An Introduction to Federal Sentencing

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IN 1984, THE SENTENCING REFORM ACT replaced the broad discretion traditionally afforded federal judges in sentencing with far more limited authority, controlled by a complex set of mandatory sentencing guidelines promulgated by the U.S. Sentencing Commission. Mandatory-guidelines practice held sway for two decades, until it was fundamentally altered by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which excised the Act's mandatory provisions and rendered the guidelines merely advisory.

Under the system created by *Booker*, judges enjoy far more discretion in their sentencing decisions than they were allowed under the mandatory-guidelines regime. The fact that the guidelines are now advisory rather than mandatory can have a tremendous effect on a defendant's sentence. That 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, and to use the statutory purposes of sentencing to advocate for the best result for the client. 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.

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 the sentence that the court imposed. Congress delegated the responsibility for shaping these determinate sentences 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 punishments 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, most prominently in the fundamental judicial excisions of *Booker*. The Act's provisions, in its original and *post-Booker* forms, are described below.

The Act's Original Requirements. The Sentencing Reform Act directed the sentencing court to impose one or more of four types of punishment in every case: probation, fine, imprisonment, and supervised release. In choosing among these punishments, courts were directed to consider a broad variety of purposes and factors, including "guidelines" and "policy statements" promulgated by the Sentencing Commission. 18 U.S.C. § 3553(a)(4)(A), (a)(5); *see also* 28 U.S.C. § 994(a)(1), (a)(2). But while the Act provided for a broad range of sentencing considerations, it did not allow an equally broad range of sentencing discretion. Instead, it cabined the court's discretion within a fixed set 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 mitigat-

ing 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 sentencing 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,[1] *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 pertinent 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 purposes of sentencing, the kinds of sentences available, the need to avoid unwarranted sentencing disparities, and the need to provide restitution. *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
- 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 few restrictions on the sentence the court may impose within the limits of the statute of conviction.[2] And the sentence the court chooses is subject to appellate review only for "unreasonableness." 543 U.S. at 261.

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 that *Booker* created. A number of these cases are discussed in the sections that follow. (They are also listed at the end of this paper, under "More About Federal Sentencing.")

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[1] *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring that any 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).

[2] The Act does prohibit certain considerations for certain types of punishment, however. For example, a term of imprisonment cannot be imposed or lengthened for rehabilitative purposes, *see* § 3582(a), and a sentence upon revocation of supervised release cannot be imposed for retributive purposes, *see* § 3583(e). *See generally Tapia v. United States*, 564 U.S. 319 (2011) (discussing these statutory provisions).

Guidelines and Statutory Minimums. While *Booker* expanded 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.* U.S. SENTENCING COMM'N *Guidelines Manual* (USSG) §5G1.1 (Nov. 2010) (explaining interaction between guideline and statutory limits).

Numerous federal statutes include minimum prison sentences; some, like the federal "three strikes" law, 18 U.S.C. § 3559(c), mandate life imprisonment. In many cases, the statutory minimum will trump the guideline range, requiring a sentence far greater than would otherwise be recommended by the guidelines, or contemplated by the sentencing court. Statutory minimum sentences in three common types of federal prosecutions are discussed below: drugs, firearms, and child-sex offenses.[3]

Drug offenses. Commonly used federal drug statutes include minimum penalties for offenses that result in death and serious bodily injury, as well as minimums based on drug amounts and prior drug convictions. For certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years' imprisonment.[4]

The minimum and maximum terms can increase if a defendant was previously convicted of a "serious drug felony" or "serious violent felony," which are defined terms. 21 U.S.C. § 802(57), (58). 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.[5]

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 the defendant has a prior § 924(c) conviction. A § 924(c) charge is often, though not always, accompanied by a charge on the underlying substantive offense. In any event, 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, 132–33 (1993). The court may take this into account when imposing a sentence on a predicate non-924(c) count. *Dean v. United States*, 137 S. Ct. 1170, 1176–78 (2017).

The other firearm mandatory minimum is found in 18 U.S.C. § 924(e), the Armed Career Criminal

[3] 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.

[4] For crack cases, these quantity-based minimums were-substantially lowered by the Fair Sentencing Act of 2010, Pub. L. No. 111-220 (eff. Aug. 3, 2010). In late 2018, the President signed into law the First Step Act, which allowed defendants who were sentenced before the Fair Sentencing Act to seek sentence reductions as if the lower minimums had been in effect when they committed their offenses.

[5] 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. Mason*, 628 F.3d 123, 133–34 (4th Cir. 2010); *United States v. Marsh*, 561 F.3d 81, 85 (1st Cir. 2009); *see generally Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

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). The definitions are complex and are frequently the subject of Supreme Court litigation.[6]

Child and sex offenses. The mandatory minimum penalties for sex trafficking and child-sex offenses are among the most severe in the federal system.[7] While simple possession of child pornography does not carry a mandatory minimum sentence, receipt, sale, and distribution do.[8] The distinctions between these offenses can be hard to discern when, as is typical, the offense involves digital images of child pornography obtained from the internet.

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). Section 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 can authorize a sentence below a statutory minimum in one of two circumstances: when a defendant cooperates, or when he meets the requirements of a limited drug-offense "safety valve."

For cooperating defendants, the court may impose a 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 sen-

[6] *See, e.g.*, *Shular v. United States*, 140 S. Ct. 779 (2020) (applying definition of "serious drug offense" in § 924(e)(2)(A)); *Stokeling v. United States*, 139 S. Ct. 544 (2019) (applying definition of "violent felony" in § 924(e)(2)(B)(i)); *Quarles v. United States*, 139 S. Ct. 1872 (2019) (same, § 924(e)(2)(B)(ii)); *United States v. Stitt*, 139 S. Ct. 399 (2018) (same, § 924(e)(2)(B)(ii)). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the "residual clause" in § 924(e)'s "violent felony" definition is unconstitutionally vague. The Court later extended this holding to the similar residual clauses in § 924(c)(3)(B) and 18 U.S.C. § 16(b). *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). But the Court refused to extend *Johnson* to the identical "crime of violence" definition in guideline §4B1.2, holding that, because the Sentencing Guidelines are advisory, they are not susceptible to constitutional vagueness challenges. *Beckles v. United States*, 137 S. Ct. 886 (2017).

[7] *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); § 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.

[8] *See* 18 U.S.C. § 2252(b)(1) (5-year minimum for transportation, receipt, distribution, reproduction, sale or and possession with intent to sell of child pornography); § 2252A(b)(1) (same, but adding a 5-year minimum for advertising child pornography, promoting it, soliciting it, or offering it to a minor). If the defendant has a prior qualifying offense, the minimums increase to 15 years, and a 10-year minimum applies even to simple possession offenses. 18 U.S.C. §§ 2252(b)(2), 2252A(b)(2).

tence 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.

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 does not have more than a certain number of criminal history points under the Guidelines, 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)—with one notable exception: although the First Step Act of 2018 revised the criminal-history criteria under § 3553(f)(1), the Commission has not incorporated that change into §5C1.2. Thus, a defendant may qualify for the statutory safety valve, but not the §5C1.2 safety valve, if he has more than one criminal history point. Similarly, guideline §5C1.2 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. "Good time" credit is limited to a maximum of 54 days per year. 18 U.S.C. § 3624(b). No credit is available for life sentences, or sentences of a year or less—this means, paradoxically, that a defendant sentenced to 12 months in prison will usually serve more time than a defendant sentenced to 12 months and a day. In addition to awarding good time, the Bureau of Prisons may reduce the time to be served by as much as a year for a prisoner who completes a substance-abuse treatment program, § 3621(e)(2), and it has authority to place a defendant in community or home confinement near the end of the imprisonment term. § 3624(c), (g).

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

Probation. Probation is rare in the federal system.[9] It is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a nonpetty 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). (Sentencing ranges are discussed below, under Chapter Five of the *Guidelines Manual*.)

