

17.04 THE FEDERAL SENTENCING GUIDELINES MANUAL

17.04.01 Overview

The *Guidelines Manual* comprises eight chapters and three appendices. It contains the Guidelines, commentary, and policy statements promulgated by the Sentencing Commission for consideration when a court imposes sentence in a federal case. See 18 U.S.C. § 3553(a)(4)(A); § 3553(a)(5). The *Manual* establishes two numerical values: an offense level and a criminal history category. The two values correspond to the axes of a grid, called the sentencing table; together, they specify a sentencing range. See U.S.S.G., Chapter 5, Part A, Sentencing Table. The *Manual* provides rules for sentencing within the range, and for departures outside of it. It does not provide guidance as to the purposes of sentencing or the other sentencing factors in § 3553(a). Indeed, thus far, the *Manual* has not been updated to reflect current Supreme Court law. For example, § 5K2.0 continues to refer to § 3553(b) although it has been excised, as does the provision for departures for organizations, § 8C4, intro. cmt., and the standards for acceptance of plea agreements, § 6B1.2, p.s. Whether the *Manual* will be updated and corrected is unknown at this time.

Although the Guidelines “are only one of the factors to consider when imposing sentence,” *Gall*, 128 S. Ct. at 602; *Kimbrough*, 128 S. Ct. at 564 (Guidelines “now serve as one factor among several courts must consider in determining an appropriate sentence”), the judge “should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” *Gall*, 128 S. Ct. at 596, and that range “should be the starting point and the initial benchmark.” *Id.* As experienced practitioners know, the Guidelines often recommend a sentence that is greater than necessary to satisfy the purposes of § 3553(a)(2). In some cases, however, the applicable guideline range is lower than the sentence a court may be inclined to impose. Counsel must understand the *Manual* to determine whether, in a particular case, its recommendations hurt or help the defendant.

In sum, it is important to understand the Guidelines applicable in the particular case. The Guidelines are frequently amended, and are subject to and capable of various interpretations. What follows is only a brief overview of the *Guidelines Manual*, and cannot replace careful analysis of the Guidelines and policy statements that apply in the case. In addition, two resources provide excellent annual updates on the text and interpretive case law. See ROGER W. HAINES, JR., FRANK O. BOWMAN III & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* (2008-09 ed.); THOMAS W. HUTCHISON, PETER B. HOFFMAN, DEBORAH YOUNG & SIGMUND G. POPKO, *FEDERAL SENTENCING LAW AND PRACTICE* (2009 ed.). The latter is on Westlaw, database FSLP.

17.04.02 Chapter One - Introduction, Authority, and General Application Principles

Chapter One provides a historical introduction to the Guidelines,⁷¹ provides certain definitions that apply throughout the *Manual*, sets forth a step-by-step-procedure for calculating the guideline range, contains policy statements regarding the effect of guideline amendments, and includes the “relevant conduct” Guideline.

17.04.02.01 Step-by-Step Guideline Application

U.S.S.G. § 1B1.1 provides step-by-step instructions for applying the Guidelines. To facilitate following those steps, the Sentencing Commission has prepared sentencing worksheets. The worksheets were created before *Booker*; consequently, they do not address the other § 3553(a) factors that are essential to federal sentencing practice. Moreover, the worksheets cannot replace careful analysis of the Guidelines and their commentary and interpretive caselaw. Nevertheless, they can be of value in calculating the guideline range, especially for newcomers. The worksheets are available on the Commission’s website, available at <http://www.usc.gov/training/worksheet.htm>.

17.04.02.02 Determining the Applicable Guideline

The applicable guideline is usually determined by the offense of conviction -- the conduct “charged in the count of the indictment or information of which the defendant was convicted.” U.S.S.G. § 1B1.2(a). See further discussion of offense Guidelines in Section 17.04.03, “Chapter Two - Offense Conduct.” If two or more guideline sections appear equally applicable, Chapter One directs the court to use the section that results in the higher offense level. § 1B1.1 cmt. n.5.. Additionally, if a plea agreement “contain[s] a stipulation that specifically establishes a more serious offense,” the court must consider the guideline applicable to the more serious stipulated offense. § 1B1.2(a). For this exception to apply, the stipulation must establish every element of the more serious offense, *Braxton v. United States*, 500 U.S. 344 (1991), and the parties must “explicitly agree that the factual statement or stipulation is a stipulation for such purposes.” § 1B1.2 cmt. n.1.

