

State Practitioners:
Don't Skip This Article!



By Bonnie Hoffman

Although attorneys practicing in state courts sometimes feel articles on federal practice — especially ones on federal sentencing guidelines — are not for them, much can be gained from primers such as this one. Beyond the obvious benefits to anyone considering expanding their practice to federal courts, this article, written by NACDL Past President Alan Ellis, provides valuable information for state practitioners.

First, understanding the factors that are considered in federal sentencing helps to better serve clients who may be facing federal charges in addition to their state cases. Similar to the efforts made to consider the immigration consequences of various charges, sentences and pleas, understanding the impact state court cases can have on federal guideline calculations can prove to be an invaluable asset in negotiating cases and assisting clients in decisions regarding the resolution of their cases. For example, in federal calculations there are important differences between sentences of 12 months or less and those of 12 months and a day. Understanding this small but vital distinction can impact how a defense attorney negotiates a case or frames a sentencing argument to a judge.

Second, as pleas made in state court cases can impact future federal prosecutions, understanding guideline factors may impact whether an accused should testify in his state court trial or sentencing proceedings or what information is included in his pre-sentence report or proffer because these may enhance guideline scores relating to “relevant conduct” or the accused’s role in the offense.

Third, a basic understanding of federal guidelines can assist state court practitioners in advocating for clients whose state court probation may have been violated by a federal conviction, helping the court to understand the ways in which the client’s state court conviction and status as a probationer impacted the federal guidelines and sentence.

Finally, the article helps frame the various factors defense attorneys can encourage every court to consider in sentencing, whether they are factors that directly impact the guideline scores (such as reductions for acceptance of responsibility) or factors that must be statutorily considered (such as the need for consistency and parity).

Bonnie Hoffman, NACDL’s Parliamentarian, is a state public defender in Virginia.



An Introduction to Federal Sentencing

This article is meant to serve as an easy-to-read primer to help lawyers understand federal sentencing.

Over 25 years ago, before the Sentencing Guidelines went into effect, a federal judge could, with a few exceptions, sentence a convicted defendant to anything from probation to the statutory maximum. All that changed when the Sentencing Guidelines went into effect in 1987. The guidelines were part of a major overhaul of federal sentencing called the Sentencing Reform Act (the SRA). The SRA was supposed to correct what some politicians thought were unfair aspects of the old system, such as unexplained disparities in sentences, light sentences for white collar defendants and heavy sentences on blacks in many parts of the South, and a parole system that made it impossible to know how much time a particular defendant would actually serve. The SRA tried to solve these problems by creating a nearly mandatory guideline system. Under that system, a sentencing court would use the guidelines to determine a sentencing “range.” In most cases, the guidelines required a court to sentence a defendant somewhere within that range.

While the mandatory guideline system “solved” some of the things Congress thought were “problems,” it created others. Unfair sentencing disparities still existed. Cooperators often received lower sentences than the people they helped convict, even when the cooperators’ offense conduct was more serious. A prosecutor’s decision regarding what charges to bring could also create unfair differences in sentences. While white collar defendants no longer received lenient sentences, they received harsh ones instead. In fact, sentences in almost every kind of case became longer under the guidelines.

The mandatory guideline system also had a fatal flaw — it was unconstitutional. Unfortunately, it took nearly 18 years for the Supreme Court to recognize this defect. On Jan. 12, 2005, the Supreme Court ruled in *United States v. Booker* that the mandatory guideline system was unconstitutional. The problem was that under the mandatory guideline system, the maximum sentence a defendant faced was often determined by facts not charged in

The goals are promoting respect for law, just punishment, deterrence, protection of the public, and rehabilitation and treatment of the defendant.

To determine the lowest sentence that meets these goals, the remaining parts of the Sentencing Reform Act require a court to “consider” seven general factors: Two of those factors are the sentencing range suggested by the guidelines and the guideline policy statements. The five other factors a court must “consider” are: (1) the facts concerning the defendant and the offense, (2) the purposes of sentencing, (3) the “kinds of sentences available,” (4) the need to avoid sentences that are unnecessarily higher or lower than those in similar cases, and (5) the “need to provide restitution to any victims.” The sentencing guideline range is only one of seven factors, but often judges treat it as the most important. Many courts still impose sentences within the guideline range in most cases. But even for courts that are more willing to impose sentences outside that range, the guidelines are still important. They are the starting point for considering a lower or higher sentence. It is therefore still important to understand how the guidelines work.

An Overview of The Guidelines

When the guidelines are applied to a case, they produce a “range.” A range might be 51–63 months, for example. The sentencing range is determined by matching two numbers on a chart known as the “Sentencing Table.” One of the numbers is the offense level. The other is the criminal history category. The “offense level” is supposed to reflect the seriousness of the offense. The criminal history category reflects the number and seriousness of the defendant’s prior convictions. A sentencing court is *required* to consider this range before imposing sentence. It is therefore important that the court correctly calculate the sentencing range suggested by the guidelines.

How the Offense of Conviction Affects the Guideline Range

The guidelines measure the seriousness of an offense in two different ways. First, they look to the offense of conviction to determine the offense guideline. This can be critical. For example, a public official who took a bribe might be convicted of accepting a bribe in violation of 18 U.S.C. § 201(b), or of accepting a gratuity, in violation of 18 U.S.C.

§ 201(c). Pleading to a gratuity count will result in a lower guideline range because the offense guideline for a gratuity conviction has a base offense level of 9 (11, if the defendant is a public official), whereas the offense guideline for a bribery conviction has a base offense level of 12 (14, if the defendant is a public official). The higher the total offense level, the higher the sentencing range.

§ 8:11.2 ‘Relevant Conduct’

Selection of the offense guideline is controlled by the offense of conviction. Almost all other guideline decisions are determined by “relevant conduct.” Relevant conduct looks beyond the offense of conviction to what actually happened. For some cases, relevant conduct means what the defendant did to commit the offense, or to prepare to commit the offense, or to try to avoid being caught after committing the offense. In many (if not most) cases, relevant conduct includes much more.

The fraud, theft, tax, and drug guidelines use amounts of money or quantities of drugs to measure the seriousness of the offense. In cases like these, relevant conduct can include conduct that is not part of the offense of conviction. The guidelines look beyond the offense of conviction to other acts or omissions that were part of the same “course of conduct” or “common scheme or plan.” For example, a defendant convicted on a \$1,000 fraud count could end up with a higher guideline range than another defendant convicted on a \$100,000 fraud count. If the \$1,000 fraud count was part of a “scheme” that included 200 such frauds, the relevant conduct would be \$200,000. If the \$100,000 fraud was not part of a larger scheme, then its relevant conduct would be only \$100,000. Because the relevant conduct for the \$1,000 fraud would then be higher than the relevant conduct for the \$100,000 fraud, it will most likely produce a higher guideline range.

Relevant conduct sometimes includes things done by other people. This kind of relevant conduct applies when a defendant worked with other people to commit an offense. The guidelines call it “jointly undertaken criminal activity.” A defendant does not have to be charged with a conspiracy for this type of relevant conduct to apply. A defendant does not even have to know the other people, and he does not have to know everything about what they did. Before a defendant can receive a higher guideline level for things other people did, several factors

the indictment or found beyond a reasonable doubt by a jury (or admitted by a defendant as part of a guilty plea colloquy). The Supreme Court perhaps could have solved this problem by requiring guideline facts to be charged in indictments and proved beyond a reasonable doubt to juries. But it did not. Instead, the Court focused on the parts of the Sentencing Reform Act that gave rise to the constitutional problem. It removed the language from the SRA that required judges to sentence within the guideline range in most cases.

