under *Booker*, it is the essential starting point for federal sentencing today. But *Booker* and the statute are only the beginning. The Supreme Court has subsequently issued a series of decisions mapping out the advisory guideline system *Booker* created, including *Rita v. United States*, 551 U.S. 338 (2007), *Gall v. United States*, 552 U.S. 38 (2007), *Kimbrrough v. United States*, 552 U.S. 85 (2007), and *Irizarry v. United States*, 128 S. Ct. 2198 (2008). Counsel should carefully review these decisions, and the relevant circuit cases interpreting them, when preparing for sentencing.

**Guidelines and Statutory Minimums.** While *Booker* increased the courts’ discretion to sentence outside the guidelines, it did not supersede the statutory sentencing limits for the offense of conviction. Even if the guidelines or other § 3553(a) factors appear to warrant a sentence below the statutory minimum, or above the statutory maximum, the statutory limit controls. *Edwards v. United States*, 523 U.S. 511, 515 (1998); *cf.* United States Sentencing Guideline (USSG) §5G1.1 (explaining interaction between guideline and statutory limits).<sup>3</sup>

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3. A plurality of the Supreme Court has stated that the constitutional rule of *Apprendi* does not apply to mandatory minimum sentences. *See Harris v. United States*, 536 U.S. 545, 568 (2002) (plurality opinion). But recent comments by Justice Breyer, who provided the fifth vote in *Harris*, *id.* at 569–72, may call that holding into question. *See United States v. O’Brien*, No. 08-1569, 2010 WL 2025204, at \*14 n.6 (U.S. May 24, 2010) (Stevens, J. concurring) (quoting Justice Breyer’s comments at oral argument).

Numerous federal statutes include minimum prison sentences; some, like the federal “three strikes” law, 18 U.S.C. § 3559(c), mandate life imprisonment. Defendants often face statutory minimum sentences in three types of federal prosecutions discussed below: drugs, firearms, and child-sex offenses.<sup>4</sup>

**Drug offenses.** The federal drug statutes include two types of commonly applied mandatory minimum sentences: drug-amount-based minimums, and recidivism-based minimums. For certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years’ imprisonment. The circuits are divided over whether drug amount must be alleged in the indictment and proved to the jury to trigger these mandatory minimum sentences.<sup>5</sup>

For a defendant who has previously been convicted of one or more drug offenses, the statutes set out a series of minimum sentences up to life imprisonment. The prior conviction need not be alleged in the indictment or proved at trial; however, the government must follow special notice and hearing procedures prescribed in 21 U.S.C. § 851.<sup>6</sup>

**Firearms offenses.** Title 18 U.S.C. § 924, which sets out the penalties for most federal firearm-possession offenses, includes two subsections that require significant minimum prison sentences. One is § 924(c), which punishes firearm possession during a drug-trafficking or violent crime. It provides graduated minimum sentences, starting at 5 years and increasing to life imprisonment, depending on the type of firearm, how it was employed, and whether

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4. Minimum sentences are also required for the common offenses of bringing aliens into the United States for commercial gain, 8 U.S.C. § 1324(a)(2)(B)(ii), and aggravated identity theft, 18 U.S.C. § 1028A.

5. *See, e.g., United States v. Gonzalez*, 420 F.3d 111, 130–31 (2d Cir. 2005) (collecting cases).

6. Because the enhancements to which § 851 applies are based on prior convictions, the Sixth Amendment requirement of jury findings is inapplicable. *See, e.g., United States v. Mata*, 491 F.3d 237, 245 & n.3 (5th Cir. 2007); *United States v. Hollis*, 490 F.3d 1149, 1157 (9th Cir. 2007); *see generally Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

the defendant has a prior § 924(c) conviction.<sup>7</sup> The minimum sentence of § 924(c) may not be triggered if a greater minimum is otherwise applicable,<sup>8</sup> but a sentence imposed under § 924(c) must run consecutively to any other sentence, including sentences for other § 924(c) counts charged in the same case. *See Deal v. United States*, 508 U.S. 129 (1993). A § 924(c) charge is often, but not always, accompanied by a charge on the underlying substantive offense.

The other firearm mandatory minimum is found in 18 U.S.C. § 924(e), the Armed Career Criminal Act. This statute prescribes a significantly enhanced penalty for certain defendants convicted of unlawful firearm possession under § 922(g). A defendant convicted under § 922(g) normally faces a maximum term of 10 years' imprisonment. Section 924(e)(1) increases this punishment range, to a minimum of 15 years and a maximum of life, if a defendant has three prior convictions for violent felonies or serious drug offenses. Unlike the drug laws, however, § 924(e) requires no pretrial notice for an enhanced sentence to be imposed. "Violent felony" and "serious drug offense" are defined by statute. § 924(e)(2). Application of these definitions has repeatedly been the subject of Supreme Court litigation.<sup>9</sup>

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7. Some, but not all, of the facts triggering these mandatory minimum sentences qualify as elements of the offense. *Compare O'Brien*, 2010 WL 2025204, at \*12 (possession of machine gun, which triggers 30-year minimum, constitutes element), *with Harris*, 536 U.S. at 552–56 (brandishing weapon, which triggers 7-year minimum, is not element).

8. The meaning of the "otherwise applicable" language is currently before the Supreme Court in *Abbott v. United States*, No. 09-479, and *Gould v. United States*, No. 09-7073.

9. *See Johnson v. United States*, 130 S. Ct. 1265 (2010) (simple, common-law battery does not qualify under definition of "violent felony" in § 924(e)(2)(B)(i)); *Chambers v. United States*, 129 S. Ct. 687 (2009), (failure to report to prison does not qualify under definition in § 924(e)(2)(B)(ii)); *Begay v. United States*, 553 U.S. 137 (2008) (felony DWI does not qualify); *James v. United States*, 550 U.S. 192 (2007) (attempted burglary qualifies); *see also Shepard v. United States*, 544 U.S. 13 (2005) (explaining "categorical approach" to applying "violent felony" definition); *Taylor v. United States*, 495 U.S. 575 (1990) (same); *United States v. Rodriguez*, 128 S. Ct. 1783 (2008) (discussing scope of "serious drug offense" definition); *Logan v. United States*, 128 S. Ct. 475 (2007)

**Child and sex offenses.** The mandatory minimum penalties for sex trafficking and child-sex offenses are among the most severe in the federal system.<sup>10</sup> In addition to these offense-specific minimum penalties, federal law also establishes minimum penalties ranging from 10 years to life imprisonment for repeat sex crimes and crimes of violence against children. *See* 18 U.S.C. § 3559(e), (f). Unlike § 3559(c) (the general "three strikes" provision), § 3559(e) does not require the government to follow notice and hearing procedures to obtain recidivism-based enhancements for these child-victim offenses.

**Sentencing below a statutory minimum.** Section 3553 authorizes a sentence below a statutory minimum in only two circumstances: when a defendant cooperates and when he meets the requirements of a limited drug-offense "safety valve."

For cooperating defendants, the court may impose sentence below a statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." § 3553(e). A sentence can be imposed below the mandatory minimum only upon motion of the government. *Id.*; *cf.* FED. R. CRIM. P. 35(b) (setting out rules for post-sentence reduction based on government cooperation motion). Sentencing Commission policy statement §5K1.1, discussed in more detail below, sets out the factors to be considered when the court imposes sentence based on a government substantial-assistance motion.

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(discussing statute's exemption for prior offenses when civil rights have been restored).

10. *See, e.g.*, 18 U.S.C. § 1591(b) (for sex trafficking, 10- or 15-year minimum, depending on presence of force or age of victim); § 2241(c) (for aggravated sexual abuse, 30-year minimum, or life if defendant has previously been convicted of similar crime); § 2251(e) (for production of child pornography, 15- to 30-year minimum); § 2252, § 2252A (for sale, receipt, or possession of child pornography, 5- to 15-year minimum, depending on the charged subsection and the presence of prior convictions); § 2252A(g) (for child exploitation, 20-year minimum). Registered sex offenders who commit a federal child-sex offense are subject to an additional conviction and a consecutive 10-year sentence. § 2260A.

The “safety valve” statute, 18 U.S.C. § 3553(f), removes the statutory minimum for certain drug crimes. To qualify, the crimes cannot have resulted in death or serious injury, and the court must find that the defendant has minimal criminal history, was not violent, armed, or a high-level participant, and provided the government with truthful, complete information regarding the offense of conviction and related conduct. Unlike § 3553(e), the § 3553(f) “safety valve” does not require a government motion, but the government must be allowed to make a recommendation to the court. The Sentencing Commission has promulgated a safety-valve guideline, USSG §5C1.2, which incorporates the requirements of § 3553(f); the guideline may reduce the recommended sentencing range even when no statutory minimum is in play.

**No Parole; Restrictions on Early Release from Prison.** Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. No “good time” credit is available for life sentences, or sentences of a year or less; for all others, credit is limited to a maximum of 54 days per year. *See* 18 U.S.C. § 3624(b); *see also* *Barber v. Thomas*, No. 09-5201, 2010 WL 2243706 (U.S. June 7, 2010) (interpreting § 3624(b)(1)’s 54-day rule). The Bureau of Prisons may reduce the time to be served by as much as an additional year for certain prisoners who complete a substance-abuse treatment program. § 3621(e)(2).

Section 3624 allows the Bureau of Prisons to place defendants in community or home confinement at the end of their imprisonment term. § 3624(c). The statute allows such placement for up to 10 percent of the sentence, for a maximum of 6 months’ home confinement or 12 months’ community confinement. For defendants with one year or less to serve at the time of sentencing, direct placement in community confinement is possible on the court’s recommendation.<sup>11</sup>

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11. *See* Joyce K. Conley and Kathleen M. Kenney, *Review of Inmates for Initial Designation to Residential Reentry Centers* (Feb. 2, 2009).

**Probation and Supervised Release.** While the Sentencing Reform Act does not allow parole, it does authorize courts to impose non-incarcerative sentences of two types: probation and supervised release.

**Probation.** Probation is rare in the federal system.<sup>12</sup> It is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is statutorily permitted, the guidelines do not recommend straight probation unless the bottom of the guideline range is zero. *See* USSG §5B1.1(a), §5C1.1(b). (The sentencing ranges of Chapter Five are discussed below, under “The Guidelines Manual.”)

**Supervised release.** Unlike probation, supervised release is a common punishment, imposed in addition to the sentence of imprisonment. Some statutes, such as the drug laws, mandate the imposition of a supervised release term. *See, e.g.*, 21 U.S.C. § 841. The guidelines generally call for supervised release following any imprisonment sentence longer than 1 year. *See* USSG §5D1.1(a).

Under 18 U.S.C. § 3583(b), the maximum authorized supervised-release terms increase with the grade of the offense, from 1 year, to 3 years, to 5 years. Sex offenses, child pornography offenses, and kidnapping offenses involving a minor victim carry a term of 5 years to life. § 3583(k). The specific statute of conviction may also provide for a longer term of supervised release. *See, e.g.*, 21 U.S.C. § 841(b) (authorizing up to life supervised release). Supervised release begins on the day the defendant is released from imprisonment and runs concurrently with any other term of release, probation, or parole. § 3624(e); *United States v. Johnson*, 529 U.S. 53 (2000).

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12. In fiscal year 2009, straight probation was imposed in only 7.3 percent of federal cases. *See* U.S. SENTENCING COMM’N, *Sourcebook of Sentencing Statistics* fig. D (2009) (hereinafter *2009 Sourcebook*).