Supervised release. Unlike probation, supervised release is a common punishment, imposed in addition to the sentence of imprisonment. Supervised release is authorized in all cases; it is required for domestic violence offenses, and when the statute for the substantive offense requires it.

[9] In fiscal year 2019, straight probation was imposed in only 6 percent of federal cases. *See* U.S. Sentencing Comm'n, 2019 Sourcebook of Sentencing Statistics fig. D (hereinafter 2019 Sourcebook), available at http://www.ussc.gov.

§ 3583(a); *see, e.g.*, 21 U.S.C. § 841. The guidelines generally call for supervised release following any imprisonment sentence longer than one year, *see* USSG §5D1.1(a)(2); however, they discourage supervised release for aliens who are likely to be deported when released from imprisonment, USSG §5D1.1(c) & comment. (n.5).

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.[10] 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).

Conditions, early termination, and revocation. Although federal law mandates several 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). The court may also extend probation or supervised release terms, or terminate them early. § 3564(c), (d); § 3583(e)(1), (2); *see* USSG §5D1.2, comment. (n.5) (suggesting early termination for defendants who successfully complete drug or alcohol treatment programs while on supervised release).

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).

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 a prison term less than the maximum term of supervised release, it may impose another supervised release term to follow the imprisonment. § 3583(h). For defendants required to register as sex offenders and who commit certain offenses while on release, § 3583(k) mandates revocation and a minimum of 5 years' imprisonment. § 3583(k). In *United States v. Haymond*, 139 S. Ct. 2369 (2019), the Supreme Court found § 3583(k) unconstitutional as applied—because the necessary findings were made by a judge on a preponderance standard, rather than by a jury beyond a reasonable doubt—but declined to decide whether the provision is unconstitutional on its face.

Fines and Restitution. Federal sentencing law authorizes both fines and restitution orders. Fines are imposed in a small percentage of cases.[11] Under the Sentencing Reform Act, the maximum fine

[10] The guidelines track these provisions in the maximum terms they call for. USSG §5D1.2.

[11] *See* 2019 Sourcebook, tbl. 16 (6.6 percent).

is generally $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). It can be made a condition of probation or supervised release for nearly any crime. § 3563(b)(2), § 3583(d). Under § 3663A, 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.[12] 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). In limited circumstances, a restitution award may be determined after sentencing. *See* § 3664(d)(5); *see Dolan v. United States*, 560 U.S. 604 (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(a) (factors to be considered in imposing fine).[13] A defendant who 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. Generally, a "court may not modify a term of imprisonment once it has been imposed ...." 18 U.S.C. § 3582(c). But there are a few exceptions to this rule.

Federal Rule of Criminal Procedure 35(a) allows the court to correct "arithmetical, technical, or other clear error" in the sentence. *See also* § 3582(c)(1)(B). 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)(A). These reductions require a motion from the Director of the Bureau of Prisons, or from a defendant who has satisfied certain administrative requirements. *Id.; see also* USSG §1B1.13, p.s.[14]

The statute also allows the court to reduce a sentence—on motion of the Director, the defendant,

[12] One such statute is 18 U.S.C. § 2259, which mandates restitution for victims of child exploitation. *See generally Paroline v. United States*, 572 U.S. 434, 439 (2014) (addressing necessary "causal relationship ... between defendant's conduct and a victim's losses for purposes of determining the right to, and the amount of, restitution under § 2559").

[13] The circuits disagree whether the sentencing court is required to make specific findings of fact regarding a defendant's ability to pay a fine. *See United States v. Bauer*, 129 F.3d 962, 965 (7th Cir. 1997) (collecting cases).

[14] Before the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, only the Director could make the motion. So far, policy statement §1B1.13 has not been amended to reflect the defendant's ability to bring the motion.

or the court's own motion—when a defendant's term of imprisonment was "based on" a sentencing range that has been lowered by a subsequent guideline amendment, "if such reduction is consistent with applicable policy statements issued by the Sentencing Commission."[15] § 3582(c)(2); *see* USSG §1B1.10, p.s. (The retroactive application of guideline amendments is discussed below, under "Some Traps for the Unwary.")

Finally, the statute permits a "court [to] modify an imposed term of imprisonment to the extent ... permitted by statute ...." § 3582(c)(1)(B). The most recent example of such a statute is § 404 of the First Step Act of 2018.[16] For defendants who were convicted of certain drug offenses before the Fair Sentencing Act of 2010[17]—which adjusted the drug amounts necessary to trigger mandatory minimum and increased statutory maximum sentences—§ 404(b) grants courts discretion to "impose a reduced sentence as if" those parts of the First Step Act "were in effect at the time the ... offense was committed." A motion for such a reduction can be brought by the defendant, the Director of the BOP, or the Government.

Appellate Review. The Sentencing Reform Act allows both the Government and the defendant to appeal a sentence. Consideration of these appeals was originally controlled by § 3742(e). But because that section contained "critical cross-references" to the mandatory-guideline provisions of § 3553(b), *Booker* excised it, replacing it with a requirement that sentences be reviewed for "unreasonableness." 543 U.S. at 260–61 (cleaned up).

Under the "reasonableness" standard, all sentences—whether inside or outside the guideline range—must be reviewed for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 39 (2007); *Kimbrough v. United States*, 552 U.S. 85, 111 (2007). For within-Guidelines sentences, a court of appeals may—but need not—presume the sentence to be reasonable. *Rita v. United States*, 551 U.S. 338, 347–51 (2007).[18] This contrasts with proceedings in the district court, where no such presumption is permissible. *Id.* at 350; *see also Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020) ("[R]easonableness is the label we have given to the familiar abuse-of-discretion standard" that applies to *appellate* review of the trial court's sentencing decision. The substantive standard that Congress has prescribed for *trial* courts is the "parsimony principle" enshrined in § 3553(a).") (cleaned up).

Reasonableness review proceeds in two steps. The court of appeals "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 ex-

[15] In the usual case, a sentence that is the product of a Rule 11(c)(1)(C) plea agreement is "based on" the Sentencing Guidelines, "absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines." *Hughes v. United States*, 138 S. Ct. 1765, 1776 (2018). *But see Koons v. United States*, 138 S. Ct. 1783, 1787–88 (2018) (sentence below mandatory minimum, which was the product of a Government substantial-assistance motion under § 3553(e), was "based on" the mandatory minimum, even though Guidelines range was below the statutory minimum).

[16] Pub. L. No. 115-391, § 404, 132 Stat. 5194.

[17] Pub. L. No. 111-220, 124 Stat. 2372.

[18] Some circuits do not apply the presumption. *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).

plain 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 court then considers "the substantive reasonableness of the sentence imposed" under the abuse-of-discretion standard. *Gall*, 552 U.S. at 51.[19]

In practice, reversals for substantive unreasonableness are vanishingly rare. In Fiscal Year 2019, for example, courts of appeals found only 6 sentences to be substantively unreasonable.[20] A procedural challenge is far more likely to succeed, which is not to say that success on that score is common. Looking again at Fiscal Year 2019, courts of appeals vacated only 351 sentences on procedural reasonableness grounds, out of more than 4,100 appeals presenting a sentencing issue.[21] Almost 88 percent of those procedural reversals were because the district court improperly calculated the Guidelines range.[22]

While *Booker* adopted a new standard of review to replace § 3742(e), it did not address the other provisions of § 3742, which govern the right to appeal, the disposition that the appellate court may order, and sentencing on remand. The Court later held that *Booker*'s reasoning also required invalidation of § 3742(g)(2), which purported to limit sentencing authority on remand. *Pepper v. United States*, 562 U.S. 476 (2011); *see also 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). 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 Federal Sentencing" and "Some Traps for the Unwary.")

Victims' Rights. Title18 U.S.C. § 3771 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). It provides a number of other rights as well, including the right "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).