In some ways, sentencing has not changed much after *Booker*. Sentencing facts are still not charged in indictments. Sentencing judges still calculate a defendant’s guideline offense level and criminal history score. And they still decide the facts necessary to make these calculations by a preponderance of the evidence. What is different is that sentences are not controlled by the guidelines in the same way they used to be. Judges have more flexibility to evaluate cases individually. Now that the guidelines are no longer mandatory, the most important part of the SRA is the requirement that the sentencing judge impose the sentence that is “sufficient, but not greater than necessary” to fulfill the purposes of sentencing as defined in the statute. In other words, the court must impose the lowest sentence that still meets these goals. What are those goals?

must be present. First, several people must have worked together to commit the offense. Second, the things that someone else did must have been “reasonably foreseeable” to the defendant. In other words, if the defendant had stopped to think about it, would he have been surprised at what the others did? Finally, the things that other people did must have been “in furtherance of the jointly undertaken criminal activity.” That means that they must have been done to help accomplish the same overall illegal plan the defendant helped carry out. For example, if a defendant unloaded one crate from a truck full of marijuana, all the marijuana from the truck could be relevant conduct. The entire truckload could be relevant conduct if three conditions are met. First, other people had to be involved with the offense. Second, it must have been “reasonably foreseeable” to the defendant that the entire truck was filled with marijuana. Finally, unloading that one crate must have been part of an effort to distribute the whole truckload.

Relevant conduct does not have to be described in the indictment. It can involve conduct described only in counts dismissed under a plea agreement. *It can even include conduct for which a defendant has been acquitted.* The only limit on how high relevant conduct can push an offense level is the maximum sentence allowed by the statute of conviction. No guideline offense level can exceed the limit placed by statute on the counts of conviction.

The Guidelines ‘Sentencing Range’

The guidelines calculate a suggested sentencing range that applies to an entire case. They do not determine suggested ranges for particular counts. After a court determines a range, the judge must “consider” it, along with the other factors listed in 18 U.S.C. § 3553(a), before imposing sentence. The guidelines tell the judge how to calculate a sentencing range for the entire case. After the court “considers” that range, along with the other § 3553(a) factors, it must formally impose sentence separately on each count. If the guideline range is less than the statutory maximum of each count, the guidelines recommend that the court impose the sentences to run concurrently with each other. The guidelines recommend that a court impose sentences to run consecutively if that is necessary to achieve a sentence within the guideline range. For example, the

statutory maximum for one count of conspiring to commit an offense against the United States (18 U.S.C. § 371) is five years. If a defendant were convicted on two such counts, the court could impose a guideline sentence of 84 months (seven years) only by running the sentences consecutively. However, if the guideline range was 11 to 15 years, the court could not impose a sentence higher than 10 years in all. A court may not exceed the statutory maximum for any count. The total sentence for the case must stay within the total maximum for all the counts.

Choosing the Correct Guideline Manual

The Sentencing Commission has issued changes to the Guidelines Manual almost every year since issuing the first edition in 1987. The Sentencing Commission compiles the changes into a new version of the manual on November 1 of every year. The law requires courts to use the version of the sentencing manual in effect on the day the court sentences a defendant. Sometimes, however, the manual in effect on the day of sentencing produces a guideline range that is higher than it would be if the court had used the manual in effect on the day the offense was committed. When this happens, the court must use the manual in effect on the day the defendant committed the offense. This is required by the Constitution’s *Ex Post Facto* Clause.

To check whether there is an *Ex Post Facto* problem, the court may have to make two calculations. The court will calculate the range using the manual in effect on the day of sentencing. It will then calculate the range using the manual in effect on the day the defendant committed the offense. The court then compares the two ranges and uses the lower one. A court will not pick one guideline section from one manual and another from the other manual to come up with the lowest sentence possible. This is called the “one book” rule.

The “one book” rule has one important exception. A court will apply a “clarifying amendment” from a later manual, even if it uses an earlier manual. A clarifying amendment is a change that explains what an earlier guideline meant. A court will apply a clarifying amendment to an earlier manual because the amendment does not really change the earlier guideline. It just explains what the guideline meant all along.

Applying the Guidelines

Step One: Select the Offense Guideline

The first step in applying the guidelines is to select the offense guideline for each offense of conviction. Chapter Two of the Guidelines Manual contains the offense guidelines. The Statutory Index lists the offense guidelines applicable to most federal offenses. It can be found in Appendix A to the manual. If an offense is not listed in the Statutory Index, then the guidelines provide that the “most analogous” offense guideline should be used. If the defendant has a plea agreement that stipulates to an offense that is more serious than the offense of conviction, the guidelines require the court to use the offense guideline for that more serious offense.

Step Two: Determine The Base Offense Level

After selecting the offense guideline, the next step is to determine the “base offense level.” The base offense level is the minimum offense level for a particular offense. It usually does not depend on any of the details of the case. For example, the base offense level for insider trading is level 8. If a defendant is convicted of insider trading, he will start out with eight offense levels, no matter what happened in the case.

Some offense guidelines set the base offense level based upon an amount of money or drugs. For example, USSG § 2D1.1(c) uses drug weight to set the base offense level. In tax cases, the base offense level is at least level 6, but could be higher, depending on the amount of taxes involved. Only drugs or money that qualify as “relevant conduct” are used to set the base offense level. Sometimes, the base offense level is established by the offense level for an underlying offense. This is true for money laundering cases, for example. If the money laundered is from a fraud, then the fraud guideline sets the offense level for money laundering. Occasionally, a guideline will set a minimum base offense level, but it will provide that the offense level of an underlying offense will apply if it is higher. This is true for RICO cases.

Step Three: Specific Offense Characteristics

The next step is to see if any “specific offense characteristic” (SOC) apply. SOCs add (or sometimes subtract) offense levels to the base offense level. The Sentencing Commission lists differ-

ent SOC for each offense guideline. For example, in fraud cases, the victim's loss is an SOC. This SOC ranges from no increase in offense level when there is no loss, to a 30-level increase when the loss exceeds \$100 million. It is important to remember that an SOC applies only to the offense guideline in which it is found. For example, a drug offense SOC provides for a two-level increase if a gun "was possessed." Therefore, a defendant in a drug case will receive a two-level increase if a firearm "was possessed." (The defendant does not have to be the person who "possessed" the firearm. He will receive two levels if the firearm "was possessed" by anyone for whose conduct he is responsible.) However, because the "Promoting a Commercial Sex Act" guideline, § 2G1.1, has no similar SOC, a defendant in that kind of a case in which a gun "was possessed" does not receive an increase in offense level.

Step Four: Cross References And Special Instructions

Occasionally, the offense guideline contains a "cross reference" or "special instruction." "Cross references" tell the court to apply a different offense guideline under certain circumstances. For example, USSG § 2D1.7 normally applies to sales of drug paraphernalia. Although the base offense level for this offense is normally 12, a "cross reference" requires the court to use the drug offense guideline in some paraphernalia cases if that results in a higher offense level. "Special instructions" tell the court how to apply the guidelines in particular situations. Some special instructions relate to the calculation of fines. Two examples of guidelines with special instructions are the price rigging offense guideline and the guideline for use of a firearm during and in relation to certain crimes. Other offense guidelines instruct the court to calculate the guideline offense level as if the defendant were convicted on a separate count for each victim, even though he was not. The guideline for the unlawful production of weapons of mass destruction has that kind of instruction.