**Conditions and revocation.** Although federal law mandates a number of conditions for both probation and supervised release, *see* 18 U.S.C. §§ 3563(a), 3583(d), the court generally has discretion to impose conditions that are reasonably related to the sentencing factors in § 3553(a)(1) and (2). Discretionary conditions must involve “only such deprivations of liberty or property as are reasonably necessary” to achieve legitimate sentencing purposes. §§ 3563(b), 3583(d)(2).<sup>13</sup>

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possessing a firearm or a controlled substance, for refusing to comply with drug-testing conditions, or for testing positive for an illegal controlled substance more than three times in the course of a year. §§ 3565(b), 3583(g). There may be an exception from mandatory revocation for failing a drug test, depending on the availability of treatment programs, and the defendant’s participation in them. §§ 3563(e), 3583(d). For defendants required to register as sex offenders, committing certain offenses while on release triggers mandatory revocation and a minimum of 5 years’ imprisonment. § 3583(k).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions of the Sentencing Reform Act. § 3565(a)(2). Upon revocation of supervised release, the court may imprison the defendant up to the maximum terms established for each class of felony in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term on revocation of supervised release, it may impose

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13. Recently, a number of federal courts have instituted intensive “reentry” programs for high-risk defendants on supervised release, with the goal of preventing recidivism and promoting reintegration into society. For more information on these programs and others like them, *see* U.S. SENTENCING COMM’N, *Proceedings from the Symposium on Alternatives to Incarceration* (2008). The Commission has recognized the potential value of these programs in its recent guidelines amendments. *See* U.S. SENTENCING COMM’N, *Amendments to the Sentencing Guidelines* Nos. 1, 2 (Apr. 30, 2010) (hereinafter *2010 Amendments*).

another supervised release term to begin after imprisonment. § 3583(h).

Chapter Seven of the *Guidelines Manual* sets out the Sentencing Commission’s policy statements for determining the propriety of revocation and the sentence to be imposed.

**Fines and Restitution.** Federal sentencing law authorizes both fines and restitution orders. Fines are imposed in approximately 9 percent of federal cases.<sup>14</sup> In general, the maximum fine for an individual convicted of a Title 18 offense is \$250,000 for a felony, \$100,000 for a Class A misdemeanor, and \$5,000 for any lesser offense. 18 U.S.C. § 3571(b). A higher maximum fine may be specified in the law setting forth the offense, § 3571(b)(1), and an alternative fine based on gain or loss is possible, § 3571(d).

Restitution is permitted for any Title 18 crime and most common drug offenses. 18 U.S.C. § 3663(a)(1)(A). Under § 3663A(c), restitution is mandatory for crimes of violence, property crimes, and product tampering; it is also mandated for other substantive offenses by statutes elsewhere in Title 18. Federal rules require the probation officer to investigate and report potential restitution to the sentencing court. *See* FED. R. CRIM. P. 32(c)(1)(B), (d)(2)(D). Restitution may be awarded to victims who were either directly or proximately harmed as the result of an offense. §§ 3663(a)(2), § 3663A(a)(2).<sup>15</sup> In limited circumstances, a restitution award may be determined after sentencing. *See* § 3664(d)(5); *see Dolan v. United States*, No. 09-367, 2010 WL 2346548 (U.S. June 14, 2010) (discussing statute).

A defendant’s inability to pay restitution, now and in the future, may support restitution payments that are only nominal. § 3663(a)(1)(B)(i)(II); § 3664(f)(3)(A); *cf.* USSG §5E1.1(f). Inability to pay may also support a lesser fine, or alternatives such as community service. §5E1.2(e); *cf.* 18 U.S.C. § 3572 (factors to be considered in imposing fine). A defendant who

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14. *See 2009 Sourcebook*, tbl. 15.

15. The question of proximate harm has recently arisen for victims seeking restitution in child pornography cases. *See, e.g., In re Amy*, 591 F.3d 792 (5th Cir. 2009).



knowingly fails to pay a delinquent fine or restitution may be subject to resentencing, and a defendant who willfully fails to pay may be prosecuted for criminal default. §§ 3614, 3615.

**Sentence Correction and Reduction.** Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3582 limit the sentencing court’s authority to correct or reduce a sentence after it is imposed. Rule 35(a) allows the court to correct “arithmetical, technical, or other clear error” in the sentence. The rule requires that the court act within 14 calendar days after sentencing. Rule 35(b) authorizes a sentence reduction to reflect a defendant’s post-sentence assistance in the investigation or prosecution of another person who has committed an offense. The rule requires a motion by the Government; with limited exceptions, the motion must be filed within a year after sentencing.

Section 3582 authorizes a sentence reduction for certain defendants who have served 30 years of a life sentence under § 3559(c), and for other defendants when the court finds that “extraordinary and compelling reasons” warrant a sentence reduction. § 3582(c)(1). These reductions require a motion from the Director of the Bureau of Prisons. *Id.*; *see also* USSG §1B1.13, p.s. The statute also allows the court to reduce a sentence—on motion of the Director, the defendant, or the court’s own motion—when a defendant’s sentencing range has been lowered by a subsequent guideline amendment, “if such reduction is consistent with the applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2); *see* USSG §1B1.10, p.s. (The retroactive application of guideline amendments is discussed below, under “Some Traps for the Unwary.”)

**Appellate Review.** In addition to rendering the guidelines advisory, *Booker* significantly changed the standard of appellate review of federal sentences. The Sentencing Reform Act allows both the government and the defendant to appeal a federal sentence. The standard of review for these appeals was originally set out in § 3742(e); however, the Supreme Court excised that provision in *Booker*, replacing it with a requirement that federal sentences be reviewed for “reasonableness.” 543 U.S. at 260–63.

The “reasonableness” standard requires that all sentences—inside or outside the guideline range—be reviewed for abuse of discretion. *Gall*, 552 U.S. at 39. For within-guideline sentences, a court of appeals may—but need not—presume the sentence to be reasonable. *Rita*, 551 U.S. at 334.<sup>16</sup> This contrasts with proceedings in the district court, where no such presumption may be made. *Id.* at 350; *see also Nelson v. United States*, 129 S. Ct. 890, 892 (2009) (per curiam) (reversing sentence because district court presumed guidelines reasonable at sentencing).

In conducting reasonableness review, the appellate court “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.” *Gall*, 552 U.S. at 51; *see also Rita*, 551 U.S. at 350, 356–57. If there is no procedural error, the appellate court then considers “the substantive reasonableness of the sentence imposed” under the abuse-of-discretion standard. *Gall*, 552 U.S. at 51.<sup>17</sup>

While *Booker* excised § 3742(e), it did not address the other provisions of § 3742, which govern the right to appeal, the disposition that the appellate court may

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16. A number of circuits have declined to apply a presumption of reasonableness to guideline sentences. *See United States v. Van Anh*, 523 F.3d 43, 50–60 (1st Cir. 2008); *United States v. Rutkoske*, 506 F.3d 170, 180 n.5 (2d Cir. 2007); *United States v. Hoffecker*, 530 F.3d 137, 204 (3d Cir. 2008); *United States v. Carty*, 520 F.3d 984, 988 (9th Cir. 2008) (en banc); *United States v. Campbell*, 491 F.3d 1306, 1313–14 & n.8 (11th Cir. 2007).

17. The Supreme Court has suggested in *dicta* that closer substantive review may be called for when a non-guidelines sentence is based on a general policy disagreement with the Sentencing Commission, rather than an evaluation of the facts of an individual case. *See Kimbrough*, 552 U.S. at 109 (suggesting possibility of “closer review,” but finding no occasion for it in review of policy disagreement with cocaine base guidelines); *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam) (same).

order, and sentencing on remand.<sup>18</sup> Section 3742 includes a provision limiting appellate rights if the parties enter into a plea bargain that sets a specific sentence. § 3742(c); *see also* FED. R. CRIM. P. 11(c)(1)(C) (describing specific-sentence agreement). (Rule 11(c)(1)(C) and appeal waivers are discussed below, under “Plea Bargaining and the Guidelines” and “Some Traps for the Unwary.”)

**Victims’ Rights.** In 2004, Congress enacted 18 U.S.C. § 3771, which provides procedural rights to crime victims in federal courts and mechanisms for enforcing those rights. The statute generally gives victims the right to have notice of, and to be present at, public court proceedings, and to be “reasonably heard” at a variety of proceedings, including sentencing. § 3771(a)(2),(3), (4). Victims also have the right to confer with an attorney for the Government about the case, to have proceedings free from unreasonable delay, and “to full and timely restitution as provided by law.” § 3771(a)(6). The Sentencing Commission has incorporated § 3771 in a policy statement. *See* USSG §6A1.5, p.s.; *cf.* FED. R. CRIM. P. 32(i)(4)(B) (victim’s right to be heard at sentencing).<sup>19</sup>

**Petty Offenses; Juveniles.** The Sentencing Reform Act applies to both petty offenses (offenses carrying a maximum term of 6 months or less) and juvenile delinquency cases. The Act has had little effect on these cases, however, because the Sentencing Commission has chosen not to promulgate separate guidelines for them. *See* USSG §1B1.9, §1B1.12, p.s. Nevertheless, the guidelines for adults are considered in determining the maximum possible term of official detention for juveniles. *See United States v. R.L.C.*, 503 U.S. 291 (1992) (interpreting 18 U.S.C. § 5037(c)).

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18. *But see Booker*, 543 U.S. at 307 n.6 (Scalia, J., dissenting) (suggesting that § 3742(f) cannot function once §§ 3553(b)(1) and 3742(e) are excised); *see also United States v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005) (*Booker*’s reasoning requires excision of § 3742(f) and (g)).

19. For more information on the victims’ rights provisions, *see generally* Amy Baron-Evans, *Rights and Procedures Under the Crime Victims’ Rights Act and New Federal Rules of Criminal Procedure* (Apr. 30, 2009).

**Statutory Amendments.** The Sentencing Reform Act has been amended on numerous occasions in the 25-plus years since it was enacted. If an amendment is both substantive and detrimental to the defendant, its retroactive application may violate the Ex Post Facto Clause. *See Johnson v. United States*, 529 U.S. 694, 699–701 (2000) (discussing effect of Ex Post Facto Clause on Act’s amended provisions regarding supervised-release revocation); *cf. Lynce v. Mathis*, 519 U.S. 433 (1997) (retroactive amendment of state sentencing law violated Ex Post Facto).

## The Guidelines Manual

The *Guidelines Manual* comprises eight chapters and three appendices. It contains the Sentencing Commission guidelines, policy statements, and commentary that the court must consider when it imposes sentence in a federal case. *See* 18 U.S.C. § 3553(a)(4)(A) (court must consider guidelines); § 3553(a)(5) (court must consider policy statements). The *Manual* establishes two numerical values for each guidelines case: an offense level and a criminal history category. The two values correspond to the axes of a grid, called the sentencing table; together, they specify a sentencing range for each case. (The sentencing table is appended to this paper.) The *Manual* provides rules for sentencing within the range, and for departures outside of it. With minor exceptions, it does not provide guidance as to application of the other sentencing factors in § 3553(a).<sup>20</sup>

While *Booker* returned a large measure of sentencing discretion to the court, it did not diminish the importance of understanding the guidelines’ application in a particular case. This is not just because the guidelines remain the “starting point and the initial benchmark” for the sentencing decision. *Gall*, 552 U.S. at 49. Statistics show that, while the percentage of guideline sentences has decreased since *Booker*, courts still

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20. *See, e.g.*, USSG Ch.1, Pt.A, subpt.2 (discussing *Booker*); *2010 Amendments*, No. 4 (amending USSG §1B1.1).

follow the guidelines' recommendation more often than not.<sup>21</sup>

As experienced practitioners know, the guidelines often call for a sentence that is greater than necessary to achieve the purposes of § 3553(a)(2). In some cases, however, the applicable guideline range is lower than the sentence a court may be inclined to impose. Counsel must understand the *Manual* to determine whether, in a particular case, its recommendations hurt or help the defendant.

