
An Introduction to Federal Sentencing

Eleventh Edition

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An Introduction to Federal Sentencing

For nearly a quarter century, the federal government has struggled with its sentencing policy—particularly its policy on the scope of judicial sentencing authority. The Sentencing Reform Act of 1984 revolutionized sentencing, replacing traditional judicial discretion with far more limited authority, controlled by a complex set of mandatory federal sentencing guidelines promulgated by a new agency, the U.S. Sentencing Commission. Sentencing practice was again fundamentally altered by the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which excised the mandatory-guideline provisions of the Sentencing Reform Act, rendering them merely advisory.

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

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

case. The starting point is a thorough understanding of the federal sentencing process.

This paper begins by describing the statutory basis of guideline sentencing, as altered by the Supreme Court in *Booker*, and the structure of the guidelines themselves. It then attempts to place the guidelines in the larger context of federal sentencing advocacy. This context both emphasizes the guidelines’ importance and reveals their limits, demonstrating the need for counsel to be ready, when necessary, to challenge the guidelines’ underlying assumptions. 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.¹

The Basic Statutory System

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

The Act’s Original Requirements. As originally written, the Sentencing Reform Act directed the sentencing court to consider a broad variety of purposes and factors, including “guidelines” and “policy statements” promulgated by the Commission. 18 U.S.C. § 3553(a)(4)(A), (a)(5); *see also* 28 U.S.C. § 994(a)(1), (a)(2). But while it provided for a broad range of sentencing considerations, the Act did not allow an equally broad range of sentencing discretion. Instead, the Act cabined the court’s discretion within a grid of sentencing ranges specified by the guidelines, absent a valid ground for departure. § 3553(b)(1), (b)(2). A departure from the applicable range was authorized only when the court found “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” § 3553(b)(1); *cf.* United States Sentencing Guideline (USSG) § 1B1.1, comment. (n.1(E)) (defining “departure”). In determining whether a circumstance was adequately considered, the court’s review was restricted to

the Commission’s guidelines, policy statements, and official commentary. § 3553(b)(1).

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

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

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

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

2. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring that fact, other than prior conviction, that increases statutory maximum penalty must be proved to jury beyond reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (applying *Apprendi* to facts that justify imposition of the death penalty); *Blakely v. Washington*, 542 U.S. 296, 303–08 (2004) (applying *Apprendi* to state’s mandatory guideline system).

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

The text of § 3553(a) is appended to this paper. Under *Booker*, it is the essential starting point for federal sentencing today. But *Booker* and the statute are only the beginning. The Supreme Court has subsequently issued a series of decisions that begin to map out the advisory guideline system *Booker* created: *Rita v. United States*, 127 S. Ct. 2456 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Irizarry v. United States*, 128 S. Ct. 2198 (2008). Counsel should carefully review these decisions in preparing for sentencing.

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

Numerous federal statutes include minimum prison sentences; some, like the federal “three strikes” law, 18 U.S.C. § 3559(c), mandate life imprisonment. Defendants most commonly face statutory minimum sentences in three types of federal prosecutions: drugs, firearms, and child-sex offenses.³

Drug offenses. The federal drug statutes include two types of commonly applied mandatory minimum sentences. One is based on the amount of drugs involved; for certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years’ imprisonment. The circuits are divided over whether drug

3. Minimum sentences are also required for the common immigration offense of bringing aliens into the United States for commercial gain, 8 U.S.C. § 1324(a)(2)(B)(ii), and for the immigration- and fraud-related offense of aggravated identity theft, 18 U.S.C. § 1028A. *See Flores-Figueroa v. United States*, No. 08-108, 129 S. Ct. 457 (2008) (granting certiorari to determine *mens rea* required by § 1028A(a)(1)).

amount must be alleged in the indictment and proved to the jury to trigger these mandatory minimum sentences.⁴

The other type of mandatory minimum is based on criminal history; for a defendant who has previously been convicted of one or more drug offenses, the statutes set out a series of minimum sentences up to life imprisonment. The prior conviction need not be alleged in the indictment or proved at trial; however, the government must follow special notice and hearing procedures prescribed in 21 U.S.C. § 851.⁵

Firearms offenses. Title 18 U.S.C. § 924, which sets out the penalties for the most common 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 a fixed sentence of life imprisonment, depending on the type of firearm, how it was employed, and whether the defendant has a prior § 924(c) conviction.⁶ A sentence imposed under § 924(c) must run consecutively to any other sentence, including sentences for other § 924(c) counts charged in the same case. *See Deal v. United States*, 508 U.S. 129 (1993). A § 924(c) charge is often (but not always) accompanied by a charge on the underlying substantive offense. Special guidelines rules apply to § 924(c), based on the number of counts, the mandatory

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

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. Mata*, 491 F.3d 237, 245 & n.3 (5th Cir. 2007) (*Apprendi* does not apply to prior-conviction enhancement under § 851), *cert. denied*, 128 S. Ct. 1219 (2008); *United States v. Hollis*, 490 F.3d 1149, 1157 (9th Cir. 2007) (same), *cert. denied*, 128 S. Ct. 1120 (2008). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

6. Some, but not all, of the facts triggering these mandatory minimum sentences qualify as elements of the offense. *Compare Castillo v. United States*, 530 U.S. 120 (2000) (possession of machine gun, which triggers 30-year minimum, constitutes element), *with Harris v. United States*, 536 U.S. 545 (2002) (brandishing weapon, which triggers 7-year minimum, is not element of offense). *Cf. Dean v. United States*, No. 08-5274, 129 S. Ct. 593 (2008) (granting certiorari to determine whether, under § 924(c)(1)(A), accidental discharge of weapon can trigger 10-year minimum sentence).

consecutive nature of the penalty, and the defendant's criminal history. USSG §2K2.4, §4B1.1(c), §5G1.2(e).

The other firearm mandatory minimum is found in 18 U.S.C. § 924(e), the Armed Career Criminal Act. This statute prescribes a significantly enhanced penalty for certain defendants convicted of unlawful firearm possession under § 922(g). A defendant convicted under § 922(g) normally faces a maximum term of 10 years' imprisonment. Section 924(e)(1) increases this punishment range, to a minimum of 15 years and a maximum of life, if a defendant has three prior convictions for violent felonies or serious drug offenses. "Violent felony" and "serious drug offense" are defined by statute. § 924(e)(2).⁷ Unlike the drug laws, however, § 924(e) requires no pretrial notice for an enhanced sentence to be imposed.

Child and sex offenses. The Adam Walsh Child Protection and Safety Act of 2006, Pub L. No. 109-248, added or increased maximum and mandatory minimum penalties for sex trafficking and many child-sex offenses. The resulting penalties are among the most severe in the federal system.⁸ In addition to these offense-specific minimum penalties, Congress also established new

minimum penalties ranging from 10 years to life imprisonment for repeat sex crimes and crimes of violence against children. *See* 18 U.S.C. § 3559(e), (f). Unlike the "three strikes" provision, see § 3559(c), the statute does not require the government to follow the notice and hearing procedures of 21 U.S.C. § 851 to obtain recidivism-based enhancements for these child-victim offenses. Registered sex offenders who commit a federal child-sex offense are subject to an additional conviction and a consecutive 10-year sentence. § 2260A.

Because of their relatively recent enactment, the scope and validity of these new child-sex provisions are still being explored by the courts.

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

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

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

7. The meaning and scope of the definitions in § 924(e) have repeatedly been the subject of Supreme Court litigation. *See Chambers v. United States*, 129 S. Ct. 687 (2009) (failure to report to prison does not qualify under definition of "violent felony"); *Begay v. United States*, 128 S. Ct. 1581 (2008) (felony DWI does not qualify); *James v. United States*, 127 S. Ct. 1586 (2007) (attempted burglary qualifies); *Shepard v. United States*, 544 U.S. 13 (2005) (explaining "categorical approach" to applying "violent felony" definition); *Taylor v. United States*, 495 U.S. 575 (1990) (same); *Johnson v. United States*, No. 08-6925 (U.S. Feb. 23, 2009) (granting certiorari to consider application of "violent felony" definition to state battery offense). *See also United States v. Rodriguez*, 128 S. Ct. 1783 (2008) (discussing scope of "serious drug offense" definition); *Logan v. United States*, 128 S. Ct. 475 (2007) (discussing statute's exemption for prior offenses when civil rights have been restored).