Step Five: Adjustments Related To the Victim, Defendant's Role, and Obstruction of Justice

Next, the court applies adjustments that have to do with the nature of the victim, the defendant's role in the offense, and obstruction of justice. One can find these adjustments in Chapter Three, Parts A, B, and C of the Sentencing Guidelines Manual. Unlike

the offense guidelines in Chapter Two of the Manual, these adjustments apply to all offenses. For example, USSG § 3B1.1 adds between two and four levels based on a defendant's leadership role. This adjustment can be added no matter which offense guideline applies.

Adjustments also apply that are based on the nature of the victim. A defendant can receive additional levels if the victim was especially "vulnerable," for example. Levels are also added if the victim was a government official. An adjustment applies if the victim was "restrained" or if the offense involved or promoted terrorism.

Role-in-the-offense adjustments can either increase or decrease the offense level. If the defendant was an organizer, leader, manager, or supervisor of at least one other participant, the court must increase his offense level from between two and four levels. The guidelines also call for a role-in-the-offense increase if the defendant abused a position of trust or used a special skill. The court can make an upward adjustment if the defendant used someone under the age of 18 to help commit the offense or to avoid detection or apprehension. The amount of increase depends on the nature of the defendant's role and the number of people involved in the offense, or how extensive the offense was. A defendant's offense level is decreased between two and four levels if his role in the offense was comparatively "minimal," "minor," or somewhere in between. In drug cases, defendants who receive minor or minimal role adjustments also qualify for additional decreases.

Before the abuse-of-a-position-of-trust adjustment applies, the government must prove two things. First, the defendant must have held a "position of trust." A "position of trust" is not the same as "being trusted." This adjustment does not apply simply because a victim trusted a defendant. The defendant must hold a *position* of trust. For example, a corporate officer holds a position of trust with respect to his corporation. Second, being in a position of trust must have helped the defendant commit the offense. For example, being a corporate officer might help a defendant steal funds to which he had access because he was an officer. The use-of-a-special-skill adjustment applies to defendants who have "special skills," such as lawyers, chemists, doctors, pilots, and accountants. But having a special skill is not enough to qualify for this adjustment. The special skill must help the defendant

commit the offense. A chemist convicted of tax evasion would not receive this adjustment. One does not need to be a chemist to evade taxes. A chemist convicted of manufacturing controlled substances, on the other hand, might receive it. The question would be whether his special knowledge of chemistry helped him commit the offense.

The obstruction of justice adjustment is found at USSG § 3C1.1. It is most often applied against defendants who testify falsely in their own defense. Not all defendants who testify receive this adjustment. The court must first find that they committed perjury. It is a risk that all defendants must consider before taking the stand. The adjustment is also applied to other obstructive behavior, such as destroying evidence, or pressuring or threatening witnesses.

Step Six: Grouping

Whenever a case involves more than one count of conviction, the offense levels for each count or group of counts must be "combined." The offense levels must be combined for the guidelines to determine an offense level that applies to the entire case. There are two ways that the guidelines combine offense levels from different counts to determine the offense level for the case. The first way is by "grouping." The second way is by taking the offense level for the most serious count, and then adding levels to it. The number of levels added to the offense level for the most serious count depends on the seriousness of the other counts.

Counts can be "grouped" if they are "closely related." Several kinds of counts can be grouped. Counts are grouped when their offense levels are largely determined by a quantity of something. For example, if a defendant pleads guilty to two counts of possession of marijuana with intent to distribute, those counts are considered together. The total amount of marijuana from both counts will be added up and used to establish the base offense level for the "group." Counts of fraud or tax evasion would group this way.

Counts can also be grouped when their offense levels are not largely determined by quantity. Courts look to a number of factors to make grouping decisions in these kinds of cases. First, a court would look at whether the crimes had the same victim or victims. If they did, the court would look to whether the offenses involved the same acts or transactions. It would also look to whether they were part of a common scheme or plan. If both of these factors were pres-

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ent, the counts would “group.” Consider a case in which a defendant trespassed on government property and stole something from the government. The defendant was convicted on one count of trespassing on government property and another count of theft of government property. The counts would group because both factors are present. First, the victim of each count is the same — the government. Second, both counts are part of the same scheme — a scheme to steal something from the government. When courts group counts in this way, the offense level for the group is the offense level for the most serious count. Courts also group counts when one count is conduct that is used to determine the offense level for another count. For example, the base offense level for a money laundering count is the offense level for the underlying offense. If the underlying offense is a drug offense, then the money laundering and drug offenses would be grouped. When counts are grouped in this way, the offense level for the group is the offense level for the most serious count.

Some offenses are never grouped together. Some of these crimes are identified in USSG § 3D1.2. For example, burglary counts are not grouped, even though their offense level depends on the loss to the victim. USSG § 2B2.1 is the burglary guideline. Generally, courts do not group violent crimes or offenses against persons. Courts do not group assaults, robberies, and sexual offenses. Some nonviolent offenses also do not group. These include fraudulently acquiring naturalization, citizenship or residency documents, payment to obtain public office, or escape from custody or confinement.

If the court does not group the counts, it will use USSG § 3D1.4 to determine a combined offense level. For example, if a defendant was convicted of conspiracy to commit murder, several drug distribution counts, and a bank robbery, not all the counts would group. The drug distribution counts would group with each other, but they would not group with the other counts. The murder and bank robbery counts would not group with any count. The court would therefore calculate an offense level for the drug distribution group. It would also separately calculate an offense level for the murder group and one for the robbery group. The court would then combine these offense levels. Even though there was only one count of robbery and one count of murder, the guidelines think of them as separate

“groups” when it combines them.

When a court combines offense levels, it first looks to the offense level for the most serious group. It then compares that offense level to the offense level for each of the other groups. When the offense level for a group is between one and eight levels less serious than the most serious group, the combined offense level will be raised. When a group is nine or more levels less serious than the most serious offense, it does not cause the combined offense level to increase. When a defendant is convicted of more than one crime, and those counts cannot be grouped, the combined offense level is determined solely by the counts of conviction. For example, if a defendant is convicted of four bank robberies, his combined offense level will be based on the four counts of conviction. This is so, even if the government has evidence that the defendant committed nine bank robberies. The court might consider the other bank robberies in deciding whether to impose a sentence that is higher than the top of the guideline range.

Step Seven: Acceptance Of Responsibility

The last step in calculating the offense level is to determine whether the “acceptance of responsibility” adjustment applies. Defendants who accept responsibility are entitled to at least a two-level reduction in offense level. Sometimes, defendants are entitled to a three-level reduction.

The two-level reduction is most often given to defendants who plead guilty. But pleading guilty is no guarantee. Defendants who plead guilty are sometimes denied credit for acceptance of responsibility. Defendants who try to withdraw their pleas prior to sentencing have been denied the credit. Likewise, courts have denied the credit to defendants who have made statements denying guilt after they pleaded guilty. Defendants who obstruct justice or commit other crimes after pleading guilty are often denied the credit too.

Sometimes, but not very often, a court will give credit for accepting responsibility to a defendant who went to trial. Defendants who receive this credit after going to trial usually have not disagreed with the prosecutor’s version of what happened. Instead, they are people who made only a legal argument at trial that what they did was not a crime.

A defendant may receive an additional level reduction for acceptance of

responsibility, for a total of three, if he meets three conditions. First, he must have an offense level of 16 or higher. The level is measured right before the credit is applied. Second, he must timely notify the prosecution of his intent to plead guilty, “thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” Finally, a court may grant this third level downward adjustment only if the prosecutor files a motion stating that defendant meets the criteria for the additional level.