⁷¹ On November 1, 2008, the historical introduction, U.S.S.G., Chapter 1, Part A, was amended with new commentary entitled “Continuing Evolution and Role of the Guidelines.” This commentary is not a complete or accurate description of *post-Booker* sentencing law; the differences between this commentary and current law are discussed in *Testimony of Alan Dubois and Nicole Kaplan Before the Commission Public Hearing on “The Sentencing Reform Act of 1984: 25 Years Later”* at 34-39 (2/10/09), available at http://www.fed.org/pdf_lib/Dubois%20and%20Kaplan%20Testimony%20Final.2.10.09.pdf.

17.04.02.03 Effect of Guideline Amendments

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

The controlling Guidelines are those in effect on the date of sentencing, unless their application would violate the *Ex Post Facto* Clause. U.S.S.G. § 1B1.11(a), (b)(1). When a detrimental guideline amendment takes effect between the commission of the offense and the date of sentencing, the *Ex Post Facto* Clause would bar its application. *See Miller v. Florida*, 482 U.S. 423 (1987) (applying *Ex Post Facto* Clause to state sentencing Guidelines). Before *Booker*, the circuits agreed that the *Ex Post Facto* Clause applied to the federal Guidelines;⁷² since *Booker* rendered the Guidelines advisory, the circuits have divided on the issue. *Compare United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) (ex post facto no longer applicable after *Booker*), *cert. denied*, 127 S. Ct. 3055 (2007) with *United States v. Turner*, 548 F.3d 1094 (D.C. Cir. 2008) (ex post facto limits still apply); *United States v. Roberts*, 442 F.3d 128, 130 (2d Cir. 2006); *United States v. Iskander*, 407 F.3d 232, 242-43 (4th Cir. 2005); *United States v. Reasor*, 418 F.3d 466, 479 (5th Cir. 2005); *United States v. Harmon*, 409 F.3d 701, 706 (6th Cir. 2005).

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

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

⁷² *See United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir. 1994) (noting circuits’ agreement).

Some amendments benefit a defendant who is already serving a term of imprisonment. If the Commission expressly provides that a beneficial amendment has retroactive effect, and the amendment would reduce the defendant's guideline range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10, p.s. Last year, the Commission substantially amended policy statement § 1B1.10. See U.S.S.G. App. C, amends. 712, 713 (Mar. 3, 2008). The new policy statement invites the court to consider aggravating circumstances to deny or limit the effect of a retroactive amendment, and, in mandatory language, places various restrictions on retroactive application. Accordingly, anyone representing a defendant who could benefit from a retroactively applicable guideline should carefully review the new policy statement and the Commission's reasons for amending it. Helpful materials are posted under "Retroactive Application of the Crack Cocaine Amendments," available at http://www.fd.org/odstb_CrackCocaine.htm. Keep in mind that, after *Booker*, treating the policy statement's restrictions as mandatory may be subject to challenge.⁷³

17.04.02.04 Relevant Conduct

Although the initial choice of guideline section is tied to the offense of conviction, guideline calculations are frequently made according to the much broader concept of "relevant conduct." The Commission developed the concept as part of its effort to create a modified "real offense" sentencing system -- a system under which the court punishes the defendant based on a judicial finding, without trial safeguards, of the "real" conduct, not only conduct with which the defendant was charged and of which he was convicted. See U.S.S.G. § 1A1.4(a), p.s. (The Guidelines' Resolution of Major Issues). The theory behind relevant conduct was that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining. *Id.* But the opposite has occurred -- the use of uncharged, dismissed, and acquitted crimes in calculating the guideline range transferred sentencing power to prosecutors and created hidden and unwarranted disparities from the outset.⁷⁴ The Commission has acknowledged that the relevant conduct rule "is not working as intended." See FIFTEEN YEAR REVIEW at 92 (Nov. 2004).

In *Witte v. United States*, 515 U.S. 389 (1995), the Supreme Court held that the Double Jeopardy Clause does not bar prosecution for conduct that was the basis for an uncharged relevant conduct enhancement in a prior case. Two years later, without full briefing or argument, the Court held that the Double Jeopardy Clause does not prohibit the use of acquitted conduct to calculate a defendant's guideline range. *Watts v. United States*, 519 U.S. 148, 156 (1997) (per curiam). Justice Breyer suggested that the Commission revisit the issue "[g]iven the role that juries and acquittals

⁷³ See *United States v. Hicks*, 472 F.3d 1167, 1168 (9th Cir. 2007) (*Booker* applicable to § 3582(c) and § 1B1.10). But see *United States v. Melvin*, 556 F.3d 1190 (11th Cir. 2009) (*Booker* inapplicable), cert. denied, ___ S. Ct. ___, 2009 WL 357585 (May 18, 2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009) (same), cert. denied, ___ S. Ct. ___, 2009 WL 772917 (May 18, 2009); *United States v. Rhodes*, 549 F.3d 833, 840-41 (10th Cir. 2008) (same), cert. denied, 129 S. Ct. 2052 (April 27, 2009). The Supreme Court may grant certiorari if the circuit split deepens, as U.S.S.G. 1B1.10's mandatory language is not confined to crack but applies to any favorable retroactive amendment.

