Federal Sentencing Under the Advisory Guidelines: A Primer for the Occasional Federal Practitioner

— Part One

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Just over 20 years ago, before the Sentencing Guidelines went into effect, a federal judge could, with a few exceptions, sentence a convicted defendant anywhere 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 (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 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, a court was required 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 January 12, 2005, the Supreme Court ruled in *United States v. Booker*[1] 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 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 did not change 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 a sentence that is "sufficient, but not greater than necessary,"[2] to fulfill the purposes of sentencing as defined in the statute. In other words, the court must impose the lowest sentence that is still sufficient to promote respect for law, to provide just punishment and deterrence, to protect the public, and to rehabilitate and treat the defendant.[3]

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.[4] The five other factors a court must consider are: (1) the facts concerning the defendant and the offense,[5] (2) the purposes of sentencing,[6] (3) the kinds of sentences available,[7] (4) the need to avoid sentences that are unnecessarily higher or lower than those in similar cases,[8] and (5) the need to provide restitution to any victims.[9]

The sentencing guideline range is only one of seven factors a court must "consider" before it imposes sentence. But often judges treat it as the most important. Many courts still impose most 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.

This article is meant to serve as a primer to help the occasional federal practioner understand sentencing after *Booker*.

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),[10] whereas the offense guideline for a bribery conviction has a base offense level of 12 (14, if the defendant is a public official).[11] The higher the total offense level, the higher the sentencing range.

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, to prepare to commit the offense, or to try to avoid being caught after committing the offense.[12] 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 which is not part of the offense of conviction. The guidelines look beyond the offense of conviction to other acts or omissions which were part of the same "course of conduct" or "common scheme or plan."[13]

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. Nor does he have to know everything about what they did.

Before a defendant can receive a higher guideline level for things other people did, several factors 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."[14] 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 marijua-

na. Finally, unloading the 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. Once 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 the first edition came out in 1987. The changes are compiled 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 a defendant is sentenced.[15] If using the manual in effect on the day of sentencing would violate the Constitution's *Ex Post Facto* Clause, the court must use the manual in effect on the day the defendant committed the offense.[16]

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.

There is one important exception to the "one book" rule. A court will apply a "clarifying amendment" from a later manual even if it uses an earlier manual. A clarifying amendment is a change which 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 is to select the offense guideline for each offense of conviction.[17] The offense guidelines are found in Chapter Two of the Guidelines Manual. 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.[18] 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: 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.[19] 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 tax loss. Only drugs or money which 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.[20] 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 will provide that the offense level of an underlying offense will apply if it is higher. This is true for RICO cases.[21]

Step Three: Specific Offense Characteristics

The next step is to see if any "specific offense characteristic" (SOC) applies. SOCs add (or sometimes subtract) offense levels to the base offense level. The Sentencing Commission lists different SOCs for each offense guideline. For example, in fraud cases, the victim loss is an SOC. This SOC ranges from no increase in offense level where there is no loss, to a 30-level increase when the loss exceeds $100 million.[22]

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."[23] 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 where 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. [24]

Special instructions tell the court how to apply the guidelines in particular situations. Some special instructions relate to the calculation of fines. The price rigging offense guideline is an example of such an instruction, [25]so is the guideline for use of a firearm during and in relation to certain crimes.[26] 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.[27]

Step Five: Applying Chapter Three Adjustments

Next, the court applies adjustments that have to do with victims, the defendant's role in the offense, and obstruction of justice.[28] These adjustments are found 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.

There are also adjustments that apply based on the nature of the victim. A defendant can receive additional levels if the victim was especially "vulnerable," for example.[29] Levels are also added if the victim was a government official.[30] An adjustment applies if the victim was "restrained,"[31] or if the offense involved or promoted terrorism.[32]

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 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.[33] 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.[34] In drug cases, defendants who receive minor or minimal role adjustments also qualify for additional decreases.[35]

The guidelines also call for a *role in the offense* increase if the defendant abused a position of trust or used a special skill.[36] There is also an upward adjustment if the defendant used someone under the age of 18 to help commit the offense or to avoid detection or apprehension.[37]

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. You do 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 the special knowledge of chemistry helped the defendant 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 there is 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.[38]

Counts can be "grouped" if they are "closely related."[39] Several kinds of counts can be grouped. Counts are grouped when their offense levels are largely determined by a quantity of something.[40] 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 is 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 present, the counts would group.[41] 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 counts are grouped in this way, the offense level for the group is the offense level for the most serious count.[42]