Step Eight: Criminal History Category

A defendant’s guideline range is determined by two factors. The first factor is the offense level. The second factor is the criminal history category. A higher criminal history category means a higher guideline range. A court calculates a defendant’s criminal history category using criminal history points. Defendants receive “points” for prior sentences. The number of points a defendant receives partially depends on the length of each prior sentence. A defendant receives three points for each prior sentence of at least 13 months. A defendant receives two points for each prior sentence of at least 60 days. Otherwise, a defendant receives one point for a prior sentence. A defendant receives two more points if he committed his current offense while he was on probation, parole, supervised release, imprisonment, work release or escape status. The court adds another two points if the defendant committed the current offense when he was in prison. The court also adds up to two more points if the defendant committed the current offense less than two years after he completed a sentence of at least 60 days.

Some sentences are too old to be counted. A sentence of more than 13 months does not count if the sentence was imposed more than 15 years before the defendant began to commit the current offense. There is one exception to this rule. A sentence imposed more than 15 years ago counts if the defendant committed the current offense less than 15 years after he was released from prison on the prior sentence. A similar 10-year rule applies to prior sentences of 13 months or less.

A prior sentence of probation normally counts for one criminal history point. For example, if a defendant was sentenced to 30 days in jail and three

years’ probation, he would normally receive one point. However, if the court later revoked probation and sentenced the defendant to 14 months in prison, he would receive three points.

Some minor offenses never add points. Sentences for hitchhiking, loitering and public intoxication never count. Other sentences only count if the defendant received at least 30 days’ imprisonment or one year of probation, or if the prior offense was similar to the current offense. Sentences for careless or reckless driving, disorderly conduct, contempt of court, gambling, prostitution, and trespassing are treated like this.

A prior sentence that punished conduct that is part of the current offense does not count. In other words, if conduct underlying the prior sentence is “relevant conduct” for the current offense, no points are added. For example, when a defendant is prosecuted in both state and federal court for the same acts, the defendant receives no points for the prior state sentence. Cases that ended in diversion or deferred prosecution usually do not add points. The exception is cases in which the defendant entered a formal plea of guilty or *nolo contendere*.

Sentences imposed in foreign countries do not count. Neither do sentences for expunged, reversed, or invalid convictions. Sentences that are “set aside” for errors of law, or because the defendants are innocent, do not count. Prior sentences usually do not count if the defendant committed the offense when he was under 18. However, when juveniles receive adult sentences of 13 months or more, they do count as priors. Sentences imposed on juveniles also count if the defendants began their current offenses within five years of completing the juvenile sentences.

There are six criminal history categories. Category I is for defendants with either zero or one criminal history point, representing no to minimal and non-serious prior criminal conduct. Category VI is for defendants with more than 13 points, representing those with numerous and serious prior criminal conduct. Criminal history points affect a defendant’s guideline range. A defendant in Category I will have a lower guideline range than will a defendant with the same offense level who is in a higher criminal history category. Sometimes, a defendant’s criminal history score exaggerates or understates the seriousness of his criminal record. A defendant may have a lot of points because of many minor brushes with the law. The high

criminal history category may make his priors seem more serious than they really are. In that case, a guideline policy statement suggests that a “downward departure” may be appropriate. Another defendant may have a long criminal history, but few prior sentences that count. This can happen when a defendant has many foreign or juvenile convictions that do not count. In such a case, a guideline policy statement suggests that an “upward departure” may be appropriate. Now that the guidelines are no longer mandatory, there is no significant difference between a guideline and a guideline policy statement. A sentencing court must “consider” guidelines as well as guideline policy statements prior to imposing sentence.

Step Nine: The Guideline Range

After the court arrives at the applicable offense level and criminal history category, it is a simple matter to determine the guideline range. The court simply turns to the Sentencing Table at the beginning of Chapter Five of the Guidelines Manual and goes to the intersection of the appropriate offense level line with the criminal history category column. The range is given in months of imprisonment. For example, if the offense level is 24 and the criminal history category is III, the range is 63-78 months. A 0-6 month range means that the sentencing guidelines recommend a sentence somewhere between probation and six months’ imprisonment.

There are two exceptions to this method of arriving at the guideline range. The first exception applies when the guideline range would come out higher than the statutory maximum. For example, if a defendant is convicted on one count of money laundering, a 20-year statutory maximum applies. If the defendant’s offense level was 34 and his criminal history category was VI, the range would normally be 262-327 months. However, because the statutory maximum is 20 years (240 months), the 262-327-month range does not apply. Instead, 240 months becomes the recommended guideline sentence.

If the same defendant is being sentenced on one money laundering count *and* one drug count, the court would be able to impose a sentence within the guideline range if it wanted to. The court could construct a sentence within this range by running part of the sentences consecutively. For example, if the drug count had a statutory maximum of 20 years, then the court could impose a 20-year sentence on each count. The court

could run part of one sentence consecutively to achieve a sentence within the 262-327-month guideline range.

The second exception is applicable when the range is lower than a mandatory minimum sentence. For example, if the offense level is 22 and the criminal history category is I, the guideline range would normally be 41-51 months. However, if the defendant was subject to a five-year mandatory minimum sentence, the recommended guideline sentence becomes 60 months (five years). Mandatory life sentences also trump any lower sentence suggested by the guidelines. Mandatory life is required by certain murder and drug statutes and under the “three strikes” law. There is no parole for defendants sentenced for crimes committed on or after November 1, 1987, which is when the Sentencing Reform Act, the law that established the Guidelines, went into effect. A person receiving a life sentence will die in prison unless the sentence is later changed for some reason.

Special Situations

The guidelines generally determine the sentencing range by calculating the offense level and the criminal history category in the ways already discussed. This method usually produces a sentence that any reasonable person would consider punitive enough. Sometimes, however, Congress wants to make sure that the guideline range is even harsher for certain defendants. The Sentencing Commission has adjusted the guidelines to comply.

Career Offender. The first type of defendant subject to a harsher sentence is the “career offender.” To be a career offender, a defendant must meet three conditions. He must have been at least 18 years old when he committed his current offense. His current offense must be a crime of violence or a “controlled substance” offense. Finally, he must have two prior convictions for crimes of violence or controlled substance offenses. The Career Offender guideline sets offense levels based on statutory maximums. It also places all “career offenders” in Criminal History Category VI.

Armed Career Criminal. “Armed career criminals” must receive sentences of at least 15 years’ imprisonment. They may be sentenced up to life in prison. An armed career criminal is someone who violates 18 U.S.C. § 922(g) and meets other conditions set by § 924(e) (the Armed Career Criminal Act, also known as ACCA). Section 922(g) mainly applies

FORENSIC DNA CONSULTANT

LISA MOKLEBY

B.Sc., M.S.F.S.

306-960-7495

- Trial preparation/ assistance
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to gun possession by previously convicted felons. Explaining these offenses is beyond the scope of this section. The guideline offense level for ACCA defendants is determined by USSG § 4B1.4. This guideline requires the court to calculate a defendant’s offense level using the one of several methods that produces the greatest offense level. The first method is to determine the defendant’s normal guideline level. The second uses the “career offender” guideline, if that is applicable. The third imposes an offense level of 33 or 34. The ACCA guideline also controls a defendant’s criminal history category. It requires a criminal history category of at least IV. In some cases it requires a court to use Category VI.

Repeat Sexual Offenders. Repeat sexual offenders are subject to statutory maximums that are twice as long as first offenders. The guidelines take this into account through USSG § 4B1.5. This is the guideline for “repeat and dangerous sex offenders against minors.” This guideline sets the offense level based on the statutory maximum. It requires a criminal history category of at least Category V.