⁷⁴ See, e.g., Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557 (1992); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992); Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990).

play in our system.” *Id.* at 159 (Breyer, J., concurring). Justice Kennedy stated in dissent that “to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal.” *Id.* at 170 (Kennedy, J., dissenting). The majority in *Booker* emphasized that in neither *Watts* nor *Witte* “was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment,” that “*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument,” and that “[i]t is unsurprising that we failed to consider fully the issues presented to us in these cases.” *Booker*, 543 U.S. at 240 & n.4. Thus, while mandatory sentencing based on relevant conduct found by a judge was successfully challenged on constitutional grounds in *Booker*, the remedy the Court prescribed did not bar the use of relevant conduct -- it simply made the resulting guideline range advisory. A number of circuits have held that *Watts*’s holding survives *Booker*. See *United States v. White*, 551 F.3d 381, 383–84 (6th Cir. 2008) (en banc) (collecting cases).

The relevant conduct guideline requires sentencing based on “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” § 1B1.3(a)(1)(A). For offenses “of a character for which § 3D1.2(d) would require grouping of multiple counts,” such as drug crimes and fraud crimes, relevant conduct extends further, to “acts and omissions” that were not part of the offense of conviction but “were part of the same course of conduct or common scheme or plan as the offense of conviction.” § 1B1.3(a)(2).

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

As noted above, relevant conduct need not be included in formal charges. § 1B1.3 cmt. (backg’d). It can include conduct underlying dismissed, acquitted, or even uncharged counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. While the relevant conduct rules affect every stage of representation, they are especially important in the context of plea bargaining. See Section 17.08, “Plea Bargaining and Sentencing.”

17.04.03 Chapter Two - Offense Conduct

Offense conduct forms the vertical axis of the sentencing table. The offense conduct Guidelines are set out in Chapter Two. The chapter has 18 parts covering different offense types (e.g., “Offenses Against the Person,” “Basic Economic Offenses,” “Offenses Involving Drugs and Narco-Terrorism,” “Offenses Involving Immigration, Naturalization, and Passports”); each part has multiple Guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense or many. Part X of Chapter Two applies when no guideline has been promulgated for an offense; it also provides the Guidelines for certain conspiracies, attempts, and solicitations, as well as for aiding and abetting, accessory after the fact, and misprision of a felony.

Each guideline provides one or more base offense levels for a particular offense. Most Guidelines also have specific offense characteristics that adjust the base level up or down. A guideline may cross-reference to other Guidelines for more serious offenses than the offense of conviction. Unless otherwise specified, the base offense level (if there is more than one), specific offense characteristics, and cross-references are based on relevant conduct. *See* U.S.S.G. § 1B1.3.

Although Chapter Two includes Guidelines for a multitude of federal offenses, four categories of offense account for the vast majority of federal criminal cases: drugs, economic offenses, firearms, and immigration.

17.04.03.01 Drug Offenses

In drug and drug conspiracy cases, the offense level is based primarily on drug type and quantity, as set out in the drug quantity table in guideline § 2D1.1(c). The table starts at offense level 6 and goes up to offense level 38; for defendants who played a mitigating role in the offense, the range is reduced by 2 to 4 levels. § 2D1.1(a)(3). *See* further discussion of role in the offense in Section 17.04.04, "Chapter Three - Adjustments," *infra*.

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

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

17.04.03.02 Economic Offenses

For many economic offenses (including theft, fraud, and property destruction) the offense level is determined under § 2B1.1. The Guideline is similar in structure to the drug offense guideline, in that the offense level is generally driven by an amount -- the amount of "loss." The guideline commentary broadly defines "loss" as the greater of actual loss or the loss the defendant intended, even if the intended loss was "impossible or unlikely to occur." § 2B1.1 cmt. n.3 (A)(ii). The commentary includes extensive notes as to items that are included or excluded from the loss amount, as well as special rules for a variety of particular fraud and theft schemes. § 2B1.1, comment. n.3 (A)-(F)). In addition to its broad definition of loss, Guideline § 2B1.1 includes many specific offense adjustments that can increase the offense level.