8. *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 (for production of child pornography, 15- to 30-year minimum); § 2252, § 2252A (for sale, receipt, or possession of child pornography, 5- to 15-year minimum, depending on the charged subsection and the presence of prior convictions). The Adam Walsh Act also created a new "child exploitation enterprise" offense, for which the minimum sentence is 20 years' imprisonment. *See* 18 U.S.C. § 2252A(g).

No Parole; Restrictions on Early Release from Prison. Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. No “good time” credit is available for life sentences, or sentences of a year or less; for all others, credit is limited to a maximum of 54 days per year. *See* 18 U.S.C. § 3624(b); *see also* *Moreland v. Federal Bureau of Prisons*, 547 U.S. 1106 (2006) (statement of Stevens, J., respecting denial of certiorari) (discussing 54-day rule). The Bureau of Prisons may also reduce the time to be served by up to an additional year for certain prisoners who complete a substance-abuse treatment program. § 3621(e)(2).

Section 3624 allows the Bureau of Prisons to place defendants in community or home confinement at the end of their imprisonment term. § 3624(c). As recently amended, the statute allows such placement for up to 10 percent of the sentence, for a maximum of 6 months’ home confinement or 12 months’ community confinement.⁹

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

Probation. Probation is rare in the federal system.¹⁰ It is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is statutorily permitted, the guidelines do not recommend straight probation unless the bottom of the guideline range is zero. *See* USSG §5B1.1(a), §5C1.1(b). (See discussion of Chapter Five below, under “The Guidelines Manual.”)

Supervised release. Unlike probation, supervised release is imposed in addition to a sentence of imprisonment. Some statutes mandate the imposition of a supervised release term, and the guidelines generally call for

supervised release following any imprisonment sentence longer than 1 year. USSG §5D1.1(a). Under 18 U.S.C. § 3583(b), the maximum authorized supervised-release terms increase with the grade of the offense, from 1 year, to 3 years, to 5 years. Sex offenses, child pornography offenses, and kidnapping offenses involving a minor victim carry a term of 5 years to life. § 3583(k). The specific statute of conviction may also provide for a longer term of supervised release. 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 and revocation. Although federal law mandates a number of conditions for both probation and supervised release, *see* 18 U.S.C. §§ 3563(a), 3583(d), the court generally has discretion to impose conditions that are reasonably related to the sentencing factors in § 3553(a)(1) and (2). Discretionary conditions must involve “only such deprivations of liberty or property as are reasonably necessary” to achieve legitimate sentencing purposes. §§ 3563(b), 3583(d)(2).¹¹

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possessing a firearm or a controlled substance, refusing to comply with drug-testing conditions, or testing positive for an illegal controlled substance more than three times in the course of a year. 18 U.S.C. §§ 3565(b), 3583(g). There may be an exception from mandatory revocation for failing a drug test, depending on the availability of treatment programs, and the defendant’s participation in them. §§ 3563(e), 3583(d). For defendants required to register as sex offenders, committing certain offenses while on release triggers mandatory revocation and a minimum of 5 years’ imprisonment. § 3583(k).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions of the Sentencing Reform Act. § 3565(a)(2). Upon revocation of supervised release, the court may imprison the defendant

9. *See* Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a) (2008).

10. In fiscal year 2008, straight probation was imposed in only 7.4 percent of federal cases. *See* U.S. SENTENCING COMM’N, *Sourcebook of Sentencing Statistics* fig. D (2008) (hereinafter *2008 Sourcebook*), <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>.

11. Recently, a number of federal courts have instituted intensive “reentry” programs for high-risk defendants on supervised release, with the goal of preventing recidivism and promoting reintegration into society. For more information on these programs and others like them, *see* U.S. SENTENCING COMM’N, *Proceedings from the Symposium on Alternatives to Incarceration* (2008), http://www.ussc.gov/SYMPO2008/NSATI_0.htm.

up to the maximum terms established for each class of felony in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term on revocation of supervised release, it may impose another supervised release term to begin after imprisonment. § 3583(h).

The Sentencing Commission has promulgated policy statements for determining the propriety of revocation and the sentence to be imposed. USSG Ch.7. (See discussion of Chapter Seven below, under “The Guidelines Manual.”)

Fines and Restitution. Federal sentencing law authorizes both fines and restitution orders. Fines are imposed in approximately 12 percent of federal cases.¹² In general, the maximum fine for an individual convicted of a Title 18 offense is \$250,000 for a felony, \$100,000 for a Class A misdemeanor, and \$5,000 for any lesser offense. 18 U.S.C. § 3571(b). A higher maximum fine may be specified in the law setting forth the offense, § 3571(b)(1), and an alternative fine based on gain or loss is possible, § 3571(d). Restitution is permitted for any Title 18 crime and most common drug offenses. 18 U.S.C. § 3663 (a)(1)(A). Under § 3663A(c), restitution is mandatory for crimes of violence, property crimes, and product tampering; it is also mandated for other substantive offenses by statutes elsewhere in Title 18. Federal rules require the probation officer to investigate and report potential restitution to the sentencing court. *See* FED. R. CRIM. P. 32(c)(1)(B), (d)(2)(D). A defendant who knowingly fails to pay a delinquent fine or restitution is subject to resentencing, and a defendant who willfully fails to pay may be prosecuted for criminal default. §§ 3614, 3615.

While the guidelines ordinarily call for both fines and restitution, a defendant’s inability to pay, now and in the future, may support restitution payments that are only nominal. USSG §5E1.1(f). Inability to pay may also support a lesser fine, or alternatives such as community service. §5E1.2(e).

Sentence Correction and Reduction. Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3582 strictly limit the sentencing court’s authority to correct or reduce a sentence after it is imposed. Rule 35(a) allows

12. *See* U.S. SENTENCING COMM’N, *Overview of Federal Cases, Fiscal Year 2007* at 4, http://www.ussc.gov/general/20081222_Data_Overview.pdf.

the court to correct “arithmetical, technical, or other clear error” in the sentence. The rule requires that the court act within 7 days after sentencing.¹³ Rule 35(b) authorizes a sentence reduction to reflect a defendant’s post-sentence assistance in the investigation or prosecution of another person who has committed an offense. The rule requires a motion by the Government; with limited exceptions, the motion must be filed within a year after sentencing.

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

Appellate Review. In addition to rendering the guidelines advisory, *Booker* significantly changed the standard of appellate review of federal sentences. The Sentencing Reform Act allows both the government and the defendant to appeal a federal sentence. Section 3742(e) provided the standard of review for these appeals; because that statute referred to § 3553(b), however, the Supreme Court excised the provision in *Booker*, replacing it with a requirement that federal sentences be reviewed for “reasonableness.” 543 U.S. at 260–63.

The “reasonableness” standard requires that all sentences—within, just outside, or significantly outside the guideline range—be reviewed for abuse of discretion. *Gall*, 128 S. Ct. at 591. In conducting this review, the appellate court “must first ensure that the district court

13. This time limit may not be absolute. *Cf. Eberhart v. United States*, 126 S. Ct. 403 (2005) (Rules 33 and 45 are claim-processing rules; 7-day time limit for motion for new trial is nonjurisdictional). *But see United States v. Griffin*, 524 F.3d 71, 83–85 (1st Cir. 2008) (holding, even after *Eberhart*, that Rule 35(a)’s time limit is jurisdictional); *United States v. Higgs*, 504 F.3d 456 (3d Cir. 2007) (same); *United States v. Smith*, 438 F.3d 796 (7th Cir. 2006) (same).

committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Id.* at 597. *See also Rita*, 127 S. Ct. at 2465, 2468–69. If there is no procedural error, the appellate court then considers “the substantive reasonableness of the sentence imposed” under the abuse-of-discretion standard. *Gall*, 128 S. Ct. at 597.