Mandatory Minimums. Some laws require courts to impose a sentence

that is no less than a certain number of years. Mandatory minimum sentences are the most common way that Congress makes sure that some defendants receive harsher sentences than their guidelines would otherwise require. For example, a defendant convicted of growing 100 or more marijuana plants must be sentenced to at least five years in prison, no matter how much the plants weigh. If a defendant grew 100 marijuana plants that each produced 100 grams of useable marijuana, he would have grown 10 kilograms of marijuana. This normally results in a base offense level 16. If this defendant received no other levels and was in Criminal History Category I, his guideline range would normally be 21-27 months. However, because of the mandatory minimum, the court would have to impose a five-year (60-month) sentence on that count.

§ 3553(A) Factors

After the sentencing court calculates the guideline range, it must “consider” it along with the other factors listed in 18 U.S.C. § 3553(a). Those factors are the “nature and circumstances of the offense and the history and characteristics of the defendant,” the purposes of sentencing, “the kinds of sentences available,” the policy statements issued by the Sentencing Commission, such as those related to departures, “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” and “the need to provide restitution to any victims of the offense.”

Departures and Variances

Another one of the seven 3553(a) factors a sentencing court must “consider” is the Sentencing Commission’s policy statements. The sections of the Sentencing Guidelines Manual that deal with “departures” are all “policy statements.” When the guidelines were mandatory, a “departure” was the way that they dealt with situations that were either not covered by the guidelines at all or that were not adequately covered by them. The guidelines themselves recognize that it may be appropriate for a court to impose a sentence that is lower or higher than the otherwise recommended range. When a court lowers the offense level or criminal history category for this reason, it is called a “downward departure.”

When it raises one of them for this reason, it is called an “upward departure.” When a court “departs,” it does not have to say that it is departing up or down any particular number of offense levels or criminal history categories. It can simply depart to a sentence that is higher or lower than the guideline range. When the guidelines were still mandatory, “departures” were the only way a court could impose a sentence outside the guideline range.

Now that the guidelines are advisory, it is less important whether a particular mitigating or aggravating factor would justify a departure. That is because courts may now sentence below or above the guideline range if they think that is necessary to achieve a sentence that is “sufficient, but not greater than necessary” to achieve the goals of sentencing — regardless of whether there are grounds for a departure under the guidelines. A sentence above or below the guideline range that is not supported by a departure is called a “variance. Although a court may now impose a below-guideline sentence even when guideline policy statements provide no basis to “depart,” policy statements are still important. If a mitigating factor would have justified a downward departure under the mandatory guideline system, it may be easier to justify a lower sentence to a court.

Sentencing guideline policy statements provide that several factors may never support departures. They include race, sex, religion, lack of youthful guidance, drug or alcohol dependence, and post-sentencing rehabilitation. But now that the guidelines are no longer mandatory, courts may, in appropriate cases, rely on these formerly excluded factors to impose a sentence that is outside the guideline range.

Guideline policy statements say that departures may be appropriate in three situations. In the first situation, the case involves a factor that is not mentioned by the guidelines at all. Such factors are likely to be unique to the case in question. The second situation arises when a case involves a factor for which a policy statement “encourages” departures. Encouraged downward departures are listed in USSG §§ 5K2.1-5K2.18 and § 5K2.20. Some of the circumstances for which the guidelines encourage downward departures are as follows:

- ❖ The victim’s wrongful conduct provoked the offense.

- ❖ The defendant committed the offense to avoid a greater harm. The guidelines give “mercy killing” as an example of this.
- ❖ The defendant was forced to commit the offense. This departure is helpful when there was coercion, but not enough to warrant an acquittal.
- ❖ The offense was out of character for the defendant. The guidelines call this “aberrant behavior.”
- ❖ The defendant’s “diminished mental capacity” contributed to the offense. Diminished mental capacity refers to psychological problems. It also covers very low intelligence. The guidelines recognize two kinds of diminished capacity. One kind of diminished capacity makes it difficult for a defendant to control his behavior. The other kind makes it difficult for a defendant to understand that what he did was wrong. This departure is encouraged only for nonviolent offenses and for offenses that were not caused by voluntary drug or other intoxicant use. It is also not generally available to sex offenses.
- ❖ The defendant voluntarily disclosed the offense.

The guidelines encourage *upward* departures for things such as extreme conduct, abduction or unlawful restraint, extreme psychological injury, and significantly endangering the public welfare. Some of the guidelines in Chapter Two also mention “encouraged departures” for specific types of offenses. Most of these point upward, but some encourage downward departures.

The third situation in which guideline policy statements recognize that departures may be appropriate is when a case involves a “discouraged factor” to an extraordinary degree. The guidelines say that these factors are “not ordinarily relevant” to whether a court should depart. Departures based on such factors are recommended only if they are present to an extraordinary extent.

Factors for which departures are “discouraged” include the following:

- ❖ A defendant’s age.
- ❖ A defendant’s education.
- ❖ A defendant’s skills.

- ❖ A defendant's physical, mental or emotional condition.
- ❖ A defendant's civic and charitable contributions.
- ❖ A defendant's employment record.
- ❖ A defendant's family ties and responsibilities.

These factors are “discouraged” as reasons for departure because they are more common. For example, it is not unusual for a defendant facing sentencing to have emotional problems. Children and spouses often suffer when one of their family members is sent to prison. Policy statements recommend that courts not depart for these reasons unless the emotional problem or the suffering of the spouse or children is extraordinary.

Sometimes policy statements recommend that courts consider departures based on a factor that the guidelines have considered. This can happen when the factor is present to a degree that the guidelines did not consider. For example, the guidelines provide for a downward adjustment for acceptance of responsibility. Some courts have departed downward for extraordinary acceptance of responsibility. When a court “departs” for this reason, it means that it lowers the offense level even more than the two or three levels provided by the guidelines. Courts have found extraordinary acceptance of responsibility in several situations. Defendants who have begun to pay restitution before they have been charged with an offense have received this departure. Likewise, defendants have received this departure when they have taken steps to rehabilitate themselves before being charged. Now that the guidelines are no longer mandatory, courts may choose to impose sentences below the recommended range for reasons that the Sentencing Commission took into account, as long as they “consider” the guidelines, policy statements, and other factors required by 18 U.S.C. § 3553(a), and as long as they explain why the lower sentence is “sufficient, but not greater than necessary” to achieve the goals of sentencing.

A defendant also may receive a downward departure if he helps the government prosecute or investigate someone else. A guideline policy statement recommends that a court not depart for this reason unless the prosecution files a motion stating that the

defendant provided “substantial assistance.” Normally, a defendant cannot force the government to file a “substantial assistance” motion. This rule has two exceptions (three in some circuits). The first exception comes into play when the government refuses to file a motion for an unconstitutional reason, such as a defendant's race. The second exception arises when the government has agreed in a plea agreement to file the motion, and then does not. It is unusual for the government to promise in advance to file a substantial assistance motion. Plea agreements often mention conditions under which the government will file substantial assistance motions, but they usually give the government sole discretion to determine whether those conditions have been met.

In some circuits a third exception to the general rule exists. This exception can help defendants with cooperation agreements that provide the government will file the motion if it believes the defendant's cooperation amounts to “substantial assistance.” Agreements like these, however, are hard to enforce. The government can always say that it did not believe the defendant's cooperation amounted to “substantial assistance.” In some circuits a defendant can force the prosecution to file a departure motion if he can demonstrate that the prosecution's refusal to file the motion was made in “bad faith.” The defendant must prove that his cooperation met the prosecution's standards for substantial assistance, but the prosecution refused to file the motion anyway.