Petty Offenses; Juveniles. By its terms, the Sentencing Reform Act applies to both petty offenses (offenses carrying a maximum term of 6 months or less) and juvenile delinquency cases. But the Act has had little effect on these cases because the Sentencing Commission has chosen not to promulgate separate guidelines for them. *See* USSG §1B1.9, §1B1.12, p.s. That said, the Supreme

[19] 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, e.g.*, *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*, 555 U.S. 261, 264 (2009) (per curiam) (same). *Cf. United States v. Irey*, 612 F.3d 1160, 1212 (11th Cir. 2010) (en banc) (applying "closer review" in child pornography production case).

[20] 2019 Sourcebook, tbl. A-6. One judge has observed that the presumption of reasonableness "is non-binding in theory but nearly ironclad in fact[,]" and bemoaned "the lack of meaningful judicial standards for determining the reasonableness of Guidelines sentences." *United States v. Neba*, 901 F.3d 260, 266–67 (5th Cir. 2018) (Jones, J., concurring).

[21] 2019 Sourcebook, tbl. A-6.

[22] *Id.*

Court has read the Juvenile Delinquency Act to require consideration of guidelines for adults 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)).

Statutory Amendments. The Sentencing Reform Act has been amended many times since it was enacted more than 35 years ago. 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 statute requires a court to consider when it sentences a defendant. *See* 18 U.S.C. § 3553(a)(4)(A), (a)(5). 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. It also states the Commission's views on *Booker*.

While *Booker* rendered the guidelines advisory, it did not diminish the importance of understanding the guidelines' application in a given 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 within-Guidelines sentences has markedly decreased since *Booker*, courts still follow the Guidelines' recommendations more often than not.[23]

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 other cases, the applicable guideline range can be lower than the sentence a court would otherwise be inclined to impose. Counsel must understand the *Guidelines Manual* to determine whether its recommendations hurt or help the defendant.

Chapter One: Introduction and General Application Principles. Chapter One introduces the Guidelines and sets out definitions that apply throughout the *Guidelines 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 applicable guideline section 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

[23] In Fiscal Year 2019, 51.4 percent of sentences were within the Guidelines range. *See* 2019 Sourcebook, tbl. 29. Another 24 percent of sentences were the product of a Guidelines-sanctioned departure. *See id.*

"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)(a), p.s. (The Guidelines' Resolution of Major Issues).

The relevant-conduct guideline usually requires sentencing based not only on the conduct comprising the offense of conviction, but on "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused" by the defendant, regardless of whether those acts "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). For many offenses, such as drug and fraud crimes, relevant conduct extends even 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).[24]

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) "within the scope of the jointly undertaken criminal activity," (2) "in furtherance of that criminal activity," and (3) "reasonably foreseeable in connection with that 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. (nn.3, 4). Relevant conduct does not include the conduct of others that occurred before the defendant joined, even if the defendant knew of that conduct. §1B1.3, comment. (n.3(B)).

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. *See United States v. Watts*, 519 U.S. 148, 153–54 (1997) (per curiam) (discussing acquitted conduct). Because it allowed increased punishment based on judge-found facts, mandatory relevant-conduct sentencing was 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. Despite the ruling in

[24] It is important to note that, although the relevant conduct rules are generally applicable to guideline determinations, specific language in other provisions of the *Guidelines Manual* may limit its effect in particular cases. *See generally* §1B1.3(a) (relevant conduct rules apply "[u]nless otherwise specified"); §1B1.1, comment. (n.1(H)) (term "offense" includes all relevant conduct "unless a different meaning is specified or is otherwise clear from the context"). For example, a particular provision may refer to conduct on the part of "the defendant," rather than conduct that "the offense involved." *See, e.g.*, §2K2.1(b)(5) & comment (n.13(B)) (limiting liability for firearm-trafficking adjustment to conduct covered by §1B1.3(a)(1)(A), not the broader relevant-conduct rules elsewhere in §1B1.3); §2K2.6(b)(1) & comment. (n.1(A)) (same, use of body armor in connection with another offense); §3C1.1 & comment. (n.9) (same, obstruction of justice).

Booker, a constitutional challenge to a judge's relevant conduct finding may still be possible, if that finding provides the only basis to uphold a sentence as reasonable. (This sort of challenge is briefly described below, under "Validity of Guidelines.")

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 Federal Sentencing.")

Guidelines, policy statements, and commentary. The Sentencing Reform Act authorized the Commission to promulgate both sentencing "guidelines," 28 U.S.C. § 994(a)(1), and "general policy statements regarding application of the guidelines," § 994(a)(2). The Commission also issues commentary to accompany guidelines and policy statements. USSG §1B1.7. Policy statements and commentary can interpret a guideline or explain how it is to be applied. *Id.* In such circumstances, failure to follow a policy statement or commentary can result in a misapplication of the guideline. *See Stinson v. United States*, 508 U.S. 36, 38 (1993) (commentary); *Williams v. United States*, 503 U.S. 193, 201 (1992) (policy statement). Policy statements and commentary can also "suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines." §1B1.7 (Policy statements on departures are discussed below, under Chapters Four and Five).

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 17 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. Many of these adjustments are cumulative, and together they can dwarf the initial base 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, five categories of offense account for the bulk of federal criminal cases: drugs, economic offenses (such as fraud and theft), child pornography, firearms, and immigration.[25]

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 and may be capped at level 32. §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

[25] *See* 2019 Sourcebook, fig. 2 (five categories account for 86% of sentenced offenders).

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.5). 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 five exceptions: methamphetamine, amphetamine, PCP, hydrocodone, and oxycodone. For other drugs "unusually high purity may warrant an upward departure" from the guideline range. *Id*. comment. (n.27(C)). If the offense involves more than one type of drug, then the court must "convert each of the drugs to its converted drug weight, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level." *Id*. comment. (n.8(B)).

The drug guidelines include many provisions that raise the offense level for specific aggravating factors, such as the possession of a firearm, §2D1.1(b)(1); the use or threat of violence, (b)(2); and for maintaining premises for the purpose of manufacturing or distributing drugs, (b)(12). Some, but not all, of these adjustments apply cumulatively. The guideline also includes special provisions for defendants who are deemed to have an aggravating or minimal role. §2D1.1(b)(16), (17). Guideline §2D1.1(b)(16) provides a 2-level reduction if the defendant meets the criteria of the safety-valve guideline, §5C1.2.[26]

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.[27] 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, 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.

Child pornography. Child pornography offenses represent a rapidly growing area of federal prosecution, one for which the Chapter Two guidelines are particularly severe. Guideline §2G2.2 provides a base offense level of 18 for most child-pornography possession offenses, and a level of 22 for receipt, distribution, and other offenses. The distinctions between possession, receipt and distribution offenses can often be difficult to discern, especially when a case involves pornography obtained from the internet. Yet the characterization of a particular offense can have a tremendous effect on the applicable offense level: mere receipt can provide a reduction of 2 levels, whereas distribution can increase the offense level by as many

[26] These criteria used to be the same as those in 18 U.S.C. § 3553(f). The First Step Act of 2018 broadened the statutory criteria, but the Commission has not amended §5C1.2 to conform to those changes.

[27] Although the loss amounts have been revised over the years, the Commission has only adjusted them for inflation one time, in 2015. *See* U.S.S.C. App. C, amend. 791.

as 7 levels. §2G2.2(b)(1), (b)(3). Use of a computer automatically increases the offense level by 2, §2G2.2(b)(6), and other increases apply depending on the number of images, or the type of pornography portrayed. Because it produces high offense levels even for first-time offenders, §2G2.2 has encountered resistance from sentencing courts around the country, and child-pornography defendants receive sentences below the Guidelines range in almost two-thirds of cases.[28]

Firearms offenses. Chapter Two, Part K covers a wide variety of federal firearms offenses; the most common are charges arising from the purchase or 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, the criminal history of the defendant, and other factors. 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 exported a firearm, or possessed or used it in connection with another felony offense, guideline §2K2.1(b)(6) provides a 4-level increase and an alternative minimum offense level of 18.[29] A further increase is possible under §2K2.1(c)(1), 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.[30] Note an important limitation: the cross-reference applies only if the other offense involved "the particular firearm or firearms cited in the [instant] offense of conviction." App. C, amend. 784 (Reason for Amendment); *see* §2K2.1, comment. (nn.14(A), (E)).