**Chapter One: Introduction and General Application Principles.** Chapter One provides an introduction to the guidelines and sets out definitions that apply throughout the *Manual*. It also sets the rules for determining the applicable guideline and explains the all-important concept of “relevant conduct.”

**Determining the applicable guideline.** The guideline section applicable to a particular case is usually determined by the conduct “charged in the count of the indictment or information of which the defendant was convicted.” USSG §1B1.2(a). If two or more guideline sections appear equally applicable, Chapter One directs the court to use the section that results in the higher offense level. §1B1.1, comment. (n.5). Additionally, if a plea agreement “contain[s] a stipulation that specifically establishes a more serious offense,” the court must consider the guideline applicable to the more serious stipulated offense. §1B1.2(a). For this exception to apply, the stipulation must establish every element of the more serious offense, *Braxton v. United States*, 500 U.S. 344 (1991), and the parties must “explicitly agree that the factual statement or stipulation is a stipulation for such purposes.” §1B1.2, comment. (n.1).

**Relevant conduct.** Although the initial choice of guideline section is tied to the offense of conviction, critical guideline determinations are frequently made according to the much broader concept of relevant conduct. See USSG §1B1.3. The Commission developed this concept as part of its effort to create a modified “real offense” sentencing system—a system

under which the court punishes the defendant based on its determination of the “real” conduct, not the more limited conduct of which the defendant may have been charged or convicted. See USSG Ch.1, Pt.A, subpt.1(4), p.s. (The Guidelines’ Resolution of Major Issues).

The relevant-conduct guideline requires sentencing based on “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . 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.” §1B1.3(a)(1)(A). For many offenses, such as drug crimes, relevant conduct extends further, to “acts and omissions” that were not part of the offense of conviction but “were part of the same course of conduct or common scheme or plan as the offense of conviction.” §1B1.3(a)(2).

When others were involved in the offense, §1B1.3 includes their conduct—whether or not a conspiracy is charged—so long as the conduct was (1) reasonably foreseeable and (2) in furtherance of the jointly undertaken criminal activity. §1B1.3(a)(1)(B). The scope of the jointly undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy, and it may not be the same for each defendant. §1B1.3, comment. (n.2). Relevant conduct does not include the conduct of other conspiracy members before the defendant joined, even if the defendant knew of that conduct. *Id.*

As noted above, relevant conduct need not be included in formal charges. §1B1.3, comment. (backg’d). It can include conduct underlying dismissed, acquitted, or even uncharged counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).<sup>22</sup> Because it allowed increased punishment based on judge-found facts, mandatory relevant-

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21. See 2009 Sourcebook, tbl. N (indicating that 56.8 percent of sentences were imposed within guideline range).

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22. The circuits have held that *Watts*’s holding survives *Booker*. See, e.g., *United States v. White*, 551 F.3d 381, 383–84 (6th Cir. 2008) (en banc) (collecting cases), cert. denied, 129 S. Ct. 2071 (2009).

conduct sentencing was successfully challenged on constitutional grounds in *Booker*. The remedy the Court prescribed did not bar the use of relevant conduct, however—it simply made the resulting guideline range advisory.

While the relevant conduct rules affect every stage of representation, they are especially important in the context of plea bargaining. (See discussion of relevant conduct below, under “Plea Bargaining and the Guidelines.”)

**Chapter Two: Offense Conduct.** Offense conduct forms the vertical axis of the sentencing table. The offense-conduct guidelines are set out in Chapter Two. The chapter has 18 parts; each part has multiple guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense, or many. Part X provides the guidelines for certain conspiracies, attempts, and solicitations, as well as for aiding and abetting, accessory after the fact, and misprision of a felony. It also applies when no guideline has been promulgated for an offense.

Each Chapter Two guideline provides one or more base offense levels for a particular statutory offense or offenses. In addition, a guideline may include specific offense characteristics that adjust the base level up or down, and it may cross-reference other guidelines that yield a higher offense level. In choosing among multiple base offense levels, determining offense characteristics, and applying cross-references, the court will normally look not just to the charge of conviction, but also to relevant conduct.

Although Chapter Two includes guidelines for a multitude of federal offenses, four categories of offense account for the vast majority of federal criminal cases: drugs, economic offenses (such as fraud and theft), firearms, and immigration.<sup>23</sup>

**Drug offenses.** In drug and drug-conspiracy cases, the offense level is generally determined by drug type and quantity, as set out in the drug quantity table in guideline §2D1.1(c). The table includes a very wide range of offense levels, from a low of 6 to a high of

38; for defendants who played a mitigating role in the offense, the top four offense levels are reduced by 2 to 4 levels. §2D1.1(a)(5). (See discussion of role in the offense below, under “Chapter Three: Adjustments.”)

Unless otherwise specified, drug quantity is determined from “the entire weight of any mixture or substance containing a detectable amount of the controlled substance.” §2D1.1(c) (drug quantity table) note \*(A). “Mixture or substance” does not include “materials that must be separated from the controlled substance” before it can be used. §2D1.1, comment. (n.1). When no drugs are seized or “the amount seized does not reflect the scale of the offense,” the court must “approximate the quantity.” *Id.* comment. (n.12). In conspiracy cases, and other cases involving agreements to sell controlled substances, the agreed-upon quantity is used to determine the offense level, unless the completed transaction establishes a different quantity, or the defendant demonstrates that he did not intend to provide or purchase the negotiated amount or was not reasonably capable of doing so. *Id.* Drug purity is not a factor in determining the offense level, with four exceptions: methamphetamine, amphetamine, pcp, and oxycodone. For other drugs “unusually high purity may warrant an upward departure” from the guideline range. *Id.* comment. (n.9).

The drug guidelines include provisions that raise the offense level for specific aggravating factors, such as death, serious bodily injury, or possession of a firearm. Guideline §2D1.1(b)(11) provides a 2-level reduction if the defendant meets the criteria of the safety-valve guideline, §5C1.2.

**Economic offenses.** For many economic offenses (including theft, fraud, and property destruction), the offense level is determined under guideline §2B1.1. The guideline is similar in structure to the drug-offense guideline, in that the offense level is generally driven by an amount—the amount of loss. The guideline commentary broadly defines “loss” as the greater of actual loss or the intended loss, even if the intended loss was “impossible or unlikely to occur.” §2B1.1, comment. (n.3(A)(ii)). The number of victims can also trigger an adjustment; however, only actual,

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23. See *2009 Sourcebook*, fig. A.

not intended victims are counted. §2B1.1(b)(2) & comment. (n.1). The commentary includes extensive notes as to items that are included or excluded from the loss amount, as well as special rules for a variety of particular fraud and theft schemes. §2B1.1, comment. (n.3(A)–(F)). In addition to these adjustments, §2B1.1 includes many other specific offense adjustments that can increase the offense level.

**Firearms offenses.** Chapter Two, Part K covers a wide variety of federal firearms offenses; the most common are charges arising from the possession of firearms or ammunition. For these offenses, guideline §2K2.1 provides a series of base offense levels, with higher levels depending on the statute of conviction, the type of firearm possessed, and the defendant’s history of violent or controlled-substance offenses, if any. The guideline also includes a variety of other specific offense adjustments that can increase the offense level further. Only one potential adjustment reduces the guideline range: if the defendant, in certain circumstances, possessed the firearm “solely for lawful sporting purposes or collection.” §2K2.1(b)(2).

Federal firearm-possession offenses often arise in connection with other criminal conduct. In these cases, specific guideline provisions produce higher sentencing ranges “if the firearm or ammunition facilitated, or had the potential of facilitating,” another offense. §2K2.1, comment. (n.14(A)). If the defendant possessed or used a firearm in connection with another felony offense, guideline §2K2.1(b)(6) provides a 4-level increase and an alternative minimum offense level of 18. A further increase is possible under §2K2.1(c), which cross-references other Chapter Two provisions applicable to the underlying conduct. These guidelines base their increases on relevant conduct, “regardless of whether [another] criminal charge was brought, or a conviction obtained.” §2K2.1, comment. (n.14(C)). Consequently, a defendant’s guideline range may be determined (and dramatically increased) by the

uncharged underlying offense, rather than the charged firearm offense.<sup>24</sup>

**Immigration offenses.** Most common immigration offenses come under one of two guidelines, §2L1.1 and §2L1.2. Guideline §2L1.1 covers smuggling, transporting, and harboring illegal aliens. It sets out many specific offense adjustments, including increases for the number of aliens involved, the possession or use of weapons, reckless conduct, threats, coercion, and injury or death. *See* §2L1.1(b).<sup>25</sup> One offense characteristic reduces the guideline range; it applies, with certain limitations, when the offense involved the smuggling, transporting, or harboring of the defendant’s spouse or child.

Guideline §2L1.2 covers the offense of unlawfully entering or remaining in the United States after a prior deportation. It provides substantial increases based on a defendant’s criminal history. All pre-deportation felonies trigger increases, as do three or more misdemeanor convictions for certain offenses. Prior convictions can as much as triple the applicable offense level, depending on whether they meet special definitions of “crime of violence,” “drug trafficking offense,” and “aggravated felony.” *See* §2L1.2(b)(1). The rules of application for these definitions are extremely complex, and have spawned substantial litigation.<sup>26</sup> The increases can apply even if the convictions do not otherwise qualify under the general rules for counting criminal history in Chapter Four of the *Guidelines Manual*. §2L1.2, comment. (n.6). However, if the resulting offense level substan-

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24. *See, e.g., United States v. Wright*, 594 F.3d 259, 267–68 (4th Cir. 2010) (court uses cross-reference to apply first-degree murder guideline); *United States v. Hicks*, 389 F.3d 514, 528–31 (5th Cir. 2004) (cross-reference to second-degree murder).

25. When death results from a smuggling offense, a cross-reference can apply to increase the offense level even further. §2L1.1(c)(1).

26. *See, e.g., United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008) (discussing crime-of-violence enhancement); *United States v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008) (discussing drug trafficking); *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (discussing aggravated felony).

tially overstates or understates the seriousness of a prior conviction, the guideline encourages a departure. §2L1.2, comment. (n.7).<sup>27</sup>

**Chapter Three: Adjustments.** Chapter Three sets out general offense-level adjustments that apply in addition to the offense-specific adjustments of Chapter Two. Some of these adjustments relate to the offense conduct, including victim-related adjustments, adjustments for hate crimes or terrorism, adjustments for the defendant’s role in the offense, and adjustments for the defendant’s use of position, of special skills, or of minors. Other Chapter Three adjustments relate to post-offense conduct, such as flight from authorities, obstruction of justice, and acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

**Role in the offense.** In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. *See* USSG Ch.3, Pt.B, intro. comment. Aggravating-role adjustments range from 2 to 4 levels, depending on the defendant’s supervisory status and the number of participants in the offense. §3B1.1. Mitigating-role adjustments likewise range from 2 to 4 levels, depending on whether the defendant’s role is characterized as minor, minimal, or somewhere in between. §3B1.2. The determination of a defendant’s role is made on the basis of all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may seek a downward adjustment (or face an upward adjustment) if more than one person participated. It is important to remember that a defendant may receive a mitigating-role reduction even if he is not held accountable for the relevant conduct of others. §3B1.2, comment. (n.3(A)).