In reviewing within-guideline sentences, the court of appeals may—but need not—presume the sentence to be reasonable. *Rita*, 127 S. Ct. at 2467.¹⁴ This contrasts with proceedings in the district court, in which no such presumption may be made. *Id.* at 2465; *see also Nelson v. United States*, 129 S. Ct. 890, 892 (2009) (per curiam) (reversing sentence because district court presumed guidelines reasonable at sentencing). As for non-guideline sentences, the Court has stated that a sentence based on a general policy disagreement with the Sentencing Commission may sometimes—but not always—call for closer review than a sentence based on an evaluation of the facts of an individual case. *See Kimbrough*, 128 S. Ct. at 575 (finding no occasion for “closer review” of policy disagreement with cocaine base guidelines); *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam) (same).

The Supreme Court has not addressed the other provisions in § 3742, which govern the right to appeal, the disposition that the appellate court may order, and sentencing on remand.¹⁵ Section 3742 includes a provision limiting

14. After *Rita*, some circuits have declined to apply a presumption of reasonableness to guideline sentences. *See, e.g., United States v. Van Anh*, 523 F.3d 43, 50–60 (1st Cir.) *cert. denied*, 128 S. Ct. 2917, 129 S. Ct. 234, 236 (2008) (multiple petitioners); *United States v. Rutkoske*, 506 F.3d 170, 180 n.5 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 2488 (2008); *United States v. Hoffecker*, 530 F.3d 137, 204 (3d Cir. 2008); *United States v. Carty*, 520 F.3d 984, 988 (9th Cir.) (en banc), *cert. denied*, 128 S. Ct. 2491 (2008); *United States v. Campbell*, 491 F.3d 1306, 1313–14 & n.8 (11th Cir. 2007).

15. The *Booker* Court stated that its ruling affected only §§ 3553(b)(1) and 3742(e), but lower courts have had to gauge the impact of *Booker* on a variety of other provisions of the Act. *See, e.g., United States v. Shepherd*, 453 F.3d 702, 704–05 (6th Cir. 2006) (following Second and Tenth Circuits, court holds that *Booker*’s reasoning requires

appellate rights if the parties enter into a plea bargain that agrees to a specific sentence. § 3742(c); *see also* FED. R. CRIM. P. 11(c)(1)(C) (describing specific-sentence agreement). (See discussion of Rule 11(c)(1)(C) below, under “Plea Bargaining and the Guidelines,” and discussion of appeal waivers below, under “Some Traps for the Unwary.”)

Petty Offenses; Juveniles. The Sentencing Reform Act does not exempt petty offenses (offenses carrying a maximum term of 6 months or less) or juvenile delinquency cases. The Sentencing Commission, however, has chosen not to promulgate separate guidelines applicable to these cases. USSG §1B1.9, §1B1.12, p.s. Nevertheless, adult guidelines are considered in determining the maximum term of official detention possible under the federal Juvenile Delinquency Act. *See* 18 U.S.C. § 5037(c); *cf. United States v. R.L.C.*, 503 U.S. 291 (1992).

Statutory Amendments. The Sentencing Reform Act has been amended on numerous occasions in the 25 years since it was enacted. Retroactive application of those amendments may violate the Ex Post Facto Clause, if the amendment is both substantive and harmful. *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 awarding reduced jail credits violated Ex Post Facto).

The Guidelines Manual

The *Guidelines Manual* comprises eight chapters and three appendices. It contains the guidelines, policy statements, and commentary promulgated by the Sentencing Commission for consideration when a court imposes sentence in a federal case. *See* 18 U.S.C. § 3553(a)(4)(A) (court must consider guidelines); § 3553(a)(5) (court must consider policy statements). The *Manual* establishes two numerical values for each guidelines case: an offense level and a criminal history category. The two values

excision of § 3553(b)(2)); *United States v. Hicks*, 472 F.3d 1167, 1171–72 (9th Cir. 2007) (same, § 3582(c)(2)); *United States v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005) (same, § 3742(f) and (g)); *cf. 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).

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 generally does not provide guidance as to application of the other sentencing factors in § 3553(a).

Although the guidelines are advisory only, counsel should expect that the guideline range suggested by the *Manual* will receive full consideration by the sentencing court. While *Booker* returned a large measure of sentencing discretion to the court, it did not diminish the importance of understanding the guidelines' application in a particular case. This is not just because the guidelines remain the "starting point and the initial benchmark" for the sentencing decision. *Gall*, 128 S. Ct. at 596. Statistics show that, even after *Booker*, courts still follow the guidelines' sentencing recommendation more often than not.¹⁶

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

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

16. Since *Booker*, the courts have imposed sentences within the guideline range approximately 60 percent of the time, although the latest data shows a slight decrease in within-guideline sentences. Compare U.S. SENTENCING COMM'N, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 62, tbl. 1 (Mar. 2006), http://www.usc.gov/Booker_Report/Booker_Report.pdf (hereinafter *Booker Report*) (62.2 percent of sentences imposed within guideline range), with U.S. SENTENCING COMM'N, *Preliminary Post-Kimbrough/Gall Data Report*, tbl. 1 (Dec. 2008), http://www.usc.gov/USSC_Kimbrough_Gall_Report_December_08.pdf (59.8 percent since December 10, 2007); cf. 2008 *Sourcebook* tbl. N (59.4 percent in fiscal year 2008).

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

Relevant conduct. Although the initial choice of guideline section is tied to the offense of conviction, critical guideline determinations are frequently made according to the much broader concept of relevant conduct. The Commission developed the 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 §1A1.4(a), p.s. (The Guidelines’ Resolution of Major Issues).

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

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

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

As noted above, relevant conduct need not be included in formal charges. §1B1.3, comment. (backg'd). It can include conduct underlying dismissed, acquitted, or even uncharged counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).¹⁷ While the relevant conduct rules affect every stage of representation, they are especially important in the context of plea bargaining. (See discussion of relevant conduct below, under “Plea Bargaining and the Guidelines.”)

Chapter Two: Offense Conduct. Offense conduct forms the vertical axis of the sentencing table. The offense-conduct guidelines are set out in Chapter Two. The chapter has 18 parts; each part has multiple guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense, or many. Part X of the chapter applies when no guideline has been promulgated for an offense; it also 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.

Each guideline provides one or more base offense levels for a particular offense. A guideline may also have specific offense characteristics that adjust the base level up or down, and it may cross-reference other guidelines that yield a higher offense level. The court will normally look to relevant conduct in choosing among multiple base offense levels, determining offense characteristics, and applying cross-references.

Although Chapter Two includes guidelines for a multitude of federal offenses, four categories of offense account for

the vast majority of federal criminal cases: drugs, economic offenses (such as fraud and theft), firearms, and immigration.¹⁸

Drug offenses. In drug and drug-conspiracy cases, the offense level is generally determined by drug type and quantity, as set out in the drug quantity table in guideline §2D1.1(c). The table includes a very wide range of offense levels, from a low of 6 to a high of 38; for defendants who played a mitigating role in the offense, the top four offense levels are reduced by 2 to 4 levels. §2D1.1(a)(3). (See discussion of role in the offense below, under “Chapter Three: Adjustments.”)

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

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

Economic offenses. For many economic offenses (including theft, fraud, and property destruction) the offense level is determined under §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

17. A number of circuits have held that *Watts*'s holding survives *Booker*. See *United States v. White*, 551 F.3d 381, 383–84 (6th Cir. 2008) (en banc) (collecting cases).

18. See U.S. SENTENCING COMM'N, *Overview of Federal Criminal Cases* at 2.

amount of loss. The guideline commentary broadly defines “loss” as the greater of actual loss or the loss the defendant intended, even if the intended loss was “impossible or unlikely to occur.” §2B1.1, comment. (n.3(A)(ii)). 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 its broad definition of loss, guideline §2B1.1 includes many specific offense adjustments that can increase the offense level.