Immigration offenses. Immigration offenses make up the largest category of offenses being sentenced in federal court—almost 40 percent of cases in FY 2019.[31] 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).[32] 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. §2L1.1(b)(1).

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[28] *See* 2019 Sourcebook, tbl. 31 (courts sentence below Guidelines range in almost 70% of child pornography cases).

[29] Note that exportation charges under 18 U.S.C. § 554 can trigger an even higher guideline range. *See* USSG §2M5.2(a)(1).

[30] *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).

[31] *See* 2019 Sourcebook, fig. 2.

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

Guideline §2L1.2 covers the offense of unlawfully entering or remaining in the United States after a prior removal. The guideline gives little weight to the actual offense conduct—the illegal reentry—assigning a base offense level of just 8. §2L1.2(a). Instead, the defendant's criminal history is the main driver of the offense level calculation. §2L1.2(b). For years, subsection (b) provided for enhancements based on the nature of a defendant's prior convictions (*e.g.*, "crime of violence," "drug trafficking offense," "aggravated felony"), their age, and sentence length. *See* §2L1.2(b)(1) (Nov. 2015). The enhancement scheme spawned a tremendous amount of litigation over whether a prior conviction qualified for a particular enhancement, most of it involving the "categorial approach" to making that determination. *See* App. C, amend. 802 (Reason for Amendment). In 2016, after a multi-year study, the Commission completely revamped subsection (b)'s enhancement scheme. It still consists of enhancements for prior convictions, but now the number and extent of the enhancements turn primarily on the length of the sentences for prior convictions. A defendant can receive separate enhancements for offenses committed before and after his first removal order, and for prior illegal reentries. Unlike the pre-2016 enhancement scheme, prior convictions trigger enhancements only if they receive criminal history points under Chapter 4. §2L1.2, comment. (n.3). That said, if the resulting offense level substantially overstates or understates the seriousness of a prior conviction, perhaps because the conviction is too old to receive criminal history points, the guideline encourages a departure. §2L1.2, comment. (n.6). It also encourages downward departures for illegal reentry defendants who have assimilated into U.S. culture. *Id.*, comment. (n.8).

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 having an aggravating role, or a downward adjustment for a mitigating one. *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 characterization of a defendant's role is based on all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may receive a downward adjustment (or face an upward enhancement) 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)).

A 2015 study found "that mitigating role is applied inconsistently and more sparingly than the Commission intended." *See* App. C, amend. 794 (Reason for Amendment). In response, the Commission amended §3B1.2's commentary to resolve a circuit split over how to assess a defendant's conduct relative to other participants in the offense, reject the approach of some circuits that disquali-

fied a defendant who was "indispensable" or "integral" to the offense from receiving the adjustment, clarify the interaction between §3B1.2 and relevant conduct principles, and provide a nonexclusive list of factors for courts to consider when applying the adjustment. *See id.*; §3B1.2, comment. (nn.3–5).

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, [33] 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 count 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(a). 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 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). (Like relevant conduct, grouping rules can be especially important during plea negotiations. See discussion below, under "Plea Bargaining and Federal Sentencing.")

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); *see id.*, comment. (n.1) (providing nonexclusive list of factors to consider). Pleading guilty provides "significant evidence" of acceptance of responsibility but does

[33] 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).

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—for example, when a defendant goes to trial to preserve a Fourth Amendment claim or other constitutional issues "that do not relate to factual guilt." *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." *Id*., 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.[34] Nevertheless, while "[a] defendant may remain silent" about relevant conduct, "a defendant who falsely denies, or frivolously 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)). Still, a good-faith challenge to relevant conduct does not bar a defendant from receiving the adjustment: "[T]he fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous." *Id*.; *see* App. C, amend. 810 (Reason for Amendment).

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 Federal Sentencing.") If the court agrees that these circumstances exist, it "should grant the motion." *Id*., comment. (n.6). "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." *Id*.

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 length of the sentence. USSG §4A1.1. Points are added for committing the instant offense while under any form of criminal justice sentence. §4A1.1(d).

A prior sentence 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 sentences or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. §4A1.2(c)–(j).[35] Sentences imposed on the same

[34] 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).

[35] 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).

day, or imposed for offenses that were charged together, are treated as one sentence, unless the offenses were separated by an intervening arrest. §4A1.2(a)(2).[36]

Criminal history departure. Policy statement §4A1.3 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. 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 can apply in Chapter Two guidelines as well. *See, e.g.*, §2K2.1(a) & comment. (n.1) (firearms offenses). 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,

[36] 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(e). 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(B)).

or possessing child pornography. §4B1.5, comment. (n.2). However, a similar provision in Chapter Two can provide a 5-level increase at sentencing for child pornography offenses. §2G2.2(b)(5) & comment. (n.1).

Chapter Five: Determining the Sentence; Departures. Chapter Five includes guidelines on imposing imprisonment, probation, fines, restitution, and supervised release. It sets out the sentencing table of applicable guideline imprisonment ranges, sentencing options under the guidelines, and the Commission's policy statements regarding departures from the guideline range.

The Sentencing Table. The sentencing table in Chapter 5, Part A (appended) 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). 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. A 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. *See, e.g.*, §5G1.2(d), §5G1.3(a). *See also* 18 U.S.C. § 3584 (setting out court's statutory authority to impose consecutive or concurrent sentences); *Setser v. United States*, 566 U.S. 231 (2012) (under § 3584, court has discretion to order federal sentence to run consecutively to anticipated, but not yet imposed, state sentence).[37]

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 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)(1) & (b)(2), p.s. Now, with the exception of special government-sponsored downward departures, courts sentencing outside the Guidelines range rely far more often on the factors in § 3553(a) than on the departure grounds listed in Chapter Five.[38] Despite the increase in non-guideline sentences,

[37] *Setser* suggested that the same may not hold true for an anticipated federal sentence, but did not resolve that question. Courts of appeals have since held that a district court may *not* order a federal sentence to run consecutively to an anticipated, but not yet imposed, *federal* sentence. *See, e.g., United States v. Ramon*, 958 F.3d 919, 922–23 (10th Cir. 2020).

[38] *See* 2019 Sourcebook, tbl. 29 (excepting government-sponsored downward departures and variances, courts departed below the guideline range in 2.3% of all cases (1,752 sentences) and varied downward in

however, the Chapter Five policy statements on departures can have an important effect on the sentence in some cases.[39]

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. USSG Ch.5, Pt.H, intro. comment. Other characteristics—age, mental and emotional conditions, physical condition, and military service—may be grounds for departure if "individually or in combination with other [offender] characteristics" they are "present to an unusual degree and distinguish[ ] the case from the typical cases covered by the guidelines." *Id.* The operative words in these policy statements 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).

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).[40]

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 Federal Sentencing.")

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).

17.8% of cases (13,525 sentences)). Sentences above the guideline range are also more likely to be based on § 3553(a) considerations (1.9% of cases) than on departure grounds (0.5% of cases). *Id.*

[39] 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.21) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.27) (downward departure in certain reverse-sting drug cases, and upward departure for drug quantity, purity, or potency); §2K2.1, comment. (n.11) (upward departure for number or type of firearms or ammunition, or particularly dangerous firearms offenses); §5D1.1, comment. (n.1) (depart and not impose supervised release when not required and not necessary).

[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. 2008) (courts have wide discretion to rely on discouraged factors).