17.04.03.03 Firearms Offenses

Weapons offenses generally involve: (1) possession of a firearm by a prohibited person, for example a felon, an illegal alien, or an insane person, 18 U.S.C. §§ 922 (g); (2) possession or storage in an improper place, for example, on an airplane, 49 U.S.C. § 1472(l); and (3) weapons deemed particularly dangerous and therefore subject to strict regulation or prohibition, for example, automatic weapons, explosive devices and silencers, 26 U.S.C. § 5861. *See, e.g., United States v. Carmouche*, 138 F.3d 1014 (5th Cir. 1998) (defendant admitted short-barreled shotgun). The more dangerous weapons are given a higher offense level than mere unauthorized possession of common firearms. U.S.S.G. §§ 2K2.1(a)(5), (6), 2K2.1(b)(3).

The level is adjusted upward if the defendant possessed multiple firearms, U.S.S.G. § 2K2.1(b)(1). *But see United States v. Houston*, 364 F.3d 243, 248 (5th Cir. 2004) (defendant did not know of guns); *United States v. Rome*, 207 F.3d 251 (5th Cir. 2000) (defendant not responsible for all firearms displayed in store he tried to burglarize); *United States v. Ahmad*, 202 F.3d 588, 590 (2d Cir. 2000) (possession of the additional firearms must be illegal). There is also an enhancement if the weapon was stolen or bore an altered serial number. U.S.S.G. § 2K2.1(b)(4). The defendant need not know that the firearm was stolen or that the serial number was obliterated. *United States v. Singleton*, 946 F.2d 23 (5th Cir. 1991); *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005); *United States v. Williams*, 49 F.3d 92, 93 (2d Cir. 1995). Under Title 26 the government must prove that the defendants knew that the weapon was automatic, *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (*en banc*), but the courts have generally rejected this scienter requirement under the Guidelines. *United States v. Fry*, 51 F.3d 543, 545-46 (5th Cir. 1995); *United States v. Bryant*, 131 F.3d 136, 136 (4th Cir. 1997).

The offense level for a firearms offense is adjusted upward four points to a minimum of eighteen points if the firearm was used or possessed in connection with another felony offense or transferred with knowledge or intent or reason to believe that it would be used or possessed in connection with such an offense, U.S.S.G. § 2K2.1(b)(6), *see, e.g., United States v. Armstead*, 114 F.3d 504, 511-13 (5th Cir. 1997) (firearms stolen in burglary connected with burglary). Though the specific test varies somewhat from circuit to circuit, in general, this enhancement will be applied “where the possession of the firearm the weapon facilitates or has the potential to facilitate the ... offense” but should not be imposed “if the weapon’s possession is coincidental or entirely unrelated to the offense.” *United States v. Walters*, 269 F.3d 1207, 1219 (10th Cir. 2001); *see also United States v. Kanatzar*, 370 F.3d 810, 814 (8th Cir. 2004). Some circuits read this provision more expansively, applying the guideline when the firearm is present during another felony. *United States v. Condren*, 18 F.3d 1190, 1195-98 (5th Cir. 1994); *United States v. Luna*, 165 F.3d 316, 322 (5th Cir. 1999) (firearm stolen during a burglary was possessed during the commission of the felony).

Even under an expansive reading of § 2K2.1(b)(6), the government must establish some nexus between the firearm and the felony. *United States v. Fadipe*, 43 F.3d 993 (5th Cir. 1995) (no nexus between bank fraud and gun found in house when defendant arrested); *see also United States v. Villegas*, 404 F.3d 355 (5th Cir. 2005) (no nexus between firearm and immigration fraud); *United States v. Budde*, 168 F.3d 502, 502 (9th Cir. 1999) (9th Cir. 1999) (unpublished), *United States v. Palmer*, 183 F.3d 1014 (9th Cir. 1999), *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993).

The circuits are split as to whether this enhancement should apply when an unarmed defendant comes into possession of firearms during a robbery or theft. Three circuits have held the enhancement should not apply in such circumstances. *United States v. Fenton*, 309 F.3d 825, 827-28 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344, 351-52 (7th Cir. 2000); *United States v. Sanders*, 162 F.3d 396, 400-02 (6th Cir. 1998); see also *United States v. Blount*, 337 F.3d 404 (4th Cir. 2003). Two have concluded it should apply. *United States v. Armstead*, 114 F.3d 504, 513 (5th Cir. 1997); *United States v. English*, 329 F.3d 615, 617-18 (8th Cir. 2003); *United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002).