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27. The Commission’s proposed amendments have added another encouraged downward departure for illegal-reentry defendants who have assimilated into U.S. culture. *See* 2010 Amendments, No. 3.

**Obstruction.** A defendant who willfully obstructed the administration of justice will receive a 2-level upward guideline adjustment. §3C1.1. Obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related offense. In some instances, even pre-investigation conduct can qualify. *Id.*, comment. (n.1).

Conduct warranting the obstruction adjustment includes committing or suborning perjury,<sup>28</sup> threatening witnesses or victims, destroying or concealing material evidence, or providing materially false information to a judge, probation officer, or law enforcement officer. §3C1.1, comment. (n.4). Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* comment. (n.5). While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, comment. (n.5(d)), reckless endangerment of another during flight will support a separate upward adjustment under §3C1.2.

**Multiple counts.** When a defendant has been convicted of more than one count (in the same charging instrument or separate instruments consolidated for sentencing), the multiple-count guidelines of Chapter Three, Part D must be applied. These guidelines produce a single offense level by grouping counts together, assigning an offense level to the group, and, if there is more than one group, combining offense levels for the groups, usually to increase the guideline range.

The guidelines group counts together when they involve “substantially the same harm,” §3D1.2, unless a statute requires imposition of a consecutive sentence. §3D1.1(b); *see also* §5G1.2. If the offense level is based on aggregate harm (such as the amount of loss or the weight of drugs), the level for the group is

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28. To support an obstruction adjustment based on perjury at trial, the court must “make independent findings necessary to establish a willful impediment to or obstruction of justice,” or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

determined by the aggregate for all the counts combined. §3D1.3(b). Otherwise, the offense level for the group is the level for the most serious offense. §3D1.3(a). When there is more than one group of counts, §3D1.4 establishes a combined offense level which can be up to 5 levels higher than the level of any one group. Even when a defendant pleads guilty to a single count, a multiple-count adjustment may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4). (See discussion of grouping below, under “Plea Bargaining and the Guidelines.”)

**Acceptance of responsibility.** Chapter Three, Part E provides a downward adjustment of 2 or, in certain cases, 3 offense levels for acceptance of responsibility by the defendant. To qualify for the 2-level reduction, a defendant must “clearly demonstrate[ ] acceptance of responsibility for his offense.” §3E1.1(a). Pleading guilty provides “significant evidence” of acceptance of responsibility, but does not automatically qualify a defendant for the reduction. §3E1.1, comment. (n.3). On the other hand, a defendant is not “automatically preclude[d]” from receiving the adjustment by going to trial. *Id.* comment. (n.2). A defendant who received an upward adjustment for obstruction under §3C1.1 is not ordinarily entitled to a downward adjustment for acceptance of responsibility. *See* §3E1.1, comment. (n.4). The court’s determination of acceptance of responsibility “is entitled to great deference on review.” §3E1.1, comment. (n.5).

Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.<sup>29</sup> Nevertheless, while “[a] defendant may remain silent” about relevant conduct, “a defendant who falsely denies, or frivolously

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29. In contrast, for a reduced drug sentence under the “safety valve” statute and guideline, the defendant must provide the government all information concerning not only the offense, but also “offenses that were part of the same course of conduct or of a common scheme or plan.” 18 U.S.C. § 3553(f)(5); *see also* USSG §5C1.2(a)(5) (same).

contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” §3E1.1, comment. (n.1(a)).

Defendants qualifying for the 2-level reduction receive a third level off if the offense level is 16 or greater and the government files a motion stating that the defendant has timely notified authorities of his intention to plead guilty. §3E1.1(b). (The adjustment for acceptance is discussed more fully below, under “Plea Bargaining and the Guidelines.”)

**Chapter Four: Criminal History.** Criminal history forms the horizontal axis of the sentencing table. The table divides criminal history into six categories, from I (the lowest) to VI (the highest). The guidelines in Chapter Four, Part A, translate the defendant’s prior record into one of these categories by assigning points for prior sentences and juvenile adjudications. The number of points scored for a prior sentence is based primarily on the sentence’s length. USSG §4A1.1. Points are added for committing the instant offense while under any form of criminal justice sentence. §4A1.1(d).<sup>30</sup>

A prior conviction is not counted in the criminal history score if it was sustained for conduct that was part of the instant offense, including relevant conduct. *See* §4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. §4A1.2(c)–(j).<sup>31</sup> Sentences imposed on the same day, or imposed for offenses that were charged together, are treated as one sen-

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30. Points are also added if the offense was committed within 2 years of release from imprisonment for certain convictions, §4A1.1(e), but the Commission has promulgated an amendment removing this adjustment, *see* 2010 *Amendments*, No. 5.

31. The guidelines, however, “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” §4A1.2, comment. (n.6). *See Custis v. United States*, 511 U.S. 485 (1994) (with sole exception of convictions obtained in violation of the right to counsel, defendant in federal sentencing proceeding has no constitutional right to collaterally attack validity of prior state convictions).

tence for the criminal history calculation, unless the offenses were separated by an intervening arrest. §4A1.2(a)(2).<sup>32</sup>

**Criminal history departure.** An important policy statement authorizes a departure from the guideline range when a defendant’s criminal history category does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. USSG §4A1.3, p.s. This policy statement may support either a downward or an upward departure; however, it does not authorize departures below criminal history category I, and it provides special rules for calculating departures above category VI. §4A1.3(a)(4)(B), (b)(2). (For the rules governing other departures, see discussion in Chapter Five below).

**Repeat offenders.** For certain repeat offenders, Chapter Four, Part B significantly enhances criminal history scores and offense levels. These offenders fall in three classes: career offenders, armed career criminals, and repeat child-sex offenders.

**Career offender.** The “career offender” guideline, §4B1.1, applies to a defendant convicted of a third crime of violence or controlled substance offense. Guideline §4B1.1 automatically places the defendant in the highest criminal history category, VI, and it simultaneously increases the offense level to produce a guideline range approximating the statutory maximum for the offense of conviction. “Crime of violence” and “controlled substance offense” are defined, for career-offender purposes, in §4B1.2; those definitions apply in a number of Chapter Two guidelines as well.<sup>33</sup> In determining whether prior

convictions qualify as career-offender predicates, the general rules for computing criminal history apply. §4B1.2, comment. (n.3). Accordingly, questions of remoteness, invalidity, and separate counting of prior convictions may be of utmost importance.

**Armed career criminal.** Guideline §4B1.4 applies to a defendant convicted under the Armed Career Criminal Act, 18 U.S.C. § 924(e); it frequently produces a guideline range above that statute’s mandatory minimum 15-year term. Like the career offender guideline, the armed career criminal guideline operates on both axes of the sentencing table. Unlike the career offender guideline, however, §4B1.4 is not limited by guideline §4A1.2’s time periods for counting prior sentences. §4B1.4, comment. (n.1). This means that remote convictions may qualify under §4B1.4 even if they do not otherwise count as criminal history. An armed career criminal is not automatically placed in criminal history category VI, but cannot receive a score below category IV. §4B1.4(c).

**Repeat child-sex offender.** For repeat child-sex offenders, guideline §4B1.5 works in concert with the career offender guideline to provide for long imprisonment terms. The guideline sets the minimum criminal history category at V, and it reaches more defendants than §4B1.2, applying career offender offense levels to a defendant even if he has only one prior qualifying offense. §4B1.5(a)(1). Even a defendant without any prior child-sex convictions may be subject to a significant offense level increase, if the court finds that he “engaged in a pattern of activity involving prohibited sexual conduct.” §4B1.5(b).

While §4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking, receiving, or

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32. Certain crimes of violence count separately for criminal history points even if they would otherwise be treated as one sentence under §4A1.2(a)(2). See §4A1.1(f). In addition, §4A1.2 includes a special upward-departure provision to deal with underrepresentative criminal history resulting from multiple cases charged or sentenced at the same time. See §4A1.2, comment. (n.3).

33. The Supreme Court’s recent jurisprudence on the definition of “violent felony” 18 U.S.C. § 924(e), see *supra* n.9, applies to the similarly worded crime-of-violence

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definition in the career offender guideline. See, e.g., *United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010); *United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (9th Cir. 2010); *United States v. Mohr*, 554 F.3d 604, 608–09 & n.4 (5th Cir.) *cert. denied*, 130 S. Ct. 56 (2009).



possessing child pornography. §4B1.5, comment. (n.2).

### **Chapter Five: Determining the Sentence;**

**Departures.** Chapter Five provides detailed rules for imposing imprisonment, probation, fines, restitution, and supervised release. It sets out the sentencing table of applicable guideline imprisonment ranges and the Commission’s policy statements governing departures from the guideline range.

**The sentencing table.** The sentencing table in Chapter 5, Part A is a grid of sentencing ranges produced by the intersection of offense levels and criminal history categories. Most ranges are expressed in months, although some recommend life imprisonment. The sentencing table’s grid is divided into four “zones,” A through D. If a defendant’s sentencing range is in Zone A, a guideline sentence of straight probation is available (all the ranges in Zone A are 0 to 6 months). §5B1.1(a)(1), §5C1.1(b). In Zone B or C, the guidelines allow for a “split” sentence (probation or supervised release conditioned upon some form of confinement). §5B1.1(a)(2), §5C1.1(c) §5C1.1(d).<sup>34</sup> For ranges in Zone D, the guidelines call for imprisonment. §5C1.1(f).

Guideline §5G1.1 explains the interplay between the guideline ranges in the sentencing table and the penalty ranges set by statute. Sentence may be fixed at any point within the guideline range, so long as the sentence is within statutory limits. *See* §5G1.1(c). When the entire range is above the statutory maximum, the statutory maximum becomes the guideline sentence. §5G1.1(a). Conversely, the statutory minimum becomes the guideline sentence if the entire range is below the minimum. §5G1.1(b). Guidelines §5G1.2 and §5G1.3 set out rules for sentencing a defendant who is convicted on multiple counts or who is subject to an undischarged prison term. In certain circumstances, these rules can call for partially or fully consecutive sentences.

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34. In its 2010 amendments to the guidelines, the Sentencing Commission expanded Zones B and C by one offense level, and authorized departures from Zone C to Zone B to allow for drug or mental-health treatment in certain cases. *See* 2010 Amendments, No 1.

**Departures.** Together, Parts H and K set out the Commission’s policies on the factors that may be considered in departing from, or fixing a sentence within, the guideline range. Before *Booker* excised 18 U.S.C. § 3553(b)(1) from the Sentencing Reform Act, these parts strictly limited the district court’s authority to sentence outside the guideline range; departures were available only when a case presented 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.” *See* §5K2.0(a), (b), p.s. Now, with the exception of special government-sponsored downward departures, courts sentence below the guideline range based on § 3553(a) factors far more often than on the departure grounds listed in Chapter Five.<sup>35</sup> Despite the increase in non-guideline sentences, however, the Commission sought to reaffirm the role of departures in its most recent amendments to the *Guidelines Manual*,<sup>36</sup> and the Chapter Five policy statements on departures can have an important effect on the sentence in some cases.<sup>37</sup>

Part H states the Commission’s policy that many important offender characteristics, including education and vocational skills, employment record, family ties and responsibilities, and community ties, are “not ordinarily relevant” in determining the propriety of a departure. Under a proposed amendment, other characteristics —age, mental and emotional conditions, physical condition, and military service —may be grounds for departure if “individually or in

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35. *See* 2009 Sourcebook, tbl. N (excepting government-sponsored downward departures, courts departed below the guideline range in 2,403 cases, and otherwise sentenced below the range in 10,252 cases). Sentences above the guideline range are also more likely to be based on § 3553(a) considerations than on departure grounds. *Id.*

36. *See* 2010 Amendments, Nos. 2, 4.