Counts are also grouped when one count is conduct that is used to determine the offense level for another count.[43] 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, violent crimes or offenses against persons are not grouped. Assaults, robberies, and sexual offenses are not grouped. Some non-violent 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.[44]

If counts are not grouped, the court 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.[45] 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.[46]

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.[47] Defendants who accept responsibility are entitled to at least a

two-level reduction in offense level.[48] Sometimes, defendants are entitled to a three-level reduction.[49]

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. So have 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 is entitled to 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." [50]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.[51] A defendant receives two points for each prior sentence of at least 60 days.[52] Otherwise a defendant receives one point for a prior sentence.[53] 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.[54] 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.[55]

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 sentence 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 which 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. Category VI is for defendants with more than 13 points. 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.

In some instances, 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[56] suggests that a "downward departure" may a 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.

Step Nine: The Guideline Range

Once the court has arrived at the applicable offense level and criminal history category, it is a simple matter to determine the guideline range. The court just 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 is where 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 range of 262-327 months does not apply. Instead, 240 months becomes the recommended guideline sentence.[57]

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.[58]

The second exception is where 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).[59] 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.[60] 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.

Part Two of this article will include a discussion of § 3553(a) factors; departures and variances; substantial assistance motions; sentencing options; sentencing appeals; and post-sentence retroactive guideline amendments.

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Notes

1. 543 U.S. 220 (2005).
2. 18 U.S.C. § 3553(a).
3. 18 U.S.C. § 3553(a)(2).
4. 18 U.S.C. §§ 3553(a)(4) and (a)(5).
5. 18 U.S.C. § 3553(a)(1).
6. 18 U.S.C. § 3553(a)(2).
7. 18 U.S.C. § 3553(a)(3).
8. 18 U.S.C. § 3553(a)(6).
9. 18 U.S.C. § 3553(a)(7).
10. USSG § 2C1.2.
11. USSG § 2C1.1.
12. *See* USSG § 1B1.3(a)(1).
13. USSG § 1B1.3(a)(2).
14. *Id.*
15. 18 U.S.C. § 3553(a)(4)(A).
16. *See* USSG § 1B1.11(b). Prior to *Booker,* courts uniformly held that the *Ex Post Facto* Clause required use of the guideline manual in effect at the time of the commission of the offense whenever the manual in effect at sentencing produced a higher range. Now that the guidelines are advisory, at least one court has held that applying the guidelines in effect at sentencing no longer violates the *Ex Post Facto* Clause. *See United States v. Demaree,* 459 F.3d 791 (7th Cir. 2006). Other courts have disagreed. *See, e.g., United States v. Restrepo-Suares,* 516 F.Supp.2d 112 (D.D.C. 2007) (finding *ex post facto* violation post-*Booker*).
17. USSG §1B1.1(a).
18. USSG § 1B1.2(a).
19. USSG § 2B1.4(a).
20. USSG § 2S1.1(a)(1).
21. USSG § 2E1.1(a).
22. *See* USSG § 2B1.1(b)(1).
23. USSG § 2D1.1(b)(1).
24. USSG § 2D1.7(b)(1).
25. USSG § 2R1.1(c) and (d).
26. USSG § 2K2.4(d)(1).
27. USSG § 2M6.1(d)(1).
28. USSG § 1B1.1(c).
29. USSG § 3A1.1(b)(1).
30. USSG § 3A1.2.
31. USSG § 3A1.3.
32. USSG § 3A1.4.
33. USSG § 3B1.1.
34. USSG § 3B1.2.
35. USSG § 2D1.1(a)(3).
36. USSG § 3B1.3.
37. USSG § 3B1.4.
38. USSG § 3D1.4.
39. USSG § 3D1.2.
40. USSG § 3D1.2(d).
41. USSG § 3D1.2(b).
42. USSG § 3D1.3(a).
43. USSG § 3D1.2(c).
44. USSG § 3D1.3.
45. USSG § 3D1.4(a) and (b).
46. USSG § 3D1.4(c).
47. USSG §1B1.1(e).
48. USSG § 3E1.1(a).
49. USSG § 3E1.1(b).
50. USSG § 3E1.1(b).
51. USSG § 4A1.1(a).
52. USSG § 4A1.1(b).
53. USSG § 4A1.1(c).
54. USSG § 4A1.1(d).
55. USSG § 4A1.1(e).
56. 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.
57. USSG § 5G1.1(a).
58. *See* USSG § 5G1.2(d).
59. USSG § 5G1.1(b).
60. 18 U.S.C. §§ 1111 (murder), 3559(c) ("three strikes"). ■