If the firearm was used or possessed in connection with the commission or attempted commission of another offense, the offense level is the same as the underlying felony. U.S.S.G. § 2K2.1(c). Consequently, a defendant's guideline range may be dramatically increased by the uncharged underlying offense, rather than the charged firearm offense. See, e.g., *United States v. Hicks*, 389 F.3d 514, 528-31 (5th Cir. 2004) (cross-reference to second-degree murder guideline). On the other hand, § 2K2.1(c) requires that the firearm be possessed in connection with the "commission of another offense;" thus, there must be proof of a closer relationship between the weapon and the offense before the cross reference will apply. *United States v. Mitchell*, 166 F.3d 748, 755-56 (5th Cir. 1999) (firearm for which defendant convicted not related to drugs and second gun in house).

The Guidelines provide for significant upward adjustments if the defendant has multiple convictions for violent or controlled substance offenses. U.S.S.G. § 2K2.1(c)(1)-(4). These enhanced base offense levels apply only if the offender had the convictions before he committed the federal offense. U.S.S.G. §§ 2K1.3(a)(3), 2K2.1(a). Only adult convictions are to be counted. U.S.S.G. § 2K2.1 cmt. n.5. The more narrow guideline definition of crime of violence applies to this enhancement. *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc)(auto theft not violent); see also *United States v. Lee*, 310 F.3d 787 (5th Cir. 2002) (remanding on unauthorized use of minor vehicle); but see *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002) (sawed off shotgun is crime of violence).

A defendant convicted under the Armed Career Criminal Act is subject to the Armed Career Criminal guideline which provides that the offense level is the greatest of (1) the offense level from chapters two and three; and (2) the career offender level if applicable or 34 if the defendant used or possessed the firearm in connection with a crime of violence or controlled substance offense or possessed a firearm described in 26 U.S.C. § 5845(c), or 33 otherwise. U.S.S.G. § 4B1.4(b). See, e.g., *United States v. Munoz*, 150 F.3d 401, 418-19 (5th Cir. 1998).

There is a downward adjustment if the firearms were possessed solely for sporting purposes or collections, as long as the defendant has no previous conviction for violent felonies or drug trafficking. U.S.S.G. § 2K2.1(b)(2). The defendant bears the burden of proving his entitlement to this adjustment. *United States v. Montano-Silva*, 15 F.3d 52 (5th Cir. 1994). To determine whether § 2K2.1(b)(2) applies, courts consider relevant surrounding circumstances, which "include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law." *United States v. Massey*, 462 F.3d 843, 845 (8th Cir. 2006) (finding defendant qualified for reduction). It is

not available to felons with a history of violent or drug trafficking convictions. U.S.S.G. § 2K2.1(b)(2).

Notably, a district court imposed a non-guideline sentence where the defendant was convicted of possession of a semi-automatic assault weapon because the ban on such weapons has expired. *United States v. Mullins*, 356 F. Supp.2d 617 (W.D. Va. 2005).

17.04.03.04 Immigration Offenses

Most common immigration offenses come under one of two Guidelines, § 2L1.1 and § 2L1.2. Guideline § 2L1.1 covers smuggling, transporting, and harboring illegal aliens. It sets out many specific offense adjustments, including increases for the number of aliens involved, the possession or use of weapons, reckless conduct, threats, coercion, and injury or death. *See* § 2L1.1(b). When death results, a cross reference to the appropriate homicide guideline applies to increase the offense level even further. § 2L1.1(c)(1). One offense characteristic reduces the guideline range; it applies, with certain limitations, when the offense involved the smuggling, transporting, or harboring of the defendant's spouse or child. § 2L1.1(b)(1).

Guideline § 2L1.2 covers unlawfully entering or remaining in the United States. It provides substantial increases based on prior convictions. All prior felonies trigger increases, as do three or more misdemeanor convictions for crimes of violence or drug trafficking offenses. Prior convictions can as much as triple the applicable offense level. § 2L1.2(b)(1). The increases apply even if the convictions do not otherwise count as criminal history. § 2L1.2 cmt. n.6. The Guidelines' treatment of prior convictions is discussed further in Section 17.04.05, "Chapter Four - Criminal History and Criminal Livelihood," *infra*.