37. In addition to the policy statements in Chapter Five, a number of Chapter Two guidelines have commentary suggesting grounds for departure from the prescribed offense level. *See, e.g.*, USSG §2B1.1, comment. (n.19) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.14) (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for large-scale drug offenses); §2K2.1, comment. (n.11) (same, large-scale or dangerous firearms offenses).

combination with other offender characteristics” they are “present to an unusual degree and distinguish[ ] the case from the typical cases covered by the guidelines.”<sup>38</sup> The operative words are “ordinarily” and “typical” —in exceptional or atypical cases, one or more of the identified characteristics may support a departure. Even in the typical case, these characteristics may be relevant for courts deciding where to sentence within the guideline range, or whether to impose a sentence outside the range under *Booker* and § 3553(a).<sup>39</sup>

Part H sets out Commission policy that certain characteristics cannot support a departure. In accordance with congressional directive, the Commission provides that certain characteristics are never relevant to the determination of the sentence: race, sex, national origin, creed, religion, and socio-economic status. *See* § 5H1.10, p.s.; *cf.* 28 U.S.C. § 994(d). After *Booker*, characteristics limited or prohibited from consideration by the *Guidelines Manual* may nevertheless be relevant to sentencing under § 3553(a).<sup>40</sup>

Part K authorizes a downward departure on the government’s motion if the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” §5K1.1, p.s.; *cf.* 18 U.S.C. § 3553(e). (Cooperation is discussed below, under “Plea Bargaining and the Guidelines.”)

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38. *2010 Amendments*, No. 2.

39. *See Booker Report* 82–83, tbls. 8–9 (relying on *Booker*, courts cited factors discouraged by Part 5H at least 1,158 times when sentencing below guideline range); *2009 Sourcebook*, tbl. 25B (3,514 such sentences in fiscal year 2009).

40. *See, e.g., Gall*, 552 U.S. at 55–59 (approving consideration of defendant’s youth, immaturity, and drug addiction in sentencing below guideline range); *see generally United States v. Smith*, 445 F.3d 1, 4–5 (1st Cir. 2006) (when weighing § 3553(a) factor, it is not decisive that Commission has discouraged or prohibited it from consideration); *see, e.g., United States v. Pinson*, 542 F.3d 822, 838–39 (10th Cir.) (courts have wide discretion to rely on discouraged factors), *cert. denied*, 129 S. Ct. 657 (2008), and *cert. denied*, 129 S. Ct. 1369 (2009) (multiple petitioners).

For departures on grounds other than cooperation, policy statement §5K2.0 states general principles and provides special rules for downward departures in child and sex offenses. Generally, a departure may be warranted when a case presents a circumstance that the Commission has identified as a potential departure ground. However, in an “exceptional” case, departure may be warranted based on a circumstance the Commission has not identified, a circumstance it considers “not ordinarily relevant” under Part H, or a circumstance that, although taken into account in determining the guideline range, is present to an exceptional degree. §5K2.0(a)(2)–(4).

Like Part H, Part 5K prohibits certain circumstances as departure grounds, including a defendant’s financial difficulties and post-offense rehabilitative efforts. §5K2.0(d), §5K2.12, §5K2.19. Other circumstances, by contrast, are specifically identified as potential grounds for departure, usually upward. Six listed circumstances may support a downward departure: (1) victim’s wrongful provocation, (2) commission of a crime to avoid a perceived greater harm, (3) coercion and duress, (4) diminished capacity, (5) voluntary disclosure of the offense, and (6) aberrant behavior. For child and sex offenses, the grounds supporting downward departure are far more limited. *See* §5K2.0(b), §5K2.22, p.s.

Keep in mind that departure grounds are generally not limited to those discussed by the Commission, and identified grounds not justifying departure individually may combine to support a departure in a particular case, *see* §5K2.0(a)(2)(B), p.s.; §5K2.0(c), p.s. Even with advisory guidelines, an important part of sentencing advocacy on behalf of the defendant can be resisting an upward departure or seeking a downward departure.

In certain districts, policy statement §5K3.1 allows departures of up to 4 levels, pursuant to a government-authorized early-disposition program. §5K3.1, p.s. (Such “fast-track” programs are discussed below, under “Plea Bargaining and the Guidelines.”)

**Chapter Six: Sentencing Procedures and Plea Agreements.** Chapter Six sets out policy statements for preparing and disclosing the presentence report,

for resolving disputed sentencing issues, and for considering plea agreements and stipulations. These policies generally track the provisions regarding plea bargains and sentencing procedures in Federal Rules of Criminal Procedure 11 and 32. (The applicable procedures are also discussed below, under “The Guidelines and Sentencing Advocacy” and “Plea Bargaining and the Guidelines.”)

**The presentence report; dispute resolution.** The policy statements of Chapter Six provide for the preparation of a presentence report in most cases, with written objections to the report submitted in advance of the sentencing hearing. USSG §6A1.1, p.s.; §6A1.2, p.s., comment. (backg’d); cf. FED. R. CRIM. P. 32(c)(1), (d), (f)(1), (i)(1)(D) (requiring written report and timely written objections in most cases). Rule 32 requires that the report discuss both guideline-related facts and other information that the court requires, including information relevant to the sentencing factors in § 3553(a). FED. R. CRIM. P. 32(d)(2)(F). (Presentence reports are further discussed below, under “Some Traps for the Unwary”).

The Commission recognizes that, because of the impact discrete factual determinations have on the guideline range, “[r]eliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.” USSG Ch.6, Pt.A (intro. comment.) Yet Chapter Six, like the Sentencing Reform Act and the rules of evidence, places no limit on the kinds of information to be used in resolving sentencing disputes. The court may consider any information that “has sufficient indicia of reliability to support its probable accuracy.” §6A1.3(a), p.s.; cf. 18 U.S.C. § 3661 (declaring “[n]o limitation” on the information about the defendant that may be considered by the sentencing court); FED. R. EVID. 1101(d)(3) (rules of evidence inapplicable to sentencing). Unreliable allegations may not be considered, however, and out-of-court declarations by an unidentified informant may be considered only when there is good cause for anonymity, and the declarations are sufficiently corroborated. §6A1.3, p.s., comment. para. 2.

The commentary to policy statement §6A1.3 leaves to the court’s discretion the degree of formality necessary to resolve sentencing disputes. It recognizes that,

while “[w]ritten statements of counsel or affidavits of witnesses” may often provide an adequate basis for sentencing findings, “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” §6A1.3, p.s., comment. para. 1.

The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence. §6A1.3, p.s., comment. para. 3. Courts are divided over whether a higher standard may be required if a particular fact determination has a disproportionate effect on the sentence imposed.<sup>41</sup> Particular guidelines may require a higher standard of proof in specific contexts. *See, e.g.*, USSG §3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt).

If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, Chapter Six and Rule 32 require it to provide reasonable notice that it is contemplating such a ruling, specifically identifying the grounds for the departure. USSG §6A1.4, p.s.; FED. R. CRIM. P. 32(h); *see generally Burns v. United States*, 501 U.S. 129 (1991). Similar notice is not necessary, however, when the court intends to sentence outside the guideline under § 3553(a) and *Booker*. *See Irizarry*, 128 S. Ct. at 2202–03. Nonetheless, “[s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the [sentencing hearing], and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues.” *Id.* at 2203; cf. FED. R. CRIM. P. 32(i)(1)(B), (3) (requiring court to allow parties to comment on “matters relating to an appropriate sentence”).

**Plea agreements.** Chapter Six, Part B sets out the *Guidelines Manual*’s procedures and standards for accepting plea agreements. The standards vary with the type of agreement. *See* FED. R. CRIM. P. 11(c)(1). (Plea agreements are discussed below, under “Plea Bargaining and the Guidelines.”) While the parties

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41. Compare *United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006) (clear and convincing standard required), with *United States v. Villarreal-Amarillas*, 562 F.3d 892, 894–898 (8th Cir. 2009) (preponderance standard sufficient).

may stipulate to facts as part of a plea agreement, policy statement §6B1.4(d) provides that such a stipulation is not binding on the court. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant “the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines.” §6B1.2, p.s., comment.

**Chapter Seven: Violations of Probation and Supervised Release.** Chapter Seven sets out policy statements applicable to revocation of probation and supervised release. *See* 18 U.S.C. § 3553(a)(4)(B) (requiring court to consider guidelines and policy statements applicable to revocation). The policy statements classify violations of conditions, guide probation officers in reporting those violations to the court, and propose dispositions for them. For violations leading to revocation, policy statement §7B1.4 provides an imprisonment table similar in format to the Chapter Five sentencing table.

**Chapter Eight: Sentencing of Organizations.** When a convicted defendant is an organization rather than an individual, application of the sentencing guidelines is governed by Chapter Eight.

**Appendices.** The official *Guidelines Manual* includes three appendices. Appendix A is an index specifying the Chapter Two guideline or guidelines that apply to a conviction under a particular statute. Appendix B sets forth selected sentencing statutes. Appendix C includes, in chronological order, the amendments to the *Guidelines Manual* since its initial publication in 1987.

## The Guidelines and Sentencing Advocacy

For years, calculation of the guidelines was the paramount issue in federal sentencing: the range set by the guidelines was mandatory, and the court’s authority to sentence outside that range was severely limited. This is no longer the case. After *Booker*, guideline application is only the starting point of sentencing. In addition to calculating the defendant’s guideline range, counsel must consider the remaining factors under 18 U.S.C. § 3553(a). All these factors

must be considered in advocating for a sentence which is sufficient, but not greater than necessary, to comply with the purposes of the Sentencing Reform Act.

**Step-by-Step Guideline Application.** As the Supreme Court has made clear, a correct calculation of the guideline range remains the first step of the federal sentencing process. *See Gall*, 552 U.S. at 49–50. Guideline §1B1.1 provides step-by-step instructions for applying the guidelines. To facilitate following those steps, the Sentencing Commission has prepared sentencing worksheets. The worksheets were created before *Booker*; consequently, they do not address the other § 3553(a) factors that are essential to federal sentencing practice. The Sentencing Commission plans to issue revised worksheets in November 2010 in light of its amendments to the *Guidelines Manual*.

**Challenging the Basis of a Particular Guideline.** While the guidelines remain crucially important, defense counsel must guard against unthinking acceptance of the guidelines’ recommendation when preparing for sentencing. When a guideline range fails to account for the mitigating circumstances of an individual defendant’s case, counsel should seek a downward departure or variance. Even when individualized arguments are absent, however, legitimate arguments can often be made that a lower sentence is required because a particular guideline lacks foundation in the statutory purposes of sentencing.

In creating the guidelines, the Commission was charged with an extremely difficult task—it was called upon to implement the wide-ranging sentencing goals of § 3553(a)(2), and at the same time both to avoid “unwarranted sentencing disparities,” and to maintain “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.” 28 U.S.C. § 991(b)(1)(B).<sup>42</sup> Facing these sometimes conflicting demands, the original members of the Commission could not agree

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42. One commentator has identified as many as 32 different congressional directives with which the Commission had to contend in promulgating the guidelines. *See* Mark W. Osler, *Death to These Guidelines and a Clean Slate of Paper*, 21 FED. SENT’G REP. 7, 7–8 (2008).

on which sentencing purposes should predominate. See USSG Ch.1, Pt.A, subpt.1(3), p.s. (The Basic Approach); *Rita*, 551 U.S. at 349. Instead, the Commissioners decided to study past practice as a proxy for policy choices. This “empirical” approach was a compromise intended to ensure that the Guidelines effectuated Congress’s sentencing goals. *Rita*, 551 U.S. at 349; see also USSG Ch.1, Pt.A, subpt.1(3), p.s.; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17–18 (1988). In *Rita*, the Supreme Court relied upon the Commission’s capacity to use empirical data and national experience in ruling that within-guidelines sentences could be afforded a presumption of reasonableness on appeal. *Rita*, 551 U.S. at 345–48; see also *Kimbrough*, 552 U.S. at 108–09.