Unless one of these conditions apply, a defendant cannot force the government to file a departure motion. This is not to suggest that substantial assistance motions are rare. They are not. The latest figures available are for 2006, and they reflect that a government substantial assistance motion is the most common reason for departure. Courts departed in 14.4 percent of the sentences imposed that year, in response to “substantial assistance” motions. Now that the guidelines are no longer mandatory, courts have the authority to impose lower sentences to reward cooperation — even when the prosecution refused to file a departure motion. The one exception to this rule is when a mandatory minimum sentence applies. In that situation, a government motion is *required* before a court can impose sentence below that minimum.

‘Substantial Assistance’ Motions, Cooperation Agreements, and the ‘Safety Valve’

There are two exceptions to laws that require mandatory minimum sentences. One applies when the prosecutor makes a “substantial assistance” motion. This exception applies to all mandatory minimum cases. The other applies only to drug cases. It is known as the “safety valve.”

‘Substantial Assistance’ Motions

Substantial assistance motions reward defendants who “cooperate” with the government. There are two kinds of substantial assistance motions. One kind permits courts to go below mandatory minimums. That kind of motion is authorized by 18 U.S.C. § 3553(e). The other kind asks courts to depart below the guideline range — but not below a mandatory minimum. That kind of motion is authorized by USSG § 5K1.1.

Prosecutors do not file departure motions for all cooperators. A prosecutor will file a motion only if the cooperation was “substantial.” What is substantial in one prosecutor's office may not be substantial in another office. All prosecutors think that testifying against another person is “substantial.” Some prosecutors think that talking about another person is not “substantial” if it does not lead to an arrest or conviction.

In a case involving a mandatory minimum sentence, a substantial assistance departure motion can give a court the power to impose a sentence as low as probation. A court can impose a lower sentence without a substantial assistance motion in a case that does not involve a mandatory minimum sentence. However, it is more likely that a court will impose a lower sentence if the government files a motion. A court will usually impose a lower sentence when the government files a departure motion, but not always. Departure motions do not *require* courts to impose lower sentences. Sometimes prosecutors make recommendations in their motions. A court also does not have to go along with a prosecutor's recommendation. It is up to the court how low to go. In some cases defense counsel can persuade the court to go even lower than recommended by the prosecutor.

Cooperation Agreements

Plea agreements sometimes require defendants to cooperate with the government. These are called “cooperation

agreements.” Cooperation agreements provide different kinds of benefits to defendants. Sometimes the prosecution promises to file a substantial assistance departure motion. If the government makes the promise without any conditions, it *must* file the motion. More often, a promise by the prosecution comes with conditions attached. The usual condition is that the defendant’s cooperation must be “substantial.” Usually, it is entirely up to the prosecutor to decide what counts as being “substantial.” Sometimes the government promises only to “consider” filing a motion. These kinds of agreements often lead to departure motions, but they are not guarantees.

The ‘Safety Valve’

There are no mandatory minimums in drug cases for defendants who qualify for the “safety valve.” If a defendant qualifies for the safety valve, the court may sentence him below the mandatory minimum. Most defendants who qualify for the safety valve also qualify for a two-level decrease in their offense levels. There is one exception to this rule. A safety valve decrease cannot take a defendant’s offense level below Level 17.

A safety valve reduction is not the same thing as a departure. A defendant who qualifies for the safety valve will usually receive a lower sentence because his guideline range will usually be lower. It will usually be lower because no mandatory minimum will make it higher, and because he will receive a two-level decrease.

The prosecution does not have to file any motion to qualify a defendant for the safety valve. A defendant must meet five conditions:

- ❖ Not more than one criminal history point;
- ❖ Defendant did not use or threaten violence; defendant did not possess a dangerous weapon in connection with the offense;
- ❖ No one was killed or seriously injured by the offense;
- ❖ Defendant was not an organizer, leader, manager or supervisor of other people involved in the offense; and
- ❖ Prior to sentencing, defendant told the prosecution everything he knew about his offense and “relevant conduct.”

The requirement that a defendant talk to the prosecution about his own offense and “relevant conduct” does not mean that he must give the government new information. It does mean, however, that sometimes a defendant must tell the prosecution about the criminal conduct of other people. A defendant does not have to testify against anyone to qualify for the safety valve.

Probation, Split Sentences, And Community or Home Confinement

Now that the guidelines are advisory, the restrictions they used to impose on probation, split sentences, and community or home confinement no longer limit courts in the same way. Courts now have the authority to impose these kinds of sentences in almost any case — even if there is no reason to “depart.” The exception arises when a statute prohibits a certain kind of sentence. Because a court must still “consider” the guidelines, it is important to understand how these restrictions work.

The guidelines recommend probation only if the range is in “Zone A” or “Zone B” of the Sentencing Table (8:42). “Zone A” means the guideline range is between zero and six months. A sentence of probation would be within the guideline range because a sentence of zero months is a sentence within the range. A sentence within this range also is not required to have home or community confinement as a term of probation. “Community confinement” means a halfway house.

Defendants in “Zone B” also may receive sentences of probation that are within the guideline range. Zone B ranges have low ends between four and eight months, and high ends of 14 months or less. For defendants in Zone B, a probation sentence is within the guideline range if it includes some kind of confinement as a term of probation. That confinement can be in a halfway house or home confinement. Zone B sentences may allow work release from the confinement without being outside the guideline range.

Defendants in “Zone C” may receive what is sometimes called a “split sentence” and still be within the guideline range. Zone C ranges have low ends greater than 10 months, but less than 18 months. Defendants in Zone C may receive sentences within the guideline range that require them to serve at least half of the minimum term in prison and the other half in community confine-

ment or home detention as a condition of supervised release. For example, if a defendant has a guideline range of 10-16 months, putting him in Zone C, the judge could give a sentence within the guideline range that includes five months’ imprisonment and supervised release that included a condition that the defendant serve five months in a halfway house or in home detention.

The guidelines recommend that defendants in “Zone D” not be sentenced to terms of probation. Zone D ranges have low ends of at least 12 months. After *Booker*, some creative lawyers have successfully urged judges to place their clients on probation or impose split sentences for people whose guidelines fall within Zone D. For example, judges have imposed sentences of a year and a day of incarceration followed by supervised release, with a year’s home confinement as a condition of supervised release, rather than two-year advisory guideline prison sentences.

When the Defendant Is Already Serving a Sentence

Some defendants are already serving sentences for other crimes when they are sentenced. Sometimes the guidelines recommend a sentence that runs consecutively to the first sentence. If the court accepts that recommendation, the new sentence will not even start until the defendant completes the first sentence. In other cases, the guidelines recommend concurrent sentences. That means that if the court accepts the recommendation, the defendant will serve both sentences at the same time, at least starting from when the second sentence is imposed. If the defendant is currently in custody serving another sentence, the court must include special language in the judgment that will permit the new federal sentence to run concurrently with the other sentence. Otherwise, the Bureau of Prisons will not begin to run the new federal sentence until the defendant has completed serving his other sentence. In other cases, the guidelines make no specific recommendation, other than that courts use their discretion to impose concurrent or consecutive sentences, or sentences that are a little of both.

The guidelines recommend consecutive sentences for crimes committed while the person was already in prison or on work release, furlough, or escape status. The guidelines recommend concurrent sentences if two conditions are met. First, the defendant must not have com-

mitted the offense in prison or on work release, furlough, or escape status. Second, the guidelines for the current offense must take the earlier offense conduct into account. This can happen when a defendant is prosecuted for a federal offense after he was prosecuted for a state offense that punishes some or all of the same conduct.