17.04.04 Chapter Three - Adjustments

Chapter Three sets out offense level adjustments that apply generally, in addition to the offense-specific adjustments of Chapter Two. Unless otherwise specified, these adjustments are based on relevant conduct. *See* U.S.S.G. § 1B1.3. Some of these adjustments relate to the offense conduct -- for example, victim-related adjustments, adjustments for hate crimes or terrorism, adjustments for role in the offense, and for abuse of a position of trust, use of special skills, minors, or body armor. Other Chapter Three adjustments relate to post-offense conduct, including flight from authorities and obstruction of justice, as well as acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

17.04.04.01 Role in the Offense

Only if the offense was committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. *See* U.S.S.G. ch.3, pt.B, intro. comment. Aggravating role adjustments range from 2 to 4 levels, depending on the defendant's supervisory status and the number of participants in the offense. § 3B1.1. Mitigating role adjustments likewise range from 2 to 4 levels, depending on whether the defendant's role is characterized as minor, minimal, or somewhere in between. § 3B1.2. The determination of a defendant's role is made on the basis of all relevant conduct, not just the offense of conviction. Accordingly, even when the defendant is the only person charged in the indictment, he may seek a

downward adjustment (or face an upward adjustment) if more than one person participated. It is important to remember that a defendant may still receive a role in the offense reduction if she is not held "accountable" for the relevant conduct of others. § 3B1.2 cmt. n.3(A).

17.04.04.02 Obstruction

A defendant who willfully obstructed the administration of justice receives a 2-level upward adjustment. § 3C1.1. Obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related offense. In some instances, even pre-investigative conduct can qualify. *Id.* cmt. n.1. The adjustment applies to committing or suborning perjury,⁷⁵ destroying or concealing material evidence, or "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." § 3C1.1 cmt. n.4. Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* cmt. n.5. While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, reckless endangerment of another during flight supports an upward adjustment under § 3C1.2.

17.04.04.03 Multiple Counts

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

The Guidelines group counts together when they involve "substantially the same harm," § 3D1.2, unless a statute requires imposition of a consecutive sentence. § 3D1.1(b); *see also* § 5G1.2 (providing rules for sentencing on multiple counts, and for imposing statutorily required consecutive sentences). If the offense level is based on aggregate harm (such as the amount of loss or weight of drugs), the level for the group is determined by the aggregate for all the counts combined. § 3D1.3(b). Otherwise, the offense level for the group is the level for the most serious offense. § 3D1.3(a). When there is more than one group of counts, § 3D1.4 usually requires an increase in the offense level to account for them. The combined offense level can be up to 5 levels higher than the level of any one group. When a defendant pleads guilty to a single count, a multiple-count adjustment may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. § 1B1.2(c)-(d) & cmt. n.4. *See* discussion of grouping in Section 17.08, "Plea Bargaining and Sentencing."

17.04.04.04 Acceptance of Responsibility

Chapter Three, Part E provides a downward adjustment of 2 or, in certain cases, 3 offense levels for acceptance of responsibility. To qualify for the 2-level reduction, a defendant must "clearly demonstrate[] acceptance of responsibility for his offense." § 3E1.1(a). Pleading guilty

⁷⁵ To support an obstruction adjustment based on perjury at trial, the court must "make independent findings necessary to establish a willful impediment to or obstruction of justice," or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

provides “significant evidence” of acceptance of responsibility, but does not result in the adjustment as a matter of right. § 3E1.1 cmt. n.3. On the other hand, a defendant is not “automatically preclude[d]” from receiving the adjustment by going to trial. *Id.* cmt. n.2. A defendant who received an upward adjustment for obstruction under § 3C1.1, however, is not ordinarily entitled to a downward adjustment for acceptance of responsibility. *See* § 3E1.1 cmt. n.4.

Defendants qualifying for the 2-level reduction receive a third level off if the offense level is 16 or greater and the government moves for the third level, stating that the defendant has timely notified authorities of his intention to plead guilty. § 3E1.1(b). The adjustment for acceptance is discussed more fully in Section 17.08, “Plea Bargaining and Sentencing.”

17.04.05 Chapter Four - Criminal History and Criminal Livelihood

Criminal history forms the horizontal axis of the sentencing table. The table divides criminal history into categories I (the lowest) to VI (the highest). The Guidelines, in Chapter Four, Part A, translate the defendant’s prior record into one of these categories by assigning points for prior sentences and juvenile adjudications. The number of points for a prior sentence is based primarily on the sentence length. U.S.S.G. § 4A1.1. There is also a recency factor: points are added for committing the instant offense within 2 years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence. § 4A1.1(d), (e).