Firearms offenses. Chapter Two, Part K covers a large variety of federal firearms offenses; the most common are charges arising from the possession of firearms or ammunition. For these offenses, guideline §2K2.1 provides a series of base offense levels, with higher levels depending on the statute of conviction, the type of firearm possessed, and whether the defendant was previously convicted of one or more crimes of violence or controlled-substance offenses. The guideline also includes a variety of specific offense adjustments that can increase the offense level further. Only one of these adjustments can reduce the guideline range: if the defendant did not unlawfully discharge or otherwise unlawfully use the firearm, and possessed it “solely for lawful sporting purposes or collection.” §2K2.1(b)(2).

Federal firearms-possession offenses often arise in connection with other criminal conduct. In these cases, specific guideline provisions produce higher sentencing ranges “if the firearm or ammunition facilitated, or had the potential of facilitating,” another offense. §2K2.1, comment. (n.14(A)). If the defendant possessed or used a firearm in connection with another felony offense, guideline §2K2.1(b)(6) provides a 4-level increase and a minimum offense level of 18. A further increase is possible under §2K2.1(c), which provides cross-references to 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.¹⁹

19. See, e.g., *United States v. Hicks*, 389 F.3d 514, 528–31 (5th Cir. 2004) (court uses cross-reference to apply second-degree murder guideline).

Immigration offenses. Most common immigration offenses come under one of two guidelines, §2L1.1 and §2L1.2. Guideline §2L1.1 covers smuggling, transporting, and harboring illegal aliens. It sets out many specific offense adjustments, including increases for the number of aliens involved, the possession or use of weapons, reckless conduct, threats, coercion, and injury or death. See §2L1.1(b).²⁰ One offense characteristic reduces the guideline range; it applies, with certain limitations, when the offense involved the smuggling, transporting, or harboring of the defendant’s spouse or child.

Guideline §2L1.2 covers the offenses of unlawfully entering or remaining in the United States. It provides substantial increases based on a defendant’s prior convictions. All prior felonies trigger increases, as do three or more misdemeanor convictions for crimes of violence or drug trafficking offenses. Prior convictions can as much as triple the applicable offense level. §2L1.2(b)(1). The increases apply even if the convictions do not otherwise count as criminal history. §2L1.2, comment. (n.6). (The guidelines’ treatment of prior convictions is discussed further below, under “Chapter Four: Criminal History.”)

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—for example 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, including flight from authorities and obstruction of justice, as well as acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

Role in the offense. In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. See USSG Ch.3, Pt.B, intro. comment. Aggravating-role adjustments range from 2 to 4 levels, depending on the defendant’s supervisory status and the number of participants in the offense.

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

§3B1.1. Mitigating-role adjustments likewise range from 2 to 4 levels, depending on whether the defendant’s role is characterized as minor, minimal, or somewhere in between. §3B1.2. The determination of a defendant’s role is made on the basis of all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may seek a downward adjustment (or face an upward adjustment) if more than one person participated. It is important to remember that a defendant may receive a role-in-the-offense reduction even if he is not held accountable for the relevant conduct of others. §3B1.2, comment. (n.3(A)).

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-investigative conduct can qualify. *Id.*, comment. (n.1).

Conduct warranting the adjustment includes committing or suborning perjury,²¹ destroying or concealing material evidence, or “providing materially false information to a probation officer in respect to a presentence or other investigation for the court.” §3C1.1, comment. (n.4). Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* comment. (n.5). While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, 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 the group offense levels together.

21. 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).

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 (providing rules for sentencing on multiple counts, and for imposing statutorily required consecutive sentences). 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 usually requires an increase in the offense level to account for them. The combined offense level can be up to 5 levels higher than the level of any one group. Even when a defendant pleads guilty to a single count, a multiple-count adjustment may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4). (See discussion of grouping below, under “Plea Bargaining and the Guidelines.”)

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

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

Chapter Four: Criminal History. Criminal history forms the horizontal axis of the sentencing table. The table divides criminal history into categories I (the lowest) to VI (the highest). The guidelines in Chapter Four, Part

A, translate the defendant’s prior record into one of these categories by assigning points for prior sentences and juvenile adjudications. The number of points scored for a prior sentence is based primarily on the sentence’s length. USSG §4A1.1. There is also a recency factor: points are added for committing the instant offense within 2 years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence. §4A1.1(d), (e).

A prior conviction is not counted in the criminal history score if it was sustained for conduct that was part of the instant offense. *See* §4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. §4A1.2(c)–(j).²² Sentences imposed on the same day, or imposed for offenses that were charged together, are treated as one sentence for the criminal history calculation, unless the offenses were separated by an intervening arrest. §4A1.2(a)(2).²³

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

Repeat offenders. For certain repeat offenders, Chapter Four, Part B significantly enhances criminal

22. 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).

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

history scores and offense levels. These offenders fall in three classes: career offenders, armed career criminals, and repeat child-sex offenders.

Career offender. The “career offender” guideline, §4B1.1, applies to a defendant convicted of a third crime of violence or controlled substance offense. Guideline §4B1.1 automatically places the defendant in the highest criminal history category, VI, and it simultaneously increases the offense level to produce a guideline range approximating the statutory maximum for the offense of conviction. “Crime of violence” and “controlled substance offense” are defined, for career-offender purposes, in §4B1.2; those definitions apply in a number of Chapter Two guidelines as well.²⁴ In determining whether prior convictions qualify a defendant as a career offender, 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 rules for counting prior sentences. §4B1.4, comment. (n.1). 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 with no prior child-sex convictions may be subject to a significant offense level

24. The Supreme Court’s recent jurisprudence on the crime-of-violence definition in 18 U.S.C. § 924(e) may apply to similar language in the career-offender definition. *See supra* note 7; *see, e.g., United States v. Mohr*, 554 F.3d 604, 608–09 & n.4 (5th Cir. 2009) (applying Supreme Court’s § 924(e) precedent to §4B1.2).

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 in, receipt of, or possession of child pornography. §4B1.5, comment. (n.2).

Chapter Five: Determining the Sentence;

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

The sentencing table. The sentencing table in Part A is a grid of sentencing ranges produced by the intersection of offense levels and criminal history categories. Most ranges are expressed in months, although some recommend life imprisonment. The sentencing table’s grid is divided into four “zones,” A through D. If a defendant’s sentencing range is in Zone A, a guideline sentence of straight probation is available (all the ranges in Zone A are 0 to 6 months). §5B1.1(a)(1), §5C1.1(b). In Zone B or C, the guidelines allow for a “split” sentence (probation or supervised release conditioned upon some 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. 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 maximum becomes the guideline sentence. §5G1.1(a). Similarly, the statutory minimum becomes the guideline sentence if it is greater than any sentence in the guideline range. §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.

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 § 3553(b)(1) from the Sentencing Reform Act, these parts strictly limited the district court’s authority to sentence outside the guideline range; departures were available only when

a case presented an aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” *See* §5K2.0(a), (b), p.s. Now, with the exception of special government-sponsored downward departures, courts more often sentence below the guideline range based on § 3553(a) factors than on the departure grounds listed in Chapter Five.²⁵ Despite the increase in non-guideline sentences, however, the Commission’s Chapter Five policy statements on departures can have a profound effect on the sentence in an individual case.²⁶

Part H states the Commission’s policy that many important offender characteristics, including age, 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. The operative word is “ordinarily”—in exceptional cases, one or more of those characteristics may support a departure. Even in the ordinary case, those 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).²⁷

Part H also sets out Commission policy that certain characteristics can never support a departure, including drug or alcohol dependence or gambling addiction

25. *See 2008 Sourcebook* tbl. N (excepting government-sponsored downward departures, courts departed below the guideline range in 2,459 cases, and otherwise sentenced below the range in 7,513 cases). Sentences above the guideline range are also more likely to be based on considerations other than departure grounds. *Id.*

26. 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.,* §2B1.1, comment. (n.19) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.14) (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for large-scale drug offenses); §2K2.1, comment. (n.11) (same, large-scale or dangerous firearms offenses); §2L1.2, comment. (n. 7) (authorizing upward or downward departure when applicable offense level substantially overstates or understates seriousness of prior conviction).

27. *See Booker Report* 82–83, tbls. 8–9 (relying on *Booker*, courts cited factors discouraged by Part 5H at least 1,158 times when sentencing below guideline range); *2008 Sourcebook* tbl. 25B (2,088 such sentences in fiscal year 2008).