Not all of the Guidelines, however, are tied to empirical evidence. See *Kimbrough*, 552 U.S. at 109 (finding that cocaine base guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role”); *Gall*, 552 U.S. at 46 n.2 (same, drug guidelines generally).<sup>43</sup> Although the Commission intended that its approach would “begin [ ] with, and build [ ] upon, empirical data,” USSG Ch.1, Pt.A, subpt.1(3), p.s., the “idealized vision of Commission policy making is the exception rather than the rule.” Paul J. Hofer, *The Reset Solution*, 20 FED. SENT’G REP. 349 (2008). Instead, “[t]he Guidelines mechanism has often been seized by the political branches and directed toward goals other than the purposes of sentencing.” *Id.* In many instances, the Commission did not rely on empirical data in promulgating guidelines, but instead responded to demands from Congress or the Department of Justice. In such cases, there is little basis for concluding that the guideline range represents a “rough approximation” of sen-

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43. Other commonly applied guidelines suffer from a similar lack of empirical support. See, e.g., *United States v. Dorvee*, 604 F.3d 84, 95–98 (2d Cir. 2010) (discussing child pornography guideline); *United States v. Pahlua-Martinez*, Nos. 8:08CR415, 8:09CR40, 2009 WL 2003241 (D. Neb. July 2, 2009) (discussing illegal-reentry guideline); see generally Amy Baron-Evans and Jennifer Coffin, *Judges Are Free to Disagree with Any Guideline, Not Just Crack, Including Guidelines That Are the Product of Congressional Directives to the Commission* (Apr. 25, 2010).

tences that would achieve the Sentencing Reform Act’s goals. *Rita*, 551 U.S. at 349–52. As the Sentencing Commission has itself noted, “[t]o date, the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity for most types of crime,” rather than “to advance different goals, that are also mentioned in the [Sentencing Reform Act].” U.S. SENTENCING COMM’N, [FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM](#) 77 (Nov. 2004).

In light of the history of the guidelines’ evolution, it is important that counsel investigate whether there is an empirical basis for an applicable guideline before accepting that guideline’s recommendation. Such investigation can lead to arguments for a lower sentence, even in a case that may not present individualized grounds for leniency. As the Supreme Court explained in the context of the cocaine-base guideline, “even when a particular defendant . . . presents no special mitigating circumstances—no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation—a sentencing court may nonetheless vary downward from the advisory guideline range. . . . The only fact necessary to justify such a variance is the sentencing court’s disagreement with the guidelines . . . .” *Spears*, 129 S. Ct. at 842 (citation omitted). This reasoning applies to any guideline that lacks empirical support. As the Court has made clear, the system created by *Booker* authorizes a non-guideline sentence not just based on individualized mitigating or aggravating circumstances, but also when the guideline sentence fails properly to reflect § 3553(a) considerations, reflects “unsound judgment,” or when “the case warrants a different sentence regardless.” *Rita*, 551 U.S. at 357. A guideline’s lack of empirical foundation can help support such arguments.<sup>44</sup>

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44. For challenges to the empirical bases of many guidelines, visit the “Deconstructing the Guidelines” section of the [Sentencing Resource Page](#) of the Office of Defender Services Training Branch Website.

Before challenging a particular guideline’s empirical basis, however, counsel should consider the guideline’s recommendation in the larger context of client advocacy. When a guideline suggests a sentence that is too high, defense counsel should be prepared to challenge the guideline’s underlying assumptions, and to argue that, in light of all the factors in § 3553(a), the recommended guideline range is greater than necessary to achieve the purposes of sentencing. If the judge is nevertheless inclined to follow the guidelines’ recommendations, counsel should closely examine the factual determinations driving those recommendations; when judge-made determinations are the only substantial basis for the sentence imposed, the sentence may be subject to constitutional challenge based on the reasoning in *Booker*.<sup>45</sup>

In other cases, the guideline range may call for an appropriate sentence, even one that is lower than the court would otherwise be inclined to impose. In those cases, defense counsel can argue for deference to the guideline range, and point out that following the Commission’s recommendation could avoid unwarranted disparity and be sufficient to achieve the purposes of sentencing. Arguing for a lower sentence within the guideline system—by way of downward adjustment or departure, rather than a variance under § 3553(a)—may also benefit a client by entitling the sentence to a presumption of reasonableness on appeal.<sup>46</sup>

This flexible, case-by-case approach may appear to be inconsistent—it is not. A case-by-case approach is necessary to account for the fact that the guidelines sometimes, but do not always, get the balance of

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45. See *Rita*, 551 U.S. at 372–73, 375–76 (Scalia, J., concurring) (sentence that is substantially reasonable only because of judge-found fact would violate Sixth Amendment); see also *White*, 551 F.3d at 388–91 (Merritt, J., dissenting) (discussing issue).

46. See, e.g., *United States v. Solis-Bermudez*, 501 F.3d 882, 884–85 (8th Cir. 2007) (presumption of reasonableness applies to both guideline sentences and departures); cf. *United States v. Mohamed*, 459 F.3d 979, 985–87 (9th Cir. 2006) (citation to departure ground in *Guidelines Manual* supports finding that sentence is reasonable).

§ 3553(a) factors right. When the guidelines call for an appropriate sentence, counsel can acquiesce in, or even argue for, a sentence within the range. But when the guidelines get the factors wrong, and threaten to harm the defendant as a result, it is counsel’s duty to oppose their rote application. Only by considering the guidelines in the larger context of § 3553(a) can counsel construct a reasoned argument for the appropriate sentence.

**Sentencing Memorandum.** Given the complex nature of the federal sentencing process, counsel should generally avoid relying on the presentence report and the sentencing hearing to present all relevant arguments to the district court. Instead, counsel should strongly consider filing a written sentencing memorandum. Depending on the needs of the client and local court practice, a sentencing memorandum can address the salient sentencing factors in § 3553(a) as well as the relevant guidelines, policy statements, and commentary in the *Guidelines Manual*. If the defendant is requesting a sentence below the guideline range, the memorandum should provide a ready foundation for the sentencing court’s written statement of reasons. See § 3553(c)(2).

**Sentencing Hearing.** Preparing for the sentencing hearing requires familiarity with the procedures for disclosing the presentence report and objecting to it, and for resolving disputes both before and during the hearing. These procedures are generally set out in Federal Rule of Criminal Procedure 32 and Chapter Six, Part A of the *Guidelines Manual*, and they may also be governed by local court rules or practices. Even in the advisory guideline system, the Supreme Court expects each defendant’s sentence to be subject to “thorough adversarial testing.” *Rita*, 551 U.S. at 351; cf. *Irizarry*, 128 S. Ct. at 2203. And counsel must scrupulously observe traditional rules on preservation of error to protect issues for possible appeal under 18 U.S.C. § 3742.<sup>47</sup>

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47. The circuits are divided over the type and timing of objections necessary to preserve claims that a sentence is unreasonable. See, e.g., *United States v. Autery*, 555 F.3d 864, 868–71 (9th Cir. 2009) (discussing cases); cf. Benjamin K. Raybin, Note, “*Objection: Your Honor Is Being Unreasonable!*”—Law and Policy Opposing the Federal

## Plea Bargaining and Federal Sentencing

Plea bargaining is a ubiquitous feature of federal criminal practice. Approximately 88 percent of defendants charged in federal court end up pleading guilty to one or more charges,<sup>48</sup> and the decision whether to plead guilty—and if so to what charges—can have a tremendous effect on the sentence that is ultimately imposed.

In a recent memorandum, the Attorney General stated the Department of Justice position that “[p]lea agreements should reflect the totality of the defendant’s conduct,” and accordingly that “prosecutors should seek a plea to the most serious offense that is consistent with the nature of defendant’s conduct and likely to result in a sustainable conviction.” *Department Policy on Charging and Sentencing* 2 (May 19, 2010). At the same time, the Attorney General recognized that plea bargaining should be “informed by an individual assessment of the specific facts and circumstances of each particular case.” *Id.* Defense counsel must use these principles to the client’s advantage, pointing out weaknesses in the prosecution that could affect the sustainability of more serious charges, and negotiating for better plea-bargain terms based on the individual mitigating circumstances presented by the case. In some instances, when a fair bargain cannot be achieved, counsel may advise the defendant to plead guilty without an agreement, or to go to trial. Such advice is inextricably tied to the sentencing consequences that will follow from the defendant’s decision. Accordingly, before advising the client, counsel must have a thorough understanding of the federal plea bargaining system and its interaction with the advisory guidelines and the other sentencing factors in 18 U.S.C. § 3553(a). The discussion below provides no more than a starting point for that essential understanding.

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*Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 244–50 (2010).

48. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbl. D-4, at 239 (2009).

Federal Rule of Criminal Procedure 11(c)(1) and policy statement §6B1.2 describe three forms of plea agreement: charge bargain, sentence recommendation, and specific, agreed sentence. While other forms of plea agreement are possible, these are the most common, and each has important consequences for sentencing under the advisory guidelines. A charge bargain must be closely examined to determine whether its supposed guideline benefit is real or illusory once the effects of relevant conduct and multiple-count grouping have been considered. Other, equally important considerations affect the possible benefits of sentence-recommendation and sentence-agreement bargains. In all cases, the potential value of an acceptance-of-responsibility adjustment must be carefully considered. And because cooperation by the defendant is a common element of plea bargains, the statutory and guideline provisions that affect cooperating defendants can be of central importance. Each of these subjects is discussed below.

**Charge Bargaining.** Federal plea bargaining has typically involved charge-bargaining agreements, under which the court may accept a defendant’s plea to one or more charges in exchange for the dismissal of others. If the other charges are not dismissed, Rule 11(c)(1)(A) gives the defendant the right to withdraw his plea. While such bargains are common, they often have little effect on the guideline range. This is because of the dramatic impact of two related guideline concepts: relevant conduct and multiple-count grouping.

**Relevant conduct.** A plea agreement calling for dismissal of counts will not reduce the offense level if the subject matter of the dismissed counts is deemed “relevant conduct” for purposes of determining the guideline range. See USSG §1B1.3 (stating relevant-conduct rule); §6B1.2(a), p.s. (charge bargain cannot preclude consideration of relevant conduct). Thus, for example, if a defendant pleads guilty to one drug count in exchange for the dismissal of others, the base offense level will usually be determined from the total amount of drugs involved in all counts, even the dismissed ones.

Despite the effect of relevant conduct, however, charge bargaining can still confer important sentencing benefits. When one of the counts is governed by a

Chapter Two guideline with a lower offense level, a plea to that count may produce a lower guideline range.<sup>49</sup> Even if a count does not have a lower guideline range, it may carry a lower statutory maximum. Because statutes trump guidelines, a charge bargain may have the effect of capping the maximum sentence below the probable guideline range, *see* USSG §5G1.1(a), or avoiding a statutory minimum that would raise the guideline range, *see* §5G1.1(b). By avoiding a higher statutory maximum or minimum, a charge bargain can also limit the extent of a potential above-guideline sentence, or allow greater discretion for a sentence reduction. Finally, a charge bargain that limits exposure to a single count of conviction can avoid the danger that sentences will run partially or fully consecutive, either to achieve the “total punishment” called for by the guidelines, *see* §5G1.2(d), or to accommodate an upward departure or variance.