Like Part H, Part 5K contains the Commission's prohibition of certain circumstances as departure grounds. *See, e.g.*, §5K2.12, p.s. (financial difficulties), §5K2.13, p.s. (diminished capacity in violent offenses). 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), p.s.; §5K2.22, p.s.

Keep in mind that departure grounds are generally not limited to those identified by the Commission, and that 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.

Policy statement §5K3.1 allows departures of up to 4 levels, pursuant to a government-authorized early disposition program. (Such "fast-track" programs are discussed below, under "Plea Bargaining and Federal Sentencing.")

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 Federal Sentencing.")

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. §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 Guidelines-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)(1), (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. Particular guidelines may require a higher standard of proof in specific contexts. *See, e.g.*, USSG §3A1.1(a) (adjustment for hate-crime motivation requires proof beyond a reasonable doubt). And courts are divided over whether a higher standard may be required if a fact has a disproportionate effect on the sentence imposed.[41]

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 v. United States*, 553 U.S. 708, 713–15 (2008). 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 715; *cf.* FED. R. CRIM. P. 32(i)(1)(C) (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 Federal Sentencing.") While the parties 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

[41] *Compare United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006) (clear and convincing standard required), *with United States v. Fisher*, 502 F.3d 293, 307 (3d Cir. 2007) (rejecting *Staten*); *see also United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008) (reserving question whether higher standard of proof may be necessary in an "extraordinary or dramatic case").

statutes. Appendix C includes, in chronological order, the amendments to the *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) in advocating for a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. And counsel must always remember that disagreement with the applicable guideline can, by itself, support a sentence below, or above, the guideline range

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 for both individual and organizational defendants, available in Appendix D of 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).[42] Facing these sometimes conflicting demands, the original members of the Commission could not agree 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 349; *see also Kimbrough*, 552 U.S. at 108–09.

Not all guidelines and policy statements, however, are tied to empirical evidence. *See Kimbrough*,

[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 Sheet of Paper*, 21 FED. SENT'G REP. 7, 7–8 (2008).

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).[43] 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 sentences 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 explicit congressional directives, to increase the certainty and severity of punishment 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).

Considering 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*, 555 U.S. at 263–64 (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 351, 357. A guideline's lack of empirical foundation can help support such arguments.

Before challenging a guideline's empirical basis, however, counsel should consider the guidelines' recommendations in the larger context of client advocacy. In some 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

[43] Other commonly applied guidelines suffer from a similar lack of empirical support. *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 184–87 (2d Cir. 2010) (discussing child pornography guideline); *see generally United States v. Jones*, 531 F.3d 163, 173 n.7 (2d Cir. 2008) (noting that Commission lacked empirical basis for its initial set of guidelines).

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.[44] By contrast, when a guideline suggests a sentence that is too high, defense counsel should be prepared to challenge its 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.

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, while the guidelines sometimes get the balance of § 3553(a) factors right, they often do not. 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 relevant guidelines, policy statements, and commentary in the *Guidelines Manual*, as well as the wide variety of mitigating factors that are applicable under § 3553(a). If the defendant is requesting a sentence below the guideline range, the memorandum should provide a ready foundation for the sentencing court's required 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*, 553 U.S. at 715–16. And counsel must scrupulously observe appellate rules on preservation of error to protect issues for possible review under 18 U.S.C. § 3742.

Plea Bargaining and Federal Sentencing

"[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Approximately 90 percent of defendants in federal court end up pleading guilty to one or more charges, [45] and the decision whether to plead guilty—and if so on what terms—can have a tremendous effect on the sentence imposed.

The Department of Justice takes the position that "[p]lea agreements should reflect the totality of a defendant's conduct[,]" and accordingly that "prosecutors will generally seek a plea to the most serious offense that is consistent with the nature

[44] *See, e.g., United States v. Jones*, 639 F.3d 484, 488 (8th Cir. 2011) (presumption of reasonableness applies to departure based on policy statement §4A1.3); *cf. United States v. Mohamed*, 459 F.3d 979, 985–87 (9th Cir. 2006).

[45] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. D-4 (2019).

and full extent of the defendant's conduct and likely to result in a sustainable conviction[.]" DOJ Manual 9-27.400. At the same time, the Department recognizes that plea bargaining should be "informed by an individualized assessment of all of the 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 a particular case or defendant. 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 following discussion provides no more than a starting point for that essential understanding.[46]

The Types of Federal Plea Agreement. 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 the supposed sentencing 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 briefly discussed below.

Charge bargains. 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. *See* FED. R. CRIM. P. 11(c)(1)(A). If the other charges are not dismissed, Rule 11(c)(5) 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.

[46] The Supreme Court has recognized the importance of providing sound legal advice concerning a plea bargain offer, holding that poor advice that led a defendant to reject a plea bargain for a sentence far less than he ultimately received constituted ineffective assistance of counsel, even though the defendant received a fair trial. *See Cooper*, 566 U.S. 156. As a general matter, even a failure to communicate a favorable plea bargain offer to a defendant will constitute ineffective assistance of counsel. *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

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.[47] 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-Guidelines 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 consecutively, 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 offenses (most notably the firearms offenses in 18 U.S.C. § 924(c)) require a consecutive sentence.

Sentencing recommendations; specific sentencing agreements. 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 specific sentence or sentencing range, or the application of a particular guideline or policy statement. Sentence recommendations under Rule 11(c)(1)(B) are nonbinding: A defendant who enters a plea agreement containing such a recommendation must understand that even if the court rejects the recommendation, 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. *See* FED. R. CRIM. P. 11(c)(5). Policy statement §6B1.2 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 or varies from the range for justifiable reasons.

[47] Note, however, that dismissed charges which are not considered in determining the guideline range can still provide grounds for upward departure. §5K2.21, p.s.

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 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. *See* USSG §3E1.1, comment. (n.3). Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. *See id.*, comment. (n.2).

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, a plea of guilty that confers no other benefit will not improve the guideline range. Nevertheless, a guilty plea may benefit the defendant in other ways—for example, 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).

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). 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*. Likewise, the Government "should not withhold [the] motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." *Id*., comment. (n.6).

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 who has committed an offense." 28 U.S.C. § 994(n). 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, 125–26 (1996).

When the court considers a cooperation motion, it should give "[s]ubstantial weight" to "the government's evaluation of the extent of the defend-

ant'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).[48] 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 government, even if the discussions do not ultimately result in a guilty plea.[49]

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. Policy statement §5K3.1 authorizes downward departures, on a Government motion, for "early disposition programs," more commonly known as "fast track." The DOJ has adopted "uniform baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted." Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys on Department Policy on Early Disposition or "Fast-Track" Programs 2 (Jan. 31, 2012). But the revised policy still grants local U.S. Attorneys discretion to establish more restrictive eligibility criteria and to allow more limited sentencing relief. *Id.* at 2–4. Because of this discretion, fast-track eligibility and benefits still vary widely from district to district.

If a defendant is eligible for a fast-track program, counsel should consider whether it would benefit the defendant to participate, considering the important rights that the program may require the defendant to relinquish (such as a waiver of the right to appeal). On the other hand, if a defendant is not eligible for a district's fast-track program, but would be eligible in other districts, counsel should consider whether to seek a below-guideline sentence on the ground that it is necessary avoid unwarranted disparity. The circuits are currently divided on the propriety of imposing a below-guideline sentence on this basis.[50]

[48] *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); *see also* 2019 Sourcebook, tbl. 44 (noting 829 cooperation-based reductions granted in absence of government motion).

[49] A defendant may waive the protections of Rule 410 as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196, 197 (1995).

[50] *See United States v. Lopez-Macias*, 661 F.3d 485, 491 n.6 (10th Cir. 2011) (discussing split).

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 prepared for its possible effect. *See* 18 U.S.C. § 3153(c)(1) (requiring that pretrial services report be made available to defense).