A prior conviction is not counted in the criminal history score if it was for conduct that was part of the instant offense. *See* § 4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons, such as constitutional invalidity. § 4A1.2(c)–(j). The Guidelines, however, “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” § 4A1.2 cmt. n.6. *See Custis v. United States*, 511 U.S. 485 (1994) (with sole exception of convictions obtained in violation of the right to counsel, defendant in federal sentencing proceeding has no constitutional right to collaterally attack validity of prior state convictions). Sentences imposed on the same day, or imposed for offenses that were charged together, are treated as one sentence for the criminal history calculation, unless the offenses were separated by an intervening arrest. § 4A1.2(a)(2).

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

17.04.05.01 Criminal History Departure

An important policy statement authorizes a departure from the guideline range when a defendant’s criminal history category does not adequately reflect the seriousness of past criminal conduct or the likelihood that the defendant will commit other crimes. U.S.S.G. § 4A1.3, p.s. This policy statement may support either a downward or an upward departure. U.S.S.G. § 4A1.3, p.s., does not authorize departures below criminal history category I, and provides special rules for calculating departures above category VI. § 4A1.3(a)(4)(B), (b)(2). Problems with the criminal history score are a frequent basis for below-guideline sentences, whether called a “departure” or a

non-guideline sentence.⁷⁶ For policy statements governing other grounds for departure, see Section 17.04.06, “Chapter Five – Determining the Sentence, Departure Policy Statements,” *infra*.

17.04.05.02 Repeat Offender Enhancements

Chapter Four, Part B significantly enhances criminal history scores and offense levels for “career offenders,” “armed career criminals,” and “repeat and dangerous sex offenders against minors.”

17.04.05.03 Career Offender

The Sentencing Commission promulgated the career offender guideline in response to 28 U.S.C. § 994(h). Congress contemplated it as a means of ensuring that “repeat violent offenders and repeat drug traffickers” (convicted of specified federal drug trafficking felonies) received sentences “at or near” the maximum term authorized by law.⁷⁷ However, the guideline is broader than the statute required, such that it all too frequently results in severe punishment for defendants who have never been convicted of any violent offense, whose criminal history consists solely of low-level drug-dealing or, worse, minor misdemeanor convictions.

The “career offender” guideline, § 4B1.1, applies to a defendant who was at least 18 years old at the time of the instant offense, who is convicted of a “crime of violence” or “controlled substance offense,” and has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Section 4B1.1 automatically places the defendant in the highest criminal history category, VI, and the greater of the offense level applicable for the offense or the following table applies:

Offense Statutory Maximum	Offense Level
Life	37
25 years or more	34
20 years or more, but less than 25 years	32
15 years or more, but less than 20 years	29
10 years or more, but less than 15 years	24
5 years or more, but less than 10 years	17
More than 1 year, but less than 5 years	12

See U.S.S.G. § 4B1.1.

⁷⁶ U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tables 25, 25A, 25B.

⁷⁷ S. REP. NO. 98-225, 98th Cong. 2d Sess. 175 (1983). The Supreme Court has held that the “maximum term authorized” means the maximum prison term available for the offense of conviction including any statutory sentencing enhancements under 21 U.S.C. § 851. *United States v. Labonte*, 520 U.S. 751 (1997).

“Crime of violence” and “controlled substance offense” are defined, for career-offender purposes, in § 4B1.2, and those definitions apply in U.S.S.G. § 2K2.1 as well. After more than two decades of applying the guideline’s definition of “crime of violence” to crimes that were not violent, most courts are now applying the Supreme Court’s narrower definition of “violent felony” in 18 U.S.C. § 924(e) to the similar language defining “crime of violence” in the career offender guideline.

See Anne Blanchard and Sara Noonan, *Potential Uses of Begay and Chambers: Annotated Caselaw Outline* (updated periodically).⁷⁸ Minor federal and state drug offenses not included in 28 U.S.C. § 994(h), however, often qualify as a “controlled substance offense.” Being a felon in possession of a firearm does not count unless the firearm is described in 26 U.S.C. § 5845(a), see § 4B1.2 cmt. n.1. Simple possession of drugs does not count. *Salinas v. United States*, 125 S. Ct. 1675 (2006).