Sometimes a defendant is serving a sentence for an unrelated crime that he did not commit in prison, etc. For these cases, the guidelines make no recommendation other than that courts use their discretion to run the sentence consecutively or concurrently, or a combination of the two. The guidelines recommend that judges decide what result is most fair in such cases.

Supervised Release

There is no parole for defendants sentenced for crimes committed on or after Nov. 1, 1987. That does not mean that after a defendant is released from prison he is no longer under any supervision. The guidelines recommend that a court impose a term of “supervised release” whenever it sentences a defendant to more than a year in prison. Terms of supervised release range from one to five years, and sometimes even life, depending on the offense and the maximum punishment.

Defendants on supervised release are under the supervision of probation officers. They must report to their probation officers on a regular basis. They also need permission from their probation officers to travel outside of their district. Defendants on supervised release must follow numerous conditions, many of which are listed in USSG § 5D1.3. For example, defendants on supervised release must work unless their probation officers excuse them. They are also not allowed to be in touch with the people they met in prison, unless their probation officers allow it. Federal law allows a court to terminate a term of supervised release after a defendant has successfully completed one year of supervised release.

A defendant who violates one of the conditions of supervised release can be sent to prison for up to the full term of supervised release. Before a court can send someone to prison for violating a term of supervised release, it must “consider” many of the same factors that it had to consider before imposing sentence in the first place. Those factors include the sentencing guidelines and policy statements. Chapter Seven of the

Guidelines Manual includes policy statements relevant to the revocation of supervised release. Whether a defendant who violates the conditions of supervised release will be sent to prison, and if so, for how long, depends on the seriousness of the violation. Defendants who violate supervised release are not usually sent to prison for the full term of the supervised release. How long a violator must serve depends on the seriousness of the violation and the violator’s criminal history category. Chapter 7, part B of the guidelines deals with violations of probation and supervised release.

Fines, Restitution, And Forfeitures

Every federal sentence includes a \$100 special assessment for each felony count of conviction. For example, if a defendant is convicted on 10 felony counts, he will receive a \$1,000 special assessment. Sentences often include other financial penalties as well, such as restitution, fines, and forfeitures. Restitution is an order to pay money that goes to the victims of the offense. Courts are often required to order defendants to pay the full amount of victims’ loss as restitution. A court must order full restitution in most cases, even if the defendant does not and never will have the money to pay it. If a defendant does not have resources to pay the restitution, the guidelines recommend that the court order him to make small monthly payments that he can afford. A court can require a defendant to make payments on a restitution order as a condition of supervised release.

The guidelines recommend that a court impose a fine unless the defendant is unable to pay one and is unlikely to become able to pay one. Courts do not impose fines in most cases because most defendants are unable to pay them. The guidelines recommend a range for fines based on a defendant’s offense level. A defendant’s criminal history does not affect the fine range. For example the fine range for offense levels 16-17 is \$5,000 to \$50,000. The fine table is found at USSG § 5E1.2(c)(3). A court must consider this range, just as it must consider the guideline imprisonment range. But it is no more required to impose a fine within the range than it is to sentence within a range. If a court orders a defendant to pay restitution and a fine, any money the defendant pays will be used to pay the restitution first.

A few statutes require defendants to pay the cost of their prosecution. These include several tax offenses, as well as larceny or embezzlement in connection with commodity exchanges. These statutes are listed in the commentary that follows USSG § 5E1.5.

Finally, some statutes require a court to impose an order of forfeiture as part of the sentence. When property is forfeited, it is turned over to the government. Racketeering and drug laws, for example, require defendants to forfeit to the government certain property used in the offense or purchased with money gained from the offense.

Appeals From Sentencing Decisions

Prior to the guidelines, it was nearly impossible to appeal a sentence. That changed with the guidelines system. When the guidelines were mandatory, it was possible to appeal a sentence if it was imposed as a result of an incorrect application of the guidelines or if the court departed upwards. The government could also appeal sentences it believed were imposed as a result of an incorrect application of the guidelines or if the court departed downwards. After *Booker*, it is still possible for defendants and the government to appeal sentences. Now courts of appeals review sentences for “reasonableness.”

Courts of appeals review two types of “reasonableness.” A court of appeals begins by reviewing a sentence for procedural reasonableness. Determining whether procedural reasonableness exists involves looking at several factors. First, the appeals court looks to whether the district court correctly calculated the guideline range. If the district court did not calculate the guideline range correctly, then it did not consider the correct range as required by § 3553(a). That makes the sentence procedurally “unreasonable.” Appellate courts review guideline issues *de novo*.

The appeals court will also determine procedural reasonableness by looking at whether the district court considered the other § 3553(a) factors and the arguments of the parties for a sentence outside the guideline range. District courts must adequately articulate their reasons for imposing a particular sentence. If a court rejects an argument for a sentence outside the guideline range, it must adequately explain its reasoning. If it does not, the

sentence is procedurally unreasonable.

Appellate courts also review sentences for substantive reasonableness. Although *Booker* promised that district court judges would finally be freed from the constraints of the guidelines and allowed to exercise their discretion to do justice at sentencing, appellate courts soon rejected numerous below guideline sentences as “unreasonable” simply because they did not believe that the mitigating circumstances on which the district courts relied were significant enough to support large “variances” from the bottom of the guideline ranges. After the Supreme Court held that appellate courts (but not district courts) may presume that sentences within the advisory guideline range are “reasonable,” the message seemed to be that while the guidelines were “advisory,” district courts that did not want to be reversed should not stray too far from the “advisory” range. Although a court of appeals may presume that a sentence within the guideline range is “reasonable,” it may not presume that a sentence outside the range is “unreasonable.” All that changed in December 2007 when the Supreme Court announced its decisions in *Gall v. United States*, and *Kimbrough v. United States*, opening up a new era in federal sentencing in which judges will once more be allowed to be judges.

Gall involved a conspiracy to distribute the illegal drug “ecstasy.” Although the guidelines recommended a sentence of 30-37 months’ imprisonment, the district court sentenced Gall to 36 months’ probation. The court cited several unusual mitigating factors to support its sentence. First, Brian Gall committed his offense when he was an immature 21-year-old college sophomore and an ecstasy user himself. Second, several months after joining the conspiracy, Gall voluntarily stopped using illegal drugs and formally notified other members of the conspiracy that he was withdrawing from it. After that, Gall not only never used or distributed any illegal drugs, but also he finished his education and went to work in the construction industry. After four years of leading an exemplary life, the government rewarded his rehabilitation with an indictment. Gall pled guilty. At sentencing, the court explained that a probationary sentence was sufficient, but not greater than necessary, to meet the goals of sentencing because Gall had in essence rehabilitated himself

some four years before he had even been indicted. The government appealed and the Eighth Circuit reversed, holding that the district court’s “100 percent” variance from the guideline range was not supported by sufficiently extraordinary reasons. The Supreme Court reversed the court of appeals.

Although *Gall* noted that it is “uncontroversial that a major departure should be supported by a more significant justification than a minor one,” the Court explicitly “reject[ed] an appellate rule that requires ‘extraordinary’ circumstances to justify a sentence outside the guidelines range.” It also “reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.” The Court noted that these approaches come perilously close to establishing a presumption that sentences outside the guideline range are “unreasonable” — a presumption the Court previously rejected in *Rita*. The Court was particularly critical of what it termed the “mathematical approach.” Viewing variances as percentages of the bottom of the guideline range tends to make sentences of probation seem “extreme,” since “a sentence of probation will always be a 100 percent departure regardless of whether the guidelines range is 1 month or 100 years.” The Court was also critical of the fact that this approach also “gives no weight” to what the Court characterized as the “substantial restriction of freedom involved in a term of supervised release or probation” — a subtle invitation to courts to impose sentences of probation more often.