Presentence 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. The report can also affect the conditions of probation or supervised release. 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.

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—recommendations that 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 sentencing court to "accept any undisputed portion of the presentence report as a finding of fact[.]"[51] For these reasons, counsel must inde-

[51] 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 amendment). 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 condi-

pendently review the entire report, make any necessary objections, and affirmatively 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.[52]

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, 316 (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 an informed decision as to the best course in the context of the 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. The Supreme Court has never specifically approved these appeal waivers, but they have been approved (with some limitations) by every court of appeals that has considered them.[53] Federal Rule of Criminal Procedure 11(b)(1)(N) requires the court to

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tions the defendant will serve his sentence. *See generally* U.S. DEP'T OF JUSTICE, Bureau of Prisons Program Statement 5100.08 (2019).

[52] 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. *Compare, e.g., United States v. Moreno-Padilla*, 602 F.3d 802, 808–09 (7th Cir. 2010) (defendant bears burden of showing that information in report is unreliable; mere objection is insufficient), *with United States v. Davis*, 583 F.3d 1081, 1095 (8th Cir. 2009) (when defendant objects to report, government must produce evidence on disputed facts). *See generally* THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE §6A1.3, author's cmt. 5(e), 1782–83 (West 2020).

[53] 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. 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

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.[54]

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 800 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*.

Normally, the court must use "the Guidelines Manual in effect on the date that the defendant is sentenced." USSG §1B1.11(a). But if using that version of the Manual would violate the Constitution's Ex Post Facto Clause—such as when a detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing—"the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." §1B1.11(b)(1); *see Peugh v. United States*, 569 U.S. 530 (2013).

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

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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, 488–89 (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 does not accord 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).

[54] *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).

guidelines in effect on the date of the previous sentencing. 18 U.S.C. § 3742(g)(1).[55]

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission, paying close attention to amendments that the Commission denominates "clarifying." Clarifying amendments are intended to explain the meaning of previously promulgated guidelines. 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."[56] On the other hand, 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. Even if a beneficial amendment is not deemed "clarifying," it may support a request for downward departure or variance before its effective date.

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. Note, however, that the availability or extent of a reduced sentence under a beneficial retroactive amendment may be limited by the language of policy statement §1B1.10, or by language in the defendant's plea agreement.[57]

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). Counsel must scrutinize all pertinent guideline provisions for statutory 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).

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). Even under the advisory system, it may be possible to argue that a guidelines-based sentence violates the Sixth Amendment. In particular, when the only bases for upholding a sentence as reasonable are judge-made factual determinations under the guidelines, the sentence may be challenged based on the reasoning in *Booker*.[58] This is particularly the case when, because the sentence is within the

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[55] 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).

[56] *See, e.g., United States v. Capers*, 61 F.3d 1100, 1110 (4th Cir. 1995) (Commission's characterization of amendment as "clarifying 'cannot be accepted as conclusive'") (quoting *United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988)); *United States v. Cianscewski*, 894 F.2d 74, 78 n.13 (3d Cir. 1990) (same).

[57] *See Dillon v. United States*, 560 U.S. 817 (2010) (notwithstanding *Booker*, limiting language in policy statement §1B1.10 is binding at sentence-modification proceedings under § 3582(c)(2).

[58] *See Rita*, 551 U.S. at 372–76 (Scalia, J., concurring) (sentence that is substantively reasonable only because of judge-found fact would violate Sixth Amendment); *see also Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of cert.) (same); *United States v. White*, 551 F.3d 381, 388–91 (6th Cir. 2008) (Merritt, J., dissenting) (discussing issue).

guideline range, it is presumed reasonable on appeal.[59]

More About Federal Sentencing

The Supreme Court's Post-*Booker* Sentencing Cases. Since *Booker*, the Supreme Court has decided many cases directly involving federal sentencing practice under the advisory guidelines. Selected decisions are listed below, with a brief description of the holding. (Many are discussed in greater detail elsewhere in this paper.) Like *Booker*, the first three listed cases—*Rita*, *Gall*, and *Kimbrough*—are essential reading, as they provide the framework for sentencing advocacy in the advisory guidelines system. But the other cases can also be important, especially as they relate to issues in a particular case.

Rita v. United States, 551 U.S. 338 (2007). It is permissible, but not required, for a court of appeals to presume that a sentence within the applicable guideline range is reasonable; however, the district court may not presume a guideline sentence is reasonable, and it must address non-frivolous arguments for a sentence outside the range; when sentencing issues are simple, extensive written reasons for the sentence are not required by 18 U.S.C. § 3553(c).

Gall v. United States, 552 U.S. 38 (2007). The abuse-of-discretion standard of review applies equally to sentences inside and outside the guidelines range; after correctly calculating the range, the court must then consider all of the factors in § 3553(a); no extraordinary individual circumstances are required for a non-guideline sentence, and the court of appeals should not substitute its judgment for that of the district court.

Kimbrough v. United States, 552 U.S. 85 (2007). Sentencing courts are free to vary from the guideline range based solely on policy considerations, including disagreements with the guidelines; while closer appellate review might be appropriate for sentences based on such disagreements, there is no occasion to discuss the need for closer review in the case of the crack cocaine guidelines, because those guidelines are not based on empirical data or national experience.

Irizarry v. United States, 553 U.S. 708 (2008). Federal Rule of Criminal Procedure 32(h)'s requirement that sentencing court give specific notice of guideline departures does not apply to variances under the advisory guideline system; counsel has the right to comment on matters relating to the appropriate sentence under Rule 32(i)(1)(C).

Moore v. United States, 555 U.S. 1 (2008) (per curiam). The sentencing court's belief that it was not free to disagree with the crack cocaine guideline required remand for resentencing.

Spears v. United States, 555 U.S. 261 (2009) (per curiam). A sentencing court is free to reject the crack-cocaine guidelines' 100-to-1 crack-to-powder ratio based on a policy disagreement, and it may substitute its own crack-to-powder ratio for that of the Sentencing Commission.

Nelson v. United States, 555 U.S. 350 (2009) (per curiam). A sentencing court cannot presume a guidelines sentence to be reasonable; the court erred by presuming the reasonableness of the guidelines range and requiring the defendant to provide a good reason for a sentence outside that range.

Dillon v. United States, 560 U.S. 817 (2010). Because a sentence-modification proceeding based

[59] *See Marlowe v. United States*, 555 U.S. 963 (2008) (Scalia, J., dissenting from denial of certiorari) (sentence for negligent homicide increased from 51- to 63-month guide-line range to life imprisonment, based on judge's determination that defendant committed second-degree murder).

on a retroactive guidelines amendment under 18 U.S.C. § 3582(c)(2) is not a plenary resentencing, *Booker* is inapplicable.

Pepper v. United States, 562 U.S. 476 (2011). *Booker* applies to a resentencing hearing on remand from the court of appeals; 18 U.S.C. § 3742(g)(2), which restricts the discretion of the resentencing court to impose a non-guideline sentence, is constitutionally invalid.

Tapia v. United States, 564 U.S. 319 (2011). Title 18 U.S.C. § 3582(a) precludes the sentencing court from imposing or lengthening a prison term for the purpose of promoting rehabilitation.

Peugh v. United States, 569 U.S. 530 (2013). It is an ex post facto violation to sentence a defendant under a version of the Sentencing Guidelines that provides a higher Guidelines range than the version in place when the offense was committed.

Alleyne v. United States, 570 U.S. 99 (2013). As with facts that increase the *maximum* sentence, any fact that increases a mandatory *minimum* sentence is an element of crime and must either be admitted by the defendant or found by a jury beyond a reasonable doubt.

Hughes v. United States, 138 S. Ct. 1765 (2018). In the usual case, a sentence that is the product of a Rule 11(c)(1)(C) plea agreement is "based on" the Sentencing Guidelines, for purposes of 18 U.S.C. § 3582(c)(2), "absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines."