(§5H1.4, p.s.), role in the offense (§5H1.7, p.s.), lack of guidance as a youth (§5H1.12, p.s.), and—in most sex cases—family and community ties (§5H1.6, p.s.). In accordance with congressional directive, policy statement §5H1.10 provides that certain characteristics are never relevant to the determination of the sentence: race, sex, national origin, creed, religion, and socio-economic status. *See* 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).²⁸

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

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; it may also be warranted in an “exceptional” case, 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 exceptionally great (or small) degree. §5K2.0(a)(2)–(4).

Like Part H, Part 5K prohibits certain circumstances as departure grounds, including a defendant’s financial difficulties and post-offense rehabilitative efforts. §5K2.0(d), §5K2.12, §5K2.19. Other circumstances, by contrast, are specifically identified as potential grounds for departure, usually upward. Six listed circumstances

may support a downward departure: (1) victim’s wrongful provocation, (2) commission of a crime to avoid a perceived greater harm, (3) coercion and duress, (4) diminished capacity, (5) voluntary disclosure of the offense, and (6) aberrant behavior. For child and sex offenses, the grounds supporting downward departure are far more limited. *See* §5K2.0(b), §5K2.22, p.s.

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

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

Chapter Six: Sentencing Procedures and Plea Agreements. Chapter Six sets out policy statements for preparing and disclosing the presentence report, resolving disputed sentencing issues, and 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. (These procedures are also discussed below, under “The Guidelines and Sentencing Advocacy” and “Plea Bargaining and the Guidelines.”)

The presentence report; dispute resolution.

The policy statements of Chapter Six provide for the preparation of a presentence report in most cases, and require that written objections to the report will usually be submitted before sentencing. USSG §6A1.1, p.s.; §6A1.2, p.s. comment. (backg’d); *cf.* FED. R. CRIM. P. 32(c)(1), (d), (f)(1), (i)(1)(D) (requiring written report and timely written objections in most cases). Under a 2007 amendment, Rule 32 requires that the report discuss both guideline-related facts and other information that the court requires, including information relevant to the sentencing factors in § 3553(a). FED. R. CRIM. P. 32(d)(2)(F). (Presentence reports are further discussed below, under “Some Traps for the Unwary”).

28. *See Gall*, 128 S. Ct. at 600–02 (approving consideration of defendant’s youth, immaturity, and drug addiction in sentencing below guideline range); *United States v. Smith*, 445 F.3d 1, 4–5 (1st Cir. 2006) (when weighing § 3553(a) factor, it is not decisive that Commission has discouraged or prohibited it from consideration). *See, e.g., United States v. Pinson*, 542 F.3d 822, 838–39 (10th Cir.) (courts have wide discretion to rely on discouraged factors), *cert. denied*, 129 S. Ct. 657 (2008), No. 08-8009 (U.S. Feb. 23, 2009) (multiple petitioners).

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

The commentary to policy statement §6A1.3 leaves to the court’s discretion the degree of formality necessary to resolve sentencing disputes. It recognizes that, while “[w]ritten statements of counsel or affidavits of witnesses” may often provide an adequate basis for sentencing findings, “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” §6A1.3, p.s., comment. para. 1.

The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence. §6A1.3, p.s., comment. para. 3. Courts are divided over whether a higher standard may be used for guideline determinations, especially when a particular fact-finding will have a significant impact on the sentence imposed.²⁹ Particular guidelines may require a higher standard of proof in specific contexts. *See, e.g.*, USSG §3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt).

If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, Chapter Six and Rule 32 require it to provide reasonable notice that it is contemplating such a ruling, specifically identifying the grounds for the departure. USSG §6A1.4, p.s.; FED. R. CRIM. P. 32(h); *see*

29. *See United States v. Garth*, 540 F.3d 766, 773–74 & n.2 (8th Cir. 2008) (collecting cases). Related issues regarding the sentencing hearing are also discussed below, under “The Guidelines and Sentencing Advocacy.”

generally Burns v. United States, 501 U.S. 129 (1991). The Supreme Court recently held that similar notice is not necessary when the court intends to sentence outside the guideline under § 3553(a) and *Booker. Irizarry*, 128 S. Ct. at 2202–03. Nonetheless, “[s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the [sentencing hearing], and in the hearing itself, has given them adequate opportunity to confront and debate the relevant issues.” *Id.* at 2203. *Cf.* FED. R. CRIM. P. 32(i)(1)(3) (requiring court to allow parties to comment on “matters relating to an appropriate sentence”).

Notice and a right to be heard is also afforded to victims, through a policy statement incorporating the victims’ rights set out in 18 U.S.C. § 3771. USSG §6A1.5, p.s.; *cf.* FED. R. CRIM. P. 32(i)(4)(B) (victim’s right to be heard at sentencing).

Plea agreements. Chapter Six, Part B sets out the *Guidelines Manual’s* procedures and standards for accepting plea agreements. The standards vary with the type of agreement. *See* FED. R. CRIM. P. 11(c)(1). (Plea agreements are discussed below, under “Plea Bargaining and the Guidelines.”) While the parties 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. para. 5.

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

Chapter Eight: Sentencing of Organizations.

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

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

The Guidelines and Sentencing Advocacy

For years, the application of the guidelines was the paramount issue in federal sentencing, because of the mandatory range that the guidelines set and the limited authority to sentence outside that range. After *Booker*, guideline application is only a starting point; the guideline range is just one of the statutory factors to be considered in imposing a sentence. In addition to calculating the defendant's guideline range, counsel must also consider the remaining factors under 18 U.S.C. § 3553(a), and determine their relative weight in advocating for a sentence which is sufficient, but not greater than necessary, to comply with the purposes of the Sentencing Reform Act. These complex requirements reflect the uncertain terrain that defense counsel must traverse when representing a defendant in the current federal sentencing system.

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*, 128 S. Ct. at 596. Guideline §1B1.1 provides step-by-step instructions for applying the guidelines. To facilitate following those steps, the Sentencing Commission has prepared sentencing worksheets. The worksheets were created before *Booker*; consequently, they do not address the other § 3553(a) factors that are essential to federal sentencing practice. Nevertheless, they may be of great value in calculating the guideline range, especially for newcomers. The worksheets for individuals are appended to this paper.

Challenging the Basis of a Particular Guideline.

While the guidelines remain important, defense counsel must guard against unthinking acceptance of the guidelines' recommendation when preparing a case for senten-

cing. In many cases, there may be legitimate arguments that a particular guideline lacks any 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).³⁰ Facing these competing—and often conflicting—demands, the original members of the Commission could not agree on which sentencing purposes should predominate. See USSG §1A1.3, p.s. (The Basic Approach); *Rita*, 127 S. Ct. at 2464. 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*, 127 S. Ct. at 2464. See also §1A1.3, 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*, 127 S. Ct. at 2462–63; cf. *Kimbrough*, 128 S. Ct. at 574.

Not all of the Guidelines, however, are tied to empirical evidence. See *Kimbrough*, 128 S. Ct. at 575 (finding that cocaine base guidelines “do not exemplify the Commission's exercise of its characteristic institutional role”); *Gall*, 128 S. Ct. at 594 n.2 (same, drug guidelines generally). Although the Commission intended that its policies would “begin[] with, and build[] upon, empirical data,” USSG §1A1.3, 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

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

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 Congress’s original sentencing goals. *Rita*, 127 S. Ct. at 2464–65. As the Sentencing Commission has itself noted, “[t]o date, the guidelines have been used, often pursuant to specific congressional directives, to increase the certainty and severity for most types of crime,” rather than “to advance different goals, that are also mentioned in the [Sentencing Reform Act].” U.S. SENTENCING COMM’N, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 77 (Nov. 2004), http://www.ussc.gov/15_year/15year.htm.