**Multiple-count grouping.** A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which separate charges involve substantially the same harm. When counts are grouped, a single offense level—the highest of the counts in the group—applies to those counts of conviction. §3D1.3(a). In such cases, a charge bargain’s benefit may be illusory, since conviction on multiple counts will not adjust the offense level upward.

Nevertheless, as with relevant conduct, a charge bargain may sometimes be of benefit under the grouping rules. For offenses that do not group, such as robberies, Chapter Three, Part D may require an upward adjustment if there are multiple convictions. Dismissing counts will avoid this adjustment, provided the defendant does not stipulate to all the elements of a dismissed offense as part of a plea bargain. *See* §1B1.2(c) & comment. (n.3). Note, however, that regardless of the grouping rules, some statutes (most notably 18 U.S.C. § 924(c)) require a consecutive sentence.

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49. Note, however, that dismissed charges not considered in determining the guideline range can provide grounds for upward departure. §5K2.21, p.s.

**Sentencing Recommendation; Specific Sentencing Agreement.** In addition to charge bargains, Federal Rule of Criminal Procedure 11 authorizes the prosecutor to make either nonbinding recommendations, or binding agreements, with regard to the sentence to be imposed. Rule 11(c)(1)(B) authorizes the prosecutor to recommend, or agree not to oppose, a particular sentence or sentencing range, or the application of a particular guideline or policy statement. Sentence recommendations under Rule 11(c)(1)(B) are non-binding: A defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw his plea. FED. R. CRIM. P. 11(c)(3)(B). Rule 11(c)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence, a sentence within an agreed guideline range, or the application of a particular guideline or policy statement. Unlike sentence-recommendation agreements, Rule 11(c)(1)(C) agreements are binding: If the court rejects the proposed sentence, the defendant is entitled to withdraw the plea. Policy statement §6B1.2(b) provides that a court may accept a Rule 11(c)(1)(B) or 11(c)(1)(C) agreement only if the proposed sentence is within the applicable guideline range or departs from the range for justifiable reasons. Because the policy statement was promulgated before *Booker* was decided, it does not address the question of whether a recommended sentence can, or must, be justified under § 3553(a).

Because of the limits it places on sentencing discretion, a binding sentence agreement under Rule 11(c)(1)(C) can sometimes be difficult to obtain. If the prosecutor will not agree to a specific sentence, or if the court is likely to reject it, counsel should consider the less-restrictive forms authorized by the rule, which can still afford the defendant a measure of protection. For example, the parties might agree under Rule 11(c)(1)(C) that a particular guideline adjustment be applied, or that the sentence not exceed a specified sentencing range. If the court does not follow the parties’ agreement on a particular sentence component, the defendant can withdraw the plea.

**Acceptance of Responsibility.** Sometimes, the only perceived guideline-range benefit for a plea of guilty will be the adjustment for acceptance of



responsibility. Pleading guilty does not guarantee the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. *See* USSG §3E1.1, comment. (nn.2, 3).

In evaluating the prospects for an acceptance-of-responsibility adjustment, counsel must guard against giving up a valuable right to trial, solely in pursuit of an adjustment that may already be lost. Scrutinize all pertinent facts that may bear upon this determination—particularly any criminal conduct committed while on pretrial release. *See* §3E1.1, comment. (n.3) (in considering evidence of acceptance, entry of a guilty plea “may be outweighed by conduct . . . that is inconsistent with . . . acceptance of responsibility”). And pay special attention to the possibility of an adjustment for obstruction of justice under guideline §3C1.1. *See* §3E1.1, comment. (n.4). When it is certain that a defendant will not receive the adjustment for acceptance of responsibility even upon a plea of guilty, and the plea confers no other benefit, then the plea will not improve the guideline range. Even so, a guilty plea may benefit the defendant—by diminishing the risk of an upward departure, improving the possibility or extent of a downward departure, or inducing the court to impose a lower sentence based on the factors in § 3553(a).

Finally, even when the acceptance adjustment is not in doubt, counsel should consider whether plea bargaining could help obtain a government motion for a third level of reduction under §3E1.1(b).<sup>50</sup> Note, however, that the plain language of §3E1.1(b) does not require entry into a plea agreement, but only “timely notifi[cation]” of an “intention to enter a plea of guilty.” *Id.*

**Cooperation.** Congress directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a lower sentence “to take into account a defendant’s substantial assistance in the investigation or prosecution of another person

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50. *See, e.g., United States v. Johnson*, 581 F.3d 994, 1001–08 (9th Cir. 2009) (collecting cases) (government permitted to require plea bargain as condition for third-level motion).

who has committed an offense.” 28 U.S.C. § 994(n).<sup>51</sup> The Commission responded to this directive by promulgating policy statement §5K1.1. The policy statement requires a motion by the government before the court can depart for substantial assistance. *See Wade v. United States*, 504 U.S. 181, 185 (1992) (dictum) (government §5K1.1 motion is “the condition limiting the court’s authority” to depart); *cf.* 18 U.S.C. § 3553(e) (government motion required for substantial-assistance departure below statutory minimum). Note that, while cooperation can reduce a sentence below either the guideline or the statutory minimum sentence, a substantial-assistance motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

When the court considers a cooperation motion, it should give “[s]ubstantial weight” to “the government’s evaluation of the extent of the defendant’s assistance”; however, the ultimate determination of the value of the defendant’s assistance is for the court to make. §5K1.1(a)(1), p.s. & comment. (n.3). Even without a government departure motion, cooperation can benefit the defendant at sentencing, as the court can consider it in placing the sentence within the guideline range, in determining the extent of a departure based on other grounds, or as one of the factors justifying a lower sentence under § 3553(a).<sup>52</sup> By contrast, “[a] defendant’s refusal to assist authorities . . . may not be considered as an aggravating sentencing factor.” §5K1.2, p.s.

A defendant contemplating cooperation should always seek the protection of Federal Rule of Evidence 410 and guideline §1B1.8. With limited exceptions, Rule 410 renders inadmissible, in any civil or criminal proceeding, any statement made in the course of plea discussions with an attorney for the

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51. For cooperation departures in child and sex offenses, see also 18 U.S.C. § 3553(b)(2)(A)(iii).

52. *See, e.g., United States v. Motley*, 587 F.3d 1153, 1158 & n.2 (D.C. Cir. 2009) (collecting cases) (cooperation may be considered without government motion); *cf.* 2009 *Sourcebook*, tbl. 25B (190 cooperation-based reductions granted in absence of government motion).

government, even if the discussions do not ultimately result in a guilty plea.<sup>53</sup> *Cf.* FED. R. CRIM. P. 11(f).

Guideline §1B1.8 permits the parties to agree that information provided by a cooperating defendant will not be used to increase the applicable guideline range. The guideline has limited effect, however. By its terms, it does not protect against the use of information previously known to the government or relating to criminal history, and it does not apply if the defendant breaches the cooperation agreement or is prosecuted for perjury or false statement. *See* §1B1.8(b). Moreover, §1B1.8 protects the defendant only from an increase in the guideline range, not from a higher sentence within that range, an upward departure, or a higher sentence under § 3553(a). While it is the “policy of the Commission” that information provided under a §1B1.8 agreement “shall not be used” for an upward departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

**“Fast-track” dispositions.** For a number of years, prosecutors in some high-volume federal districts in the Southwest and elsewhere have approved special “fast-track” disposition programs in common immigration and drug cases. *See* USSG §5K3.1, p.s. (authorizing up to a 4-level downward departure under a government fast-track program). The rules for participation in each program vary from district to district.<sup>54</sup> If an applicable fast-track program is in effect, counsel should consider whether it would benefit the defendant to participate, in light of the important rights that the program may require the defendant to relinquish. On the other hand, if no fast-track program is available in a particular district, counsel should consider whether to seek a below-guideline sentence on the ground that it would avoid unwarranted disparity. The circuits are currently

divided on the propriety of imposing a below-guideline sentence on this basis.<sup>55</sup>

## Some Traps for the Unwary

**Pretrial Services Interview.** In most courts, a pretrial services officer (or a probation officer designated to perform pretrial services) will seek to interview arrested persons before their initial appearance, to gather information pertinent to the release decision. Absent specified exceptions, information obtained during this process “is not admissible on the issue of guilt in a criminal judicial proceeding.” 18 U.S.C. § 3153(c)(3). The information is, however, made available to the probation officer for use in the presentence report. § 3153(c)(2)(C).

Although the defendant may not realize it, certain information pertinent to the release decision—including criminal history, earnings history, and possession of a special skill—can raise the guideline range, provide a basis for upward departure, or support a higher sentence under § 3553(a). Such information can also affect the decision to impose a fine or restitution. Additionally, defendants must take scrupulous care to ensure that information provided to the pretrial officer and the court is truthful. A finding that the defendant gave false information can lead to denial of credit for acceptance of responsibility, to an upward adjustment for obstruction, and even to the filing of additional charges.

Because of these many dangers, counsel should, if possible, attend the pretrial services interview or advise the defendant beforehand. Counsel who enters a case after the pretrial report is prepared must learn what information was acquired by the officer to be aware of its possible effect. *See* 18 U.S.C. § 3153(c)(1) (requiring that pretrial services report be made available to defense).

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53. A defendant may waive the protections of Rule 410 as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

54. *See* 2009 *Sourcebook*, app. B (showing fast-track dispositions, with varying frequency, in 18 of 94 districts).

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55. *Compare, e.g., United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (court may consider whether fast-track-caused disparity justifies a non-guideline sentence), *with United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740–41 (9th Cir.) (prohibiting departures on this basis), *cert. denied*, 130 S. Ct. 83 (2009). *See also* Alison Siegler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT’G REP. 299, 300–01 (2009).

**Presentence Investigation Report and Probation Officer's Interview.** In most cases, a probation officer will provide a presentence investigation report to the court for its consideration before imposing sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c). The importance of the presentence report cannot be overstated. In it, the probation officer will recommend fact findings, guideline calculations, and potential grounds for departure; in many districts, the officer may also recommend factors to be considered in sentencing outside the guideline range under § 3553(a). *See* FED. R. CRIM. P. 32(d)(2)(F). After sentencing, the report is sent to the Federal Bureau of Prisons, where it can affect the institutional placement decision, conditions of confinement, and eligibility for prison programs. It can even raise the possibility of post-imprisonment civil commitment as a “sexually dangerous person,” regardless of whether the conviction is for a sex offense. *See* 18 U.S.C. §§ 4247(a)(5), 4248. The report can also affect the conditions of probation or supervised release. Finally, the report must be disclosed not only to the Sentencing Commission, but also to Congress upon request. 28 U.S.C. § 994(w)(2).