Reference Materials

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Thomas W. Hutchison et al., FEDERAL SENTENCING LAW AND PRACTICE (West 2020).

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/
- Office of Defender Services Training Branch website, http://www.fd.org. also 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.
- Professor Douglas A. Berman's Sentencing Law and Policy blog, http://sentencing.typepad.com/

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 Federal Public Defender for the Western District of Texas and not necessarily those of any other federal defender. Comments or suggestions are welcome: write to brad_bogan@fd.org.

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
Zone A	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
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	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
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	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

WORKSHEET A

OFFENSE LEVEL

Defendant _____ District/Office _____

Docket Number _____

Count Number(s) _____ U.S. Code Title & Section _____:_____; _____:_____

Guidelines Manual Edition Used: 20___ (*Note*: The Worksheets are keyed to the November 1, 2018 *Guidelines Manual*)

INSTRUCTIONS

Complete a separate Worksheet A for each count of conviction or as required in a situation listed at the bottom of Worksheet B.***** *Exceptions*: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (*see* §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (*see* §3D1.2(a) & (b)).

1. Offense Level (*See* Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

Guideline	Description	Level

If the Chapter Two guideline requires application of a cross reference or other reference, an additional Worksheet A may be needed for that analysis. *See* §1B1.5.

Sum ☐

2. Victim-Related Adjustments (*See* Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

3. Role in the Offense Adjustments (*See* Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (–) sign in front of the adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

4. Obstruction Adjustments (*See* Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

5. Adjusted Offense Level

Enter the sum of Items 1–4. If this Worksheet A does not cover all counts of conviction or situations listed at the bottom of Worksheet B, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

☐ Check here if **all** counts (*including* situations listed at the bottom of Worksheet B)***** are addressed on this one Worksheet A. If so, no Worksheet B is used.

☐ If the defendant has no criminal history, enter "I" here and on Worksheet D, Item 4. No Worksheet C is used.

WORKSHEET B

MULTIPLE COUNTS*

Defendant _____ Docket Number _____

INSTRUCTIONS

STEP 1: Determine if any of the counts group under §3D1.2(a)–(d) ("the grouping rules"). All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically: (1) counts grouped under §3D1.2(d); or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (*see* §3D1.2(a)). Explain the reasons for grouping:

_____

_____

_____

STEP 2: Using the box(es) provided below, for each group of "closely related counts" (*i.e.*, counts that group together under any of the four grouping rules), enter the highest adjusted offense level from Item 5 of the various Worksheets "A" that comprise the group. *See* §3D1.3. Note that a "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.

STEP 3: Enter the number of units to be assigned to each group (*see* §3D1.4) as follows:

- One unit (1) for the group of counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. Adjusted Offense Level for the First Group of Counts

Count number(s) _____ ☐ _____ Unit

2. Adjusted Offense Level for the Second Group of Counts

Count number(s) _____ ☐ _____ Unit

3. Adjusted Offense Level for the Third Group of Counts

Count number(s) _____ ☐ _____ Unit

4. Adjusted Offense Level for the Fourth Group of Counts

Count number(s) _____ ☐ _____ Unit

5. Adjusted Offense Level for the Fifth Group of Counts

Count number(s) _____ ☐ _____ Unit

6. Total Units

_____ **Total Units**

7. Increase in Offense Level Based on Total Units (*See* §3D1.4)

1 unit:	no increase	2½ – 3 units:	add 3 levels
1½ units:	add 1 level	3½ – 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

☐

8. Highest of the Adjusted Offense Levels from Items 1–5 Above

☐

9. Combined Adjusted Offense Level (*See* §3D1.4)

Enter the sum of Items 7 & 8 here and on Worksheet D, Item 1. ☐

**Note*: Worksheet B also includes applications that are done "as if there were multiple counts of convictions," including: multiple-object conspiracies (*see* §1B1.2(d)); offense guidelines that direct such application (*e.g.*, §2G2.1(d)(1) (Child Porn Production)); and stipulations to additional offenses (*see* §1B1.2(c)). Note also that these situations typically require the use of multiple Worksheets A.

WORKSHEET C

CRIMINAL HISTORY

Defendant _____ Docket Number _____

Note: As an aid, some of the basic criminal history "rules" are listed below. However, there are numerous additional criminal history rules at §§4A1.1 and 4A1.2 that must be used with Worksheet C and for correct application.

Enter the Earliest Date of the Defendant's Relevant Conduct _____
(The date of *the defendant's commencement of the instant offense*(s))

1. Prior Sentences Resulting from Offenses Committed Prior to the Defendant's 18th Birthday

(a) **3 Points** if convicted as an ***adult***, for each prior sentence of imprisonment ***exceeding one year and one month*** imposed within 15 years of the defendant's earliest date of relevant conduct or resulting in incarceration during any part of that 15-year period. *See* §§4A1.1(a) and 4A1.2(d)(1) & (e)(1).

(b) **2 Points** for each prior ***adult or juvenile sentence*** of confinement of ***at least 60 days*** not counted under §4A1.1(a) imposed within 5 years or from which the defendant was released from confinement within 5 years of the defendant's earliest date of relevant conduct. *See* §§4A1.1(b) and 4A1.2(d)(2)(A).

(c) **1 Point** for each prior ***adult or juvenile sentence*** not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 years of the defendant's earliest date of relevant conduct. *See* §§4A1.1(c) and 4A1.2(d)(2)(B).

Note: Identify as "**adult**" any sentence exceeding one year and one month that resulted from an adult conviction.
A **release date** is required in only two instances: (1) when a sentence covered under §4A1.1(a) was imposed more than 15 years prior to *the defendant's earliest date of relevant conduct* but resulted in the defendant being incarcerated during any part of such 15-year period; or (2) when a sentence counted under §4A1.1(b) was imposed more than 5 years prior to *the defendant's earliest date of relevant conduct*, but release from confinement occurred within such 5-year period.

Date of Imposition	Offense	Sentence	Release Date	Guideline Section	Criminal History Points

2. Prior Sentences Resulting from Offenses Committed On or After the Defendant's 18th Birthday

(a) **3 Points** for each prior sentence of imprisonment ***exceeding one year and one month*** imposed within 15 years of the defendant's earliest date of relevant conduct or resulting in incarceration during any part of that 15-year period. *See* §§4A1.1(a) and 4A1.2(e)(1).

(b) **2 Points** for each prior sentence of imprisonment of ***at least 60 days*** not counted under §4A1.1(a) imposed within 10 years of the defendant's earliest date of relevant conduct. *See* §§4A1.1(b) and 4A1.2(e)(2).

(c) **1 Point** for each prior sentence not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 years of the defendant's earliest date of relevant conduct. *See* §§4A1.1(c) and 4A1.2(e)(2).

Note: A **release date** is required when a sentence covered under §4A1.1(a) was imposed more than 15 years prior to *the defendant's earliest date of relevant conduct* but resulted in the defendant being incarcerated during any part of such 15-year period.