In light of the history of the guidelines’ evolution, it is important that counsel investigate whether there is an empirical basis for an applicable guideline before accepting that guideline’s recommendation. Such investigation can lead to arguments for a lower sentence, even for a case that may not otherwise present grounds for leniency. As the Supreme Court recently said in the context of the cocaine-base guideline, “even when a particular defendant . . . presents no special mitigating circumstances—no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation—a sentencing court may nonetheless vary downward from the advisory guideline range. . . . The only fact necessary to justify such a variance is the sentencing court’s disagreement with the guidelines” *Spears*, 129 S. Ct. at 842 (citation omitted). This reasoning applies to any guideline that lacks empirical support. As the Court has made clear, the system created by *Booker* authorizes a non-guideline sentence not just based on individualized mitigating or aggravating circumstances, but also when the guideline sentence fails properly to reflect § 3553(a) considerations, reflects “unsound judgment,” or when “the case warrants a different sentence regardless.” *Rita*, 127 S. Ct. at 2465, 2468. A guideline’s lack of empirical foundation can help support such arguments.³¹

31. For challenges to the empirical bases of many guidelines, see Amy Baron-Evans, *Sentencing By the Statute* (2009), http://www.fd.org/pdf_lib/Sentencing%20By%20the%20Statute.2.28.09.pdf. And when seeking alternative empirical bases for sentencing, counsel may wish to consult the many governmental and academic resources are also available for review. See generally FEDERAL PUBLIC DEFENDER’S OFFICE SENTENCING RESOURCE MANUAL: USING STUDIES AND STATISTICS TO REDEFINE THE PURPOSES

Before challenging a particular guideline’s empirical basis, however, counsel should consider the guideline’s recommendation in the larger context of sentencing advocacy. When a guideline suggests a sentence that is too high, defense counsel should be prepared to challenge the guideline’s underlying assumptions, and to argue that, in light of all the factors in § 3553(a), the recommended sentence would be greater than necessary to achieve the purposes of sentencing. If the court is nevertheless inclined to follow the guidelines’ recommendations, counsel should closely examine the factual determinations driving those recommendations, and consider whether a constitutional argument may be made for a heightened standard of proof, or even jury findings.³²

In other cases, the guideline range may call for an appropriate sentence, even one that is lower than the court would otherwise be inclined to impose. In those cases, defense counsel can argue for deference to the guideline range, and point out that following the Commission’s recommendation could avoid unwarranted disparity and be sufficient to achieve the other purposes of sentencing. Arguing for a lower sentence within the guideline system—by way of downward adjustment or departure, rather than a variance under § 3553(a)—may also benefit a client if the government challenges the reasonableness of the sentence on appeal.³³

This flexible, case-by-case approach may appear to be inconsistent—it is not. A case-by-case approach is necessary to account for the fact that the guidelines sometimes, but not always, get the balance of § 3553(a) factors right. When the guidelines call for an appropriate

OF SENTENCING (2008), http://www.fd.org/pdf_lib/Resource_Manual_September_2008.pdf.

32. See *supra* note 28, and accompanying text. Constitutional issues regarding guideline determinations may also arise on appeal. Because the substantive reasonableness of a sentence will often turn on determinations made by the district court, not facts found by the jury, Justices Stevens and Scalia have opined that some sentences may be vulnerable to an as-applied Sixth Amendment challenge even under the advisory-guideline regime. See *Rita*, 127 S. Ct. at 2477, 2479 (Scalia, J., concurring); *id.* at 2473 (Stevens, J., concurring). See also *White*, 551 F.3d at 388–91 (Merritt, J., dissenting).

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

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 consider filing a 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 salient sentencing factors in § 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 written statement of reasons. *See* § 3553(c)(2).

Sentencing Hearing. Preparing for the sentencing hearing requires familiarity with the procedures for disclosing the presentence report and objecting to it, and for resolving disputes both before and during the hearing. These procedures are 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. In preparing for the hearing, counsel should consider whether to argue for more formal sentencing procedures in light of the constitutional concerns raised by *Booker*. Even in the advisory guideline system, the Supreme Court expects each defendant's sentence to be subject to "thorough adversarial testing." *Rita*, 127 S. Ct. at 2465; *cf. Irizarry*, 128 S. Ct. at 2203. Finally, at the hearing itself, counsel must scrupulously observe traditional rules on preservation of error to protect issues for possible appeal under 18 U.S.C. § 3742.³⁴

Plea Bargaining and the Guidelines

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,

34. The circuits are divided over the type and timing of objections necessary to preserve claims that a sentence is unreasonable. *See, e.g., United States v. Autery*, 555 F.3d 864, 868–71 (9th Cir. 2009) (discussing cases).

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 carefully analyzed to determine whether its supposed guideline benefit is real or illusory, once the effects of relevant conduct and multiple-count grouping have been considered. Other, equally important considerations affect the possible benefits of sentence-recommendation and sentence-agreement bargains. In all cases, the potential value of an acceptance-of-responsibility adjustment must be carefully considered. And because cooperation by the defendant is a common element of plea bargains, the statutory and guideline provisions that affect cooperating defendants can be of central importance. Each of these subjects is discussed below.

Charge Bargaining. Policy statement §6B1.2(a) authorizes the court to accept a defendant's plea to one or more charges under Rule 11(c)(1)(A), in exchange for the dismissal of others, if "the remaining charges adequately reflect the seriousness of the actual offense behavior" and "accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." Federal plea bargaining has typically involved this form of agreement, under which a defendant has the right to withdraw his plea to the bargained charges if the other charges are not dismissed. Charge bargains, however, will 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. Thus, for example, if a defendant pleads guilty to one drug count in exchange for the dismissal of others, the base offense level will usually be determined from the total amount of drugs involved in all counts, even the dismissed ones.

Despite the effect of relevant conduct, however, charge bargaining can still confer important sentencing benefits. When one of the counts is governed by a Chapter Two guideline with a lower offense level, a plea to that count may produce a lower guideline range.³⁵ Even if a count

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

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* §5G1.1(a), or avoiding a statutory minimum that would raise the guideline range, *see* §5G1.1(b).

Even when the estimated guideline range falls within the statutory sentencing range, a charge bargain to a count with a lower statutory maximum can limit the extent of a potential above-guideline sentence, imposed either as an upward departure under Chapter Five of the *Guidelines Manual*, or as a variance based on the sentencing factors in § 3553(a). And a charge bargain that limits exposure to a single count of conviction can avoid the danger that sentences will run partially or fully consecutive, either to achieve the “total punishment” called for by the guidelines, *see* §5G1.2(d), or to accommodate an upward departure or variance.

Multiple-count grouping. A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which separate charges involve substantially the same harm. When counts are grouped, a single offense level—the highest of the counts in the group—applies to those counts of conviction. §3D1.3(a). In such cases, the offense level will not be adjusted upward even if a defendant is convicted of multiple counts.

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

Sentencing Recommendation; Specific Sentencing Agreement. In addition to charge bargains, Federal Rule of Criminal Procedure 11 authorizes the prosecutor to make either nonbinding recommendations, or binding agreements, with regard to the sentence to be imposed. Rule 11(c)(1)(B) authorizes the prosecutor to recommend, or agree not to oppose, a particular sentence or sentencing range, or the application of a particular guideline or policy statement. Sentence recommendations

under Rule 11(c)(1)(B) are non-binding: A defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw his plea. FED. R. CRIM. P. 11(c)(3)(B). Rule 11(c)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence, a sentence within an agreed guideline range, or the application of a particular guideline or policy statement. Unlike sentence-recommendation agreements, Rule 11(c)(1)(C) agreements are binding: If the court rejects the proposed sentence, the defendant is entitled to withdraw the plea. Policy statement §6B1.2(b) provides that a court may accept a Rule 11(c)(1)(B) or 11(c)(1)(C) agreement only if the proposed sentence is within the applicable guideline range or departs from the range for justifiable reasons. Because the policy statement was promulgated before *Booker* was decided, it does not address the question whether a recommended sentence can, or must, be justified under § 3553(a).

Because of the limits it places on sentencing discretion, a binding sentence agreement under Rule 11(c)(1)(C) can be difficult to obtain. If the prosecutor will not agree to a specific sentence, or if rejection by the court is feared, 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 adjustment apply, that the court not depart, or that the sentence not exceed a certain guideline range. If the court does not follow the parties’ agreement on a particular sentence component, the defendant can withdraw the plea.