Many presentence report recommendations, while nominally objective, have a significant subjective component. The probation officer's attitude toward the case or the client may substantially influence the report's sentencing recommendations, which enjoy considerable deference from both the judge at sentencing and the reviewing court on appeal. Overlooked factual errors in the report can be especially dangerous, as Rule 32(i)(3)(A) permits a district court to “accept any undisputed portion of the presentence report as a finding of fact[.]”<sup>56</sup> For these reasons, counsel must independently review the entire report, make any necessary objections, and affirma-

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56. Rule 32 permits the court to decline to resolve disputes regarding the presentence report if the controverted matter will not affect the sentence. *See* FED. R. CRIM. P. 32(i)(3)(B) & advisory committee note (2002). Even when the sentence will not be affected, however, counsel should press for resolution of disputes on matters that the Bureau of Prisons could consider in determining where and under what conditions the defendant will serve his sentence. *See generally* U.S. DEP'T OF JUSTICE, [Bureau of Prisons Program Statement 5100.08](#) (2006)

tively present the defense argument for a favorable sentence. Counsel should never assume that the probation officer has arrived at a favorable recommendation, or even a correct one.<sup>57</sup>

The probation officer's presentence investigation will usually include an interview of the defendant. Broader than the interview conducted by pretrial services, this interview has even greater potential to increase a sentence in specific, foreseeable ways. Disclosing undetected relevant conduct may, by operation of guideline §1B1.3, increase the offense level. Information first revealed during the presentence interview may affect Chapter Three adjustments, such as obstruction of justice and acceptance of responsibility. Revelations of undiscovered criminal history may increase the criminal history score or provide a ground for departure. Other revelations, such as drug use and criminal associations, may result in an unfavorable adjustment or upward departure, or otherwise support a higher sentence.

Because the presentence interview holds many perils, the defendant must fully understand its function and importance, and defense counsel should attend the interview. *See* FED. R. CRIM. P. 32(c)(2) (requiring that probation officer give counsel notice and reasonable opportunity to attend interview). In some cases, counsel may decide to limit the scope of the presentence interview—by excluding, for example, any discussion of matters such as relevant conduct or criminal history. While the privilege against self-incrimination applies at sentencing, *Mitchell v. United States*, 526 U.S. 314 (1999), refusal to submit to an unrestricted presentence interview is often hazardous. It can jeopardize the adjustment for acceptance of responsibility or adversely affect decisions whether to follow the guidelines, or where to place the sentence within the guideline range. There is no fixed solution to this dilemma; counsel and the defendant must make

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57. Courts vary in how they view the evidentiary weight of the presentence report, and in what requirements they place upon a defendant to challenge the report's factual allegations. *See generally* THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* §6A1.3, author's cmt. 5(e), 1746–47 (West 2010).

an informed decision as to the best course in the context of the particular case.

**Waiver of Sentencing Appeal.** One of the most important safeguards put in place by the Sentencing Reform Act was the right to appellate review. *See* 18 U.S.C. § 3742. Nonetheless, prosecutors in many districts attempt to insulate sentences from review by requiring the defendant to waive the right to appeal or collaterally attack the sentence as part of a plea agreement.<sup>58</sup> The Supreme Court has never approved these appeal waivers, and a number of district judges have refused to accept them as part of a plea bargain.<sup>59</sup> However, they have been approved (with some limitations) by every court of appeals that has considered them.<sup>60</sup> Federal Rule of Criminal Proce-

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58. According to a recent Attorney General pronouncement, each district is to promulgate written guidance on the inclusion of such waivers. *Department Policy on Charging and Sentencing*, at 2.

59. *See, e.g., United States v. Johnson*, 992 F. Supp. 437 (D.D.C. 1997) (refusing to accept plea bargain containing appeal waiver provision); *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997) (same); *see also United States v. Melancon*, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring) (expressing serious misgivings about legality and wisdom of appeal waivers).

60. For some of these limitations, *see, e.g., United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001) (appeal waiver not binding when sentencing error would work a miscarriage of justice); *United States v. Shedrick*, 493 F.3d 292, 297 (3d Cir. 2007) (same); *United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (refusing to enforce a broad waiver that would expose the defendant to “a virtually unbounded risk of error or abuse by the sentencing court”); *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (waiver not binding if sentence imposed on basis of ethnic bias); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (appeal waiver does not bar appeal if sentence exceeded maximum authorized penalty or was based on constitutionally impermissible factor); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (waiver cannot subject defendant to sentencing at whim of district court); *United States v. Palmer*, 456 F.3d 484, 487–89 (5th Cir. 2006) (sentencing appeal waiver does not limit right to challenge conviction); *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (waiver not effective unless government seeks to enforce it); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (waiver does not prevent appeal if sentence imposed is not in accordance with negotiated agreement); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000) (appeal waivers, like other contracts, subject to public policy constraints).

dure 11(b)(1)(N) requires the district court to advise the defendant of the terms of any bargained sentencing-appeal waiver as part of the plea colloquy.

Unthinking acceptance of an appeal waiver can have disastrous results for the client. The waiver is usually accepted before the presentence report is prepared; at that time, the defendant cannot know what possible errors the probation officer, or the court, will make in determining the guideline range, the propriety of a departure, or the effect of the other sentencing factors in § 3553(a). Counsel can defend against the danger of an unknowing waiver by refusing to agree to one, or by demanding concessions in exchange for it (e.g., a reduced charge, or an agreement to a binding sentence or guideline range). If the prosecutor insists on the waiver, and refuses to give valuable concessions in exchange for it, defense counsel should carefully consider whether to advise the defendant to plead guilty without an agreement, or go to trial.

Counsel should also resist any proposed waiver that does not make specific exception for claims of ineffective assistance or prosecutorial misconduct; without these exceptions, the waiver raises the serious ethical problem of lawyers bargaining to protect themselves from possible future liability.<sup>61</sup>

**Guideline Amendments.** Title 28 U.S.C. § 994(p) authorizes the Sentencing Commission to submit guideline amendments to Congress by May 1 of each year. Absent congressional modification or disapproval, the amendments ordinarily take effect the following November 1. Congress can also direct the Commission to promulgate amendments outside the regular amendment cycle, and it has even amended the guidelines itself. Since the guidelines were first promulgated in 1987, they have been amended more than 700 times; many of these amendments affected multiple guideline provisions. The amendments, along with explanatory notes, are set out chronologically in Appendix C to the *Guidelines Manual*.

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61. *See, e.g., Ohio Advisory Ethics Op. 2001-6* (2001) (citing ethics opinions from other states); Alan Ellis and Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIM. JUST 28 (2010).

Normally, the controlling guidelines are those in effect on the date of sentencing. USSG §1B1.11(a). However, when a detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing, the Ex Post Facto Clause may bar its application. §1B1.11(b)(1); *cf. Miller v. Florida*, 482 U.S. 423 (1987) (applying ex post facto to state sentencing guidelines). Before *Booker*, the circuits agreed that ex post facto applied to the federal guidelines;<sup>62</sup> since *Booker* rendered the guidelines advisory, however, the circuits have divided on the issue.<sup>63</sup>

Each guideline includes a historical note, which facilitates determining whether the guideline has been amended since the offense was committed. If ex post facto principles require use of an earlier guideline, the Commission requires that “[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety.” §1B1.11(b)(2). For resentencing on remand after appeal, the sentencing range is determined by application of the guidelines in effect on the date of the previous sentencing. 18 U.S.C. § 3742(g)(1).<sup>64</sup>

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission, paying particular attention to amendments that the Commission denominates “clarifying.” Clarifying amendments are intended to explain the meaning of previously promulgated guidelines. If a proposed clarifying guideline amendment benefits the client, counsel should seek its application even before the effective date, arguing that it provides authoritative guidance as to the

meaning of the current guideline. Alternatively, even if a beneficial amendment is not deemed “clarifying,” it may support a request for downward departure or variance before its effective date. On the other hand, if a proposed amendment changes the application of a guideline to a defendant’s disadvantage, counsel should not automatically accede to its retroactive application, simply because the Commission characterized it as “clarifying.”<sup>65</sup>

Some amendments may benefit a defendant who is already serving an imprisonment term. If the Commission expressly provides that a beneficial amendment has retroactive effect, and the amendment would reduce the defendant’s guideline range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); USSG §1B1.10, p.s. Even when a beneficial amendment is retroactive, however, policy statement §1B1.10 can have the effect of limiting the availability of a reduced sentence. *See Dillon v. United States*, No. 09-6338, 2010 WL 2400109 (U.S. June 17, 2010) (interpreting §1B1.10).

**Validity of Guidelines.** The Sentencing Commission’s guidelines, policy statements, and commentary must be consistent with all pertinent statutory provisions. 28 U.S.C. § 994(a). As *Booker* made clear, the guidelines must also conform to the requirements of the Constitution. 543 U.S. at 233–37; *see also Mistretta v. United States*, 488 U.S. 361 (1989) (considering constitutional challenges to guideline sentencing). Counsel must scrutinize all pertinent provisions for both statutory and constitutional validity, with special attention to recent amendments. *See, e.g., United States v. LaBonte*, 520 U.S. 751 (1997) (invalidating guideline amendment as contrary to congressional directive in § 994).

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62. *See United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir. 1994) (noting circuits’ agreement).

63. *Compare United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) (ex post facto no longer applicable after *Booker*), with *United States v. Lewis*, 605 F.3d 193, 198–99 (4th Cir. 2010) (ex post facto limits still apply).

64. The sentencing statutes have special rules for guideline amendments passed by Congress. *See* 18 U.S.C. § 3553(a)(4)(A)(i) (requiring that any congressional guideline amendments in place at time of sentencing be applied “regardless of whether such amendments have yet to be incorporated” into the *Guidelines Manual*); *see also* § 3553(a)(5)(A) (same, policy statements); § 3742(g)(1) (same rule applied to remanded cases).

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65. *See, e.g., United States v. Capers*, 61 F.3d 1100, 1009 (4th Cir. 1995) (Commission’s characterization of amendment as “clarifying ‘cannot be accepted as conclusive’”) (citing *United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988)); *United States v. Cianscewski*, 894 F.2d 74, 78 (3d Cir. 1990) (same).

## More About Federal Sentencing

### Reference Materials

II FEDERAL DEFENDERS OF SAN DIEGO, INC., *Defending a Federal Criminal Case*, Ch. 17 (Federal Sentencing) (2010)

ROGER W. HAINES JR. ET AL., *Federal Sentencing Guidelines Handbook* (West 2006).

THOMAS W. HUTCHISON ET AL., *Federal Sentencing Law and Practice* (West 2007).

VERA INSTITUTE OF JUSTICE, *Federal Sentencing Reporter* (University of California Press).

### Online Information and Telephone Support

A wealth of federal sentencing information is available on the Internet. Valuable resources include:

- United States Sentencing Commission, <http://www.ussc.gov>.
- Sentencing Resource Page, Office of Defender Services Training Branch website, [http://www.fd.org/odstb\\_SentencingResource3.htm](http://www.fd.org/odstb_SentencingResource3.htm)
- Professor Douglas A. Berman's Sentencing Law and Policy weblog, <http://sentencing.typepad.com>.
- The Sentencing Project, <http://www.sentencingproject.org/>

The Office of Defender Services Training Branch, Administrative Office of the U.S. Courts, provides a toll-free hotline for defenders and private attorneys providing defense services under the Criminal Justice Act, at 800-788-9908. The Sentencing Commission also offers telephone support on the guidelines, at 202-502-4545.

### About This Publication

This publication is intended to promote the continuing legal education of persons providing representational services under the Criminal Justice Act of 1964. None of the content of this paper is intended as, or should be taken as, legal advice. The views expressed are those of the author and not necessarily those of any other federal defender. Comments or suggestions are welcome: write to [henry\\_bemporad@fd.org](mailto:henry_bemporad@fd.org).

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## 18 U.S.C. § 3553(a). Imposition of Sentence

(a) **Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

(7) the need to provide restitution to any victims of the offense.

# 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)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
<b>Zone A</b> 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b> 9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b> 11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
<b>Zone D</b> 27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life