Date of Imposition	Offense	Sentence	Release Date	Guideline Section	Criminal History Points

Worksheet C — Criminal History [Page 2 of 2]

Defendant _____ Docket Number _____

(continued from *Sentences Resulting from Offenses Committed On or After the Defendant's 18th Birthday*)

Date of Imposition	Offense	Sentence	Release Date	Guideline Section	Criminal History Points

3. Sum of Criminal History Points for prior sentences under §4A1.1(a), (b), & (c) in Items 1 & 2

A total of 4 points can be added for all the 1-Point sentences counted in Items 1 & 2 combined. ☐

4. "Status" of Defendant at Time of Instant Offense

2 Points for "status" if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence (*e.g.*, probation, parole, supervised release, imprisonment, work release, or escape status) for a sentence counted in Items 1 or 2. *See* §4A1.1(d) and Application Note 4. List the type of control and identify the counted sentence that resulted in the control. Otherwise, enter **0 Points**. ☐

_____

_____

5. Crimes of Violence

1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was counted as a single sentence which also included another sentence resulting from a conviction for a crime of violence. A total of 3 points can be added under this subsection. *See* §4A1.1(e) and Application Note 5, and §4A1.2(a)(2) & (p). Identify the crimes of violence and briefly explain why the cases are considered a single sentence. Otherwise, enter **0 Points**. ☐

_____

_____

6. Total Criminal History Points (Sum of Items 3–5) ☐

7. Criminal History Category (Enter here and on Worksheet D, Item 4) ☐

Total Points	Criminal History Category
0–1	I
2–3	II
4–6	III
7–9	IV
10–12	V
13 or more	VI

WORKSHEET D

DETERMINING THE SENTENCE

Defendant _____ Docket Number _____

1. Adjusted Offense Level (From Worksheet A or B)

If Worksheet B is required, enter the result from Worksheet B, Item 9. Otherwise, enter the result from Worksheet A, Item 5. ☐

2. Acceptance of Responsibility (See Chapter Three, Part E)

Enter the applicable reduction of **2** or **3** levels. If no adjustment is applicable, enter "0". – ☐

3. Offense Level Total (Item 1 less Item 2)

☐

4. Criminal History Category (From Worksheet A or C)

Enter the result from Worksheet C, Item 7, unless the defendant has no criminal history, and as directed at the bottom of Worksheet A, no Worksheet C is used and "I" is entered here. ☐

5. Terrorism; Career Offender; Criminal Livelihood; Armed Career Criminal; Repeat and Dangerous Sex Offender (See Chapter Three, Part A, and Chapter Four, Part B)

a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A". ☐

b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A". ☐

6. Guideline Range from Sentencing Table

Enter the applicable guideline range from Chapter Five, Part A, in months. ☐ **to**

7. Restricted Guideline Range (See Chapter Five, Part G)

If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (*see* §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A". ☐ **to**

☐ Check here if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) and 18 U.S.C. § 3553(e) – "The Safety Valve" – are applicable.

8. Undischarged Term of Imprisonment; Anticipated State Term of Imprisonment (See §5G1.3)

☐ If the defendant is subject to an undischarged term of imprisonment, or an anticipated state term of imprisonment, check this box. Below list the undischarged/anticipated term(s), the applicable section of §5G1.3 and its direction or guidance as to whether the instant federal sentence is to be imposed to run concurrently or consecutively to the undischarged/anticipated term(s), and any sentence adjustment.

Worksheet D — Determining the Sentence [Page 2 of 4]

Defendant _____ Docket Number _____

9. Sentencing Options (See Chapter Five, Sentencing Table and §§5B1.1(a) and 5C1.1)

Check the applicable box that corresponds to the Guideline Range entered in Item 6 or Item 7, if applicable.

Zone A (See §§5B1.1(a)(1) & 5C1.1(a) & (b))

☐ If checked, the following options are available:

- Fine (*See* §§5C1.1(b) & 5E1.2(a))
- "Straight" Probation (*See* §§5B1.1(a)(1) & 5C1.1(b))
- Imprisonment (*See* §5C1.1(a) & (c)(1))

Zone B (See §§5B1.1(a)(2) & 5C1.1(a) & (c))

☐ If checked, *the minimum term may be satisfied by*:

- Imprisonment (*See* §5C1.1(a) & (c)(2))
- Imprisonment of ***at least one month plus supervised release*** with a condition that substitutes community confinement or home detention for imprisonment (*See* §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (*See* §§5B1.1(a)(2) and 5C1.1(c)(3))

Zone C (See §5C1.1(a) & (d))

☐ If checked, *the minimum term may be satisfied by*:

- Imprisonment (*See* §5C1.1(a) & (d)(1))
- Imprisonment of ***at least one-half of the minimum term plus supervised release*** with a condition that substitutes community confinement or home detention for imprisonment (*See* §5C1.1(d)(2))

Zone D (See §5C1.1(a) & (f))

☐ If checked, *the minimum term is to be satisfied by* a sentence of imprisonment

10. Length of Term of Probation (See §5B1.2)

If probation is imposed, the guideline for the length of such term of probation is: (Check the applicable box)

☐ At least one year, but not more than five years if the offense level total is 6 or greater.

☐ No more than three years if the offense level total is 5 or less.

Worksheet D — Determining the Sentence [Page 3 of 4]

Defendant _____ Docket Number _____

11. Supervised Release (See §§5D1.1 and 5D1.2)

a. Imposition of a Term of Supervised Release:

☐ Ordered because required by statute (*See* §5D1.1(a)(1)).

☐ Ordered because a sentence of imprisonment of more than one year is imposed (*See* §5D1.1(a)(2)).

☐ Is ***not*** ordered although a sentence of more than one year is imposed, because it is not required by statute ***and*** the defendant likely will be deported after imprisonment (*See* §5D1.1(c)).

☐ Ordered because it may be ordered in any other case (*See* §5D1.1(b)).

b. Length of Term of Supervised Release

Check the Class of the Offense:

☐ Class A or B Felony: Two to Five Year Term (*See* §5D1.2(a)(1))

☐ Class C or D Felony: One to Three Year Term (*See* §5D1.2(a)(2))

☐ Class E Felony or Class A Misdemeanor: One Year Term (*See* §5D1.2(a)(3))

☐ If a statutorily required mandatory minimum term of supervised release for the offense impacts the guideline range for the applicable Class of Offense above, also check this box, and list the statutory minimum term (*See* §5D1.2(c)):

_____ years mandatory minimum term of supervised release

☐ If an offense in 18 U.S.C. § 2332b(g)(5)(B) that resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or if a sex offense, the term of supervised release will not be less than the minimum term established above, and may be up to life (*See* §5D1.2(b)).

Policy Statement: If a sex offense, the *statutory maximum term* of supervised release is recommended.

12. Restitution (See §5E1.1)

a. If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason:

_____

_____

b. Enter whether restitution is statutorily mandatory or discretionary:

_____

c. Enter whether restitution is by an order of restitution, or ***solely*** as a condition of supervision. Enter the authorizing statute:

_____

Worksheet D — Determining the Sentence [Page 4 of 4]

Defendant _____ Docket Number _____

13. Fines (The Guideline Range for Fines for Individual Defendants) (See §5E1.2)

a. Special Fine Provisions — **Minimum** — **Maximum**

☐ Check box if any of the counts of conviction is for a statute with a special fine provision. (This ***does not*** include the general fine provisions of 18 USC § 3571(b)(2) & (d)).

Enter the sum of statutory maximum fines for all such counts. — $

b. Fine Table (§5E1.2(c)(3))
Enter the minimum and maximum fines. — $ — $

c. Fine Guideline Range
(Determined by the minimum of the Fine Table (Item 15(b)) and the greater maximum above (Item 15(a) or 15(b))). — $ — $

d. Ability to Pay

☐ Check this box if the defendant does not have an ability to pay.

14. Special Assessments for Individual Defendants (See §5E1.3)

Enter the total amount of the statutory special assessments required for all counts of conviction:

- $100 for each felony count of conviction.
- $25 for each Class A misdemeanor count of conviction.
- While not subject to guideline sentencing, the special assessments for a Class B misdemeanor, and a Class C misdemeanor or infraction are $10 and $5 per count, respectively.

TOTAL: $

15. Factors That May Warrant a *Departure* (See §1B1.1(b))

Consider Chapter Five, Part H (Specific Offender Characteristics) and Part K (Departures), and other policy statements and commentary in the *Guidelines Manual* that might warrant consideration in sentencing. (*See also* the "List of Departure Provisions" included in the *Guidelines Manual* after the Index).

16. Factors That May Warrant a *Variance* (See §1B1.1(c))

Consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.

Completed by _____ **Date** _____