Acceptance of Responsibility. Sometimes, the only perceived guideline-range benefit for a plea of guilty will be the adjustment for acceptance of responsibility. Pleading guilty does not guarantee the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. The court’s determination of acceptance of responsibility “is entitled to great deference on review.” USSG §3E1.1, comment. (n.5). Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.³⁶ Nevertheless, while “[a] defendant may remain

36. 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).

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.” *Id.* (n.1(a)).

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

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

Cooperation. Congress directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a lower sentence “to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” 28 U.S.C. § 994(n).³⁷ The Commission responded to this directive by promulgating policy statement §5K1.1. The policy statement requires a motion by the government before the court can depart for substantial assistance. *See Wade v. United States*, 504 U.S. 181, 185 (1992) (dictum) (government §5K1.1 motion is “the condition limiting the court’s authority” to depart); *cf.* 18 U.S.C. § 3553(e) (government motion

required for substantial-assistance departure below statutory minimum). Note that, while cooperation can reduce a sentence below either the guideline or the statutory minimum sentence, a substantial-assistance motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

When the court considers a cooperation motion, it should give “[s]ubstantial weight” to “the government’s evaluation of the extent of the defendant’s assistance”; however, the ultimate determination of the value of the defendant’s assistance is for the court to make. §5K1.1(a)(1), p.s. & comment. (n.3). Even without a government departure motion, cooperation can benefit the defendant at sentencing, as the court can consider it in placing the sentence within the guideline range, in determining the extent of a departure based on other grounds, or as one of the factors justifying a lower sentence under § 3553(a).³⁸ 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.³⁹ *See also* FED. R. CRIM. P. 11(f). Guideline §1B1.8 permits the parties to agree that information provided by a cooperating defendant will not be used to increase the applicable guideline range.

Guideline §1B1.8 has limited effect, however. 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. Moreover, §1B1.8 protects the defendant only from an

38. *See, e.g., United States v. Fernandez*, 443 F.3d 19, 33–34 (2d Cir. 2006) (even without government motion, cooperation is relevant consideration under § 3553(a)(1)); *see also Booker Report* 112–15 (discussing cooperation-based reductions in absence of government motion).

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

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

increase in the guideline range, not from a higher sentence within that range, an upward departure, or a higher sentence under § 3553(a). While it is the “policy of the Commission” that information provided under a §1B1.8 agreement “shall not be used” for an upward departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

“Fast-track” dispositions. For a number of years, prosecutors in some high-volume federal districts in the southwest and elsewhere have approved special “fast-track” disposition programs in common immigration and drug cases. *See* USSG §5K3.1, p.s. (authorizing up to a 4-level departure under a government fast-track program). The rules for participation in each program vary greatly from district to district.⁴⁰ If an applicable fast-track program is in effect, counsel should consider whether it would benefit the defendant to participate, in light of the important rights that the program may require the defendant to relinquish. On the other hand, if no fast-track program is available in a particular district, counsel should consider whether to seek a below-guideline sentence on the ground that it would avoid unwarranted disparity. The circuits are currently divided on the propriety of imposing a below-guideline sentence on this basis.⁴¹

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). That information is, however, made available to the probation officer for use in the presentence report. § 3153(c)(2)(C).

Certain information pertinent to the release decision—including criminal history (especially juvenile

40. *See Booker Report* app. E-18 (identifying districts with fast-track programs).

41. *Compare United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (court may consider whether fast-track-caused disparity justifies a non-guideline sentence), with *United States v. Gonzalez-Zotelo*, 556 F.3d 736, 740–41 (9th Cir. 2009) (prohibiting departures on this basis) (collecting cases).

adjudications and tribal court convictions that might otherwise be unavailable), 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. Most importantly, defendants must take scrupulous care to ensure that information provided is truthful. A finding that the defendant gave false information can lead to denial of credit for acceptance of responsibility, an upward adjustment for obstruction, and even the filing of additional charges. Because of these many dangers, counsel should, if possible, attend the interview or advise the defendant beforehand. Counsel who enters a case after the report is prepared must learn what information was acquired by the officer to be aware of its possible effect. *See* 18 U.S.C. § 3153(c)(1) (requiring that pretrial services report be made available to defense).

Presentence Investigation Report and Probation Officer’s Interview. In most cases, a probation officer will provide a presentence investigation report to the court for its consideration before imposing sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c). The importance of the 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, eligibility for prison programs, and 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), 4247(a)(6), 4248. The report can also affect the conditions of probation or supervised release. Finally, the report must be disclosed not only to the Sentencing Commission, but also to Congress upon request. 28 U.S.C. § 994(w)(2).

Many presentence report recommendations, while nominally objective, have a significant subjective component. The probation officer’s attitude toward the case or the client may substantially influence the report’s sentencing recommendations, which enjoy considerable deference from both the judge at sentencing and the reviewing court on appeal. Overlooked factual errors in the report can be especially dangerous, as Rule 32(i)(3)(A) permits a district court to “accept any undisputed portion

of the presentence report as a finding of fact[.]”⁴² For these reasons, counsel must independently 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.⁴³

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. While the privilege against self-incrimination applies at sentencing, *Mitchell v. United States*, 526 U.S. 314 (1999), refusal to submit to an unrestricted presentence interview is often hazardous. It can jeopardize the adjustment for acceptance of responsibility or adversely affect decisions whether to

42. Rule 32 permits the court to decline to resolve disputes regarding the presentence report if the controverted matter will not affect the sentence. See FED. R. CRIM. P. 32(i)(3)(B) & advisory committee note (2002). Even when the sentence will not be affected, however, counsel should press for resolution of disputes on matters that the Bureau of Prisons could consider in determining conditions of the defendant’s imprisonment. See generally U.S. DEP’T OF JUSTICE, Bureau of Prisons Program Statement 5100.08 (2006), http://www.bop.gov/policy/progstat/5100_008.pdf

43. Courts vary in how they view the evidentiary weight of the presentence report, and in what requirements they place upon a defendant to challenge the report’s factual allegations. See generally THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE §6A1.3, author’s cmt. 5(e), 1715–17 (West 2009).

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 particular case.

Waiver of Sentencing Appeal. One of the most important safeguards put in place by the Sentencing Reform Act was the right to appellate review. See 18 U.S.C. § 3742. While *Booker* substantially changed guideline sentencing procedure, it specifically retained the right to challenge a sentence on appeal. 543 U.S. at 260.

In many districts, prosecutors 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 approved these appeal waivers, and a number of district judges have refused to accept them as part of a plea bargain.⁴⁴ However, they have been approved (with some limitations) by every court of appeals that has considered them.⁴⁵ Federal Rule of Criminal Procedure 11(b)(1)(N)

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

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

requires the district court to advise the defendant of the terms of any bargained sentencing-appeal waiver as part of the plea colloquy.

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

Counsel should also resist any proposed waiver that does not make specific exception for claims of ineffective assistance or prosecutorial misconduct; without these exceptions, the waiver raises the serious ethical problem of lawyers bargaining to protect themselves from possible future liability.⁴⁶

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 amend guidelines itself or direct the Commission to promulgate amendments outside the regular amendment cycle. Since the guidelines were first promulgated in 1987, they have been amended more than 700 times; many of these amendments affected multiple guideline provisions. The amendments, along with explanatory notes, are set out chronologically in Appendix C to the *Guidelines Manual*.

Normally, the controlling guidelines are those in effect on the date of sentencing. USSG §1B1.11(a). However, when a detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing, the Ex Post Facto Clause may bar its application. §1B1.11(b)(1). *Cf. Miller v. Florida*, 482 U.S. 423 (1987) (applying ex post facto to state sentencing guidelines).

constraints).

46. *See, e.g.,* Ohio Advisory Ethics Op. 2001-6 (2001) (citing ethics opinions from other states).

Before *Booker*, the circuits agreed that ex post facto applied to the federal guidelines;⁴⁷ since *Booker* rendered the guidelines advisory, however, the circuits have divided on the issue.⁴⁸

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).⁴⁹ For resentencing on remand after appeal, the sentencing range is determined by application of the guidelines in effect on the date of the previous sentencing. 18 U.S.C. § 3742(g)(1).