But *Gall* did more than invalidate particular approaches to reviewing variances from the guidelines. It reminded the courts of appeals that *Booker* invalidated the statutory provision that made the guidelines mandatory (18 U.S.C. § 3553(b)(1)). It also invalidated 18 U.S.C. § 3742(e), which directed appellate courts to review departures from the guidelines *de novo*. Prior to *Gall*, the courts of appeals seemed to ignore the significance of *Booker*’s invalidation of § 3742(e). While the Supreme Court thought *Booker* had “made it ... clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions,” the Court found

that the decisions of the courts of appeals that required “extraordinary” reasons for significant deviations from the guidelines “more closely resembled *de novo* review.” *Gall* makes it clear that the Supreme Court meant what it said in *Booker*.

While sentencing courts must consider the guideline range as a “starting point,” the “guidelines are not the only consideration.” District courts must also consider *all* of the other factors listed in 18 U.S.C. § 3553(a). After a court of appeals is satisfied that a district court has properly considered all of the factors listed in 18 U.S.C. § 3553(a), its review of a sentence is under the deferential abuse of discretion standard. While a court of appeals “may consider the extent of the deviation, [it] must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall* does not mean that a district court’s non-guideline sentence cannot be reversed for substantive unreasonableness. But reversal is unlikely in a case in which the district court has provided a detailed written explanation of why the § 3553(a) factors support the variance.

While *Gall* held that a district court does not abuse its discretion by basing a below-guideline sentence on offender characteristics, *Kimbrough* held that a district court does not abuse that discretion when it bases a below-guideline sentence on disparities in sentencing caused by the guidelines themselves. In *Kimbrough*, the district court imposed a below-guideline sentence in a crack cocaine case because it disagreed with the judgment of the Sentencing Commission and Congress that the distribution of any quantity of crack cocaine should be punished as severely as the distribution of one hundred times as much powder cocaine — the infamous “100 to 1 ratio.”

The essence of the holding in *Kimbrough* is that a district court’s judgment that a particular sentence is “sufficient, but not greater than necessary” (the overarching command of 18 U.S.C. § 3553(a)) is entitled to great weight, even if the district court’s judgment is based in part on its disagreement with the policies behind the applicable guideline. *Kimbrough* gave

defense attorneys license to think creatively about how guideline sentences themselves create “unwarranted disparities.” It may now be entirely possible to obtain a lower non-guideline sentence by arguing, among other reasons, that a particular guideline sentence would create unwarranted disparities with sentences imposed in similar state cases.

Although the promise of *Kimbrough* is great, it is important to remember that in many ways the history of the crack guideline makes it unique. While the majority observed that in the “ordinary” case, “the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives,’” it seemed to place special significance on the fact that the Sentencing Commission long ago concluded that the “100 to 1 ratio” was unjust. It remains to be seen whether the broadest reading of *Kimbrough* will enable future challenges to overly harsh guidelines.

The pendulum has finally swung to the point that judges now have more discretion than they have ever had since pre-guideline days to fashion an appropriate sentence in a particular case. Now it’s up to defense attorneys to present sentencing courts with the evidence and arguments they need to exercise that discretion to produce just sentences.

After Sentencing — Taking Advantage of Favorable Guideline Changes

The guidelines that a court uses at sentencing can change. Some amendments make the guidelines harsher. After the court sentences a defendant, he is protected from that kind of change. Amendments can also reduce offense levels. Defendants who have already been sentenced can sometimes take advantage of these reductions. Before a defendant who has already been sentenced can take advantage of an amendment, the amendment must be listed in USSG § 1B1.10. If an amendment is listed in § 1B1.10, the sentencing court has the *discretion* to modify a defendant’s sentence. The sentencing court does not have to reduce a defendant’s sentence based on a retroactive amendment. After the guidelines make an amendment retroactive, the defendant may make a motion to modify the sentence. The sentencing court could also modify the

sentence on its own, without a motion.

One of the most recent significant changes to the guidelines (which was shortly thereafter made retroactive) involved the “crack” cocaine guidelines. On Nov. 1, 2007, a new guideline amendment (Amendments 706 and 711) became effective that results in somewhat lower offense levels in many crack cocaine cases. Generally speaking, after November 1, offense levels in cases involving crack cocaine will be two levels lower than they would have been. The amendments make changes to the drug quantity table in USSG § 2D1.1(c), as well to Application Note 10 of that guideline.

On Nov. 1, 2014, another new guideline amendment (Amendment 782) became effective that results in lowering the drug quantity table by two levels across the board, and further, made the amendment retroactive to apply to those previously sentenced. The Sentencing Commission estimates that this amendment, which applies to all drug offenses (with some narrow exceptions), will lower sentences for drug offenders by 25 months on average. These amendments are the culmination of a more than 10 years’ effort by the Sentencing Commission and sentencing reform groups to correct a serious pattern of unfairness in the sentencing of drug offenders. The problem began when Congress passed the Anti-Drug Abuse Act of 1986.

The Sentencing Commission’s decision to make a new guideline retroactive is a good thing, but it does not guarantee a lower sentence. When the Sentencing Commission makes a guideline retroactive, it gives the court the *power* to lower a sentence — but it does not *require* the court to lower it. Before deciding to lower a particular defendant’s sentence, someone has to make a motion asking for the sentence to be modified. Then the court first has to consider the factors listed in 18 U.S.C. § 3553(a). These are the same factors a court must consider before imposing sentence in the first place, although in some pre-*Booker* cases the factors will have been given only limited consideration because the guidelines were thought to be mandatory prior to *Booker*. After considering those factors, if the court believes that a lower sentence would be “sufficient, but not greater than necessary” to achieve the goals of sentencing, it may lower the defendant’s sentence — but only “if such a reduction is consistent with

applicable policy statements issued by the Sentencing Commission.” See the language in 18 U.S.C. § 3582(c)(2). Pursuant to U.S.S.G. § (B)(iii), a defendant’s post-sentencing conduct may also be considered.

This last requirement used to be satisfied simply by showing that the amendment is listed in USSG § 1B1.10(c) (p.s.). However, beginning March 3, 2008, the Sentencing Commission has added new requirements designed to reduce a court’s discretion. This amended policy statement says that courts may not lower a sentence in cases where the amended guideline does not result in a lower guideline range. Even if the new range is lower, the policy statement attempts to prevent courts from imposing sentences lower than the bottom of the new range. The policy statement makes an exception for cases in which the court had previously departed downward. In such cases, the new sentence may be proportionally less than the new guideline range. The new policy statement also attempts to prevent courts from lowering sentences when defendants already received lower non-guideline sentences pursuant to *Booker*.

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About the Author

Alan Ellis, an NACDL Past President and Fulbright Award Recipient, is a criminal defense lawyer with offices in San Francisco and New York. He practices in the areas of federal sentencing, prison matters, appeals, and 2255 motions. He has more than 150 published books and articles to his credit, including the *Federal Prison Guidebook*, the *Federal Sentencing Guidebook*, and the *Federal Post-Conviction Guidebook*.

Alan Ellis

80 Pinheiro Circle
Novato, CA 94945
415-895-5076

E-MAIL AELaw1@alanellis.com
WEB SITE www.alanellis.com