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission, paying particular attention to amendments that the Commission denominates “clarifying.” Clarifying amendments are intended to explain the meaning of previously promulgated guidelines. If a proposed clarifying guideline amendment benefits the client, counsel should seek its application even before the effective date, arguing that it provides authoritative guidance as to the meaning of the current guideline. Alternatively, even if a beneficial amendment is not deemed “clarifying,” it may support a request for downward departure or variance before its effective date. On the other hand, if a proposed amendment changes the application of a guideline to a defendant’s disadvantage, counsel should not automatically accede to its retroactive application, simply because the Commission characterized it as “clarifying.”

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

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

48. *Compare United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) (ex post facto no longer applicable after *Booker*), *cert. denied*, 127 S. Ct. 3055 (2007), with *United States v. Turner*, 548 F.3d 1094 (D.C. Cir. 2008) (ex post facto limits still apply).

49. *But 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).

defendant's guideline range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); USSG §1B1.10, p.s. Last year, the Commission substantially amended policy statement §1B1.10. USSG App. C. amends. 712, 713 (Mar. 3, 2008). In many cases, application of the new policy statement would have the effect of limiting the availability of a reduced sentence. Accordingly, anyone representing a defendant who could benefit from a retroactively applicable guideline should carefully review the new policy statement and the Commission's reasons for amending it. Keep in mind that, after *Booker*, treating the policy statement's restrictions as mandatory may be subject to challenge.⁵⁰

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

More About Federal Sentencing

Reference Materials

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

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

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

50. *See Hicks*, 472 F.3d at 1168 (*Booker* applicable to § 3582(c) and §1B1.10). *But see United States v. Rhodes*, 549 F.3d 833, 840–41 (10th Cir. 2008) (*Booker* inapplicable), *petition for cert. filed*, No. 08-8318 (U.S. Jan. 21, 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009) (same); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009) (same), *petition for cert. filed*, No. 08-1185 (U.S. Mar. 20, 2009).

Telephone Support and Online Information

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

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

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

About This Publication

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

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

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

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

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement—

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

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

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

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

Worksheet A (Offense Level)

Defendant _____ District/Office _____

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____

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

Guidelines Manual Edition Used: 20__ (NOTE: worksheets keyed to the Manual effective November 1, 2007)

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: 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) and (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
Sum		<input style="width: 50px; height: 30px;" type="text"/>

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 does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.
If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions

Step 1: Determine if any of the counts group. (Note: 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, enter the highest adjusted offense level from the various “A” Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: 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 closely related 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

<p>1. Adjusted Offense Level for the First Group of Closely Related Counts Count number(s): _____</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	(unit)						
<p>2. Adjusted Offense Level for the Second Group of Closely Related Counts Count number(s): _____</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	(unit)						
<p>3. Adjusted Offense Level for the Third Group of Closely Related Counts Count number(s): _____</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	(unit)						
<p>4. Adjusted Offense Level for the Fourth Group of Closely Related Counts Count number(s): _____</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	(unit)						
<p>5. Adjusted Offense Level for the Fifth Group of Closely Related Counts Count number(s): _____</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	(unit)						
<p>6. Total Units</p>	<hr style="width: 50px; margin: 0 auto;"/>	(total units)						
<p>7. Increase in Offense Level Based on Total Units (See §3D1.4)</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%;">1 unit: no increase</td> <td style="width: 33%;">2 1/2 - 3 units: add 3 levels</td> </tr> <tr> <td>1 1/2 units: add 1 level</td> <td>3 1/2 - 5 units: add 4 levels</td> </tr> <tr> <td>2 units: add 2 levels</td> <td>More than 5 units: add 5 levels</td> </tr> </table>	1 unit: no increase	2 1/2 - 3 units: add 3 levels	1 1/2 units: add 1 level	3 1/2 - 5 units: add 4 levels	2 units: add 2 levels	More than 5 units: add 5 levels	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>	<hr style="width: 50px; margin: 0 auto;"/>
1 unit: no increase	2 1/2 - 3 units: add 3 levels							
1 1/2 units: add 1 level	3 1/2 - 5 units: add 4 levels							
2 units: add 2 levels	More than 5 units: add 5 levels							
<p>8. Highest of the Adjusted Offense Levels from Items 1-5 Above</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>							
<p>9. Combined Adjusted Offense Level (See §3D1.4) Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.</p>	<input style="width: 50px; height: 30px; border: 1px solid black;" type="text"/>							

Worksheet C (Criminal History)

Defendant _____ Docket Number _____

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)

2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and

2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)

3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and

1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only three instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
- b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
- c. When §4A1.1(e) applies because the defendant was released from custody on a sentence counted under §§4A1.1(a) or 4A1.1 (b) within 2 years of the instant offense or was still in custody on such a sentence at the time of the instant offense (see Item 6).

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

Worksheet C

Defendant _____ Docket Number _____

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

6. 2 Points if the defendant committed the instant offense LESS THAN 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b), or while in imprisonment or escape status on such a sentence. However, enter only 1 Point for this item if 2 points were added at Item 5 under §4A1.1(d). (See §§4A1.1(e) and 4A1.2.) List the date of release and identify the sentence from which release resulted. Otherwise, enter 0 Points.

7. 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. (See §§4A1.1(f) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered a single sentence. Otherwise, enter 0 Points.

Note: A maximum sum of 3 Points may be given for Item 7.

8. **Total Criminal History Points** (Sum of Items 4-7)

9. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

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

Worksheet D (Guideline Worksheet)

Defendant _____

District _____

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 C)
Enter the result from Worksheet C, Item 9.

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.

Months

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."

Months

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

Defendant _____

Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6 or Item 7, if applicable.)
(See Chapter Five, Sentencing Table)

Zone A If checked, the following options are available (see §5B1.1):

Fine (See §5E1.2(a))

"Straight" Probation

Imprisonment

Zone B If checked, the minimum term may be satisfied by:

Imprisonment

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 If checked, the minimum term may be satisfied by:

Imprisonment

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 If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

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 applicable box)

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

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

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(10)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

Defendant _____

Docket Number _____

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

a. A term of supervised release is: (Check applicable box)

- Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release): (Check applicable box)

- Class A or B Felony: Three to Five Year Term
- Class C or D Felony: Two to Three Year Term
- Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. _____

13. **Conditions of Supervised Release** (See §5D1.3)

List any mandatory conditions ((a)(1)-(8)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable: _____

14. **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: _____

15. **Fines** (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

- a. Special fine provisions
 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))

	<u>Minimum</u>	<u>Maximum</u>
Enter the sum of statutory maximum fines for all such counts		\$ _____
- b. Fine Table (§5E1.2(c)(3))
Enter the minimum and maximum fines

	\$ _____	\$ _____
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- c. Guideline Range of Fines
(determined by the minimum of the fine table (Item 15(b)) and the greater maximum above (Item 15(a) or 15(b)))

	\$ _____	\$ _____
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- d. Ability to Pay
 Check this box if the defendant does not have an ability to pay.

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
Zone A	4	0-6	0-6	0-6	2-8	4-10	6-12
	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
	Zone B	9	4-10	6-12	8-14	12-18	18-24
10		6-12	8-14	10-16	15-21	21-27	24-30
Zone C		11	8-14	10-16	12-18	18-24	24-30
	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
Zone D	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	1 00-125	120-150	130-162
	28	78-97	87-108	97-121	1 10-137	130-162	140-175
	29	87-108	97-121	108-135	1 21-151	140-175	151-188
	30	97-121	1 08-135	121-151	1 35-168	151-188	168-210
	31	108-135	1 21-151	135-168	1 51-188	168-210	188-235
	32	121-151	1 35-168	151-188	1 68-210	188-235	210-262
	33	135-168	1 51-188	168-210	1 88-235	210-262	235-293
	34	151-188	1 68-210	188-235	2 10-262	235-293	262-327
35	168-210	1 88-235	210-262	2 35-293	262-327	292-365	
36	188-235	2 10-262	235-293	2 62-327	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	