The guideline defines “prior felony conviction” as “prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.” U.S.S.G. § 4B1.2 cmt. n.1. Unfortunately, some states have misdemeanors punishable by up to two, three, or even ten years, which means defendants can qualify as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court. See *United States v. Lenfesty*, 923 F.2d 1293 (8th Cir. 1991); *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Brunson*, 907 F.2d 117 (10th Cir. 1990); *United States v. Thomas*, 894 F.2d 996 (8th Cir. 1990) (a misdemeanor under state law may be a felony within the meaning of § 4B1.2); *United States v. Thompson*, 88 Fed. App’x 480 (3d Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 131 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer, punished by unsupervised probation and \$25 fine, qualified as career offender predicate).

The “two prior felony convictions” must occur before the offense conduct giving rise to the offense of conviction. § 4B1.2(c). The date a defendant sustained a conviction is the date the judgment of conviction was entered, and the two prior felony convictions must be counted separately from each other. *Id.* The general rules for computing criminal history apply. § 4B1.2 cmt. n.3. Accordingly, questions of remoteness, invalidity, and separate counting of prior convictions are often important.

The career offender guideline frequently produces a sentence that is greater than necessary to satisfy any purpose of sentencing. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM at 133-34 (Nov. 2004). Nonetheless, the Commission limited downward departures under U.S.S.G. § 4A1.3(b), p.s., to one criminal history category in career offender cases. U.S.S.G. § 4A1.3(b)(3)(A), p.s. Courts frequently impose sentences substantially below the guideline range in career offender cases based on § 3553(a), post-*Booker*. See Section 17.06, “Challenges to Criminal History Enhancements.”

⁷⁸ Available at http://www.fed.org/pdf_lib/Begay.update.REVISED.3.31.09.pdf.

17.04.05.04 Armed Career Criminal

U.S.S.G. § 4B1.4 applies to a defendant convicted under 18 U.S.C. § 922(g) who is subject to a 15-year mandatory minimum under the Armed Career Criminal Act, 18 U.S.C. § 924(e), i.e., has three prior convictions for a “violent felony” or “serious drug offense.” See Section 17.02, “Sentencing Related Statutes.” Like the career offender guideline, the armed career criminal guideline operates on both axes of the sentencing table. Unlike the career offender guideline, § 4B1.4 is not limited by guideline § 4A1.2’s rules for counting prior sentences. § 4B1.4 cmt. n.1. The lowest criminal history category for an armed career criminal is IV; the highest is VI if the defendant used the weapon in connection with a “crime of violence” or a “controlled substance offense” as defined in § 4B1.2, or possessed a firearm described in 26 U.S.C. § 5845(a), or is also a career offender. See U.S.S.G. § 4B1.4(c). Section § 4B1.4 frequently produces a guideline range above the mandatory 15-year term, especially if the defendant used the weapon in connection with a drug offense or crime of violence or if the defendant is also found to be a career offender. See *United States v. Blue*, 957 F.2d 106, 107 (4th Cir. 1992) (statutory maximum for § 924(e) is life imprisonment).

17.04.05.05 Repeat Sex Offender Against Minors

For repeat sex offenders against minors, U.S.S.G. § 4B1.5 works in concert with the career offender guideline to provide for long imprisonment terms. The guideline sets the minimum criminal history category at V, and it reaches more defendants than § 4B1.2, applying career offender offense levels to a defendant even if he has only one prior qualifying offense. § 4B1.5(a)(1). Even a defendant with no prior child-sex convictions may be subject to a significant offense level increase, if the court finds that he “engaged in a pattern of activity involving prohibited sexual conduct.” § 4B1.5(b).

While § 4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking in, receipt of, or possession of child pornography. § 4B1.5 cmt. n.2.

17.04.06 Chapter Five – Determining the Sentence; Departure Policy Statements

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

17.04.06.01 The Sentencing Table

The sentencing table in Part A is a grid of sentencing ranges produced by the intersection of offense levels and criminal history categories. Most ranges are expressed in months, though some recommend life imprisonment. The grid is divided into four “zones,” A through D. If the range is in Zone A, a guideline sentence of straight probation is allowed (all the ranges in Zone A are 0 to 6 months). § 5B1.1(a)(1), § 5C1.1(b). In Zone B or C, the Guidelines allow for a “split” sentence (probation or supervised release with a condition of some confinement). § 5B1.1(a)(2), § 5C1.1(c), § 5C1.1(d). For ranges in Zone D, the Guidelines call only for imprisonment. § 5C1.1(f). Remember, however, that the court must now consider not just the kinds of sentences recommended

by the Guidelines, but the “kinds of sentences available” by statute, 18 U.S.C. § 3553(a)(3). See Section 17.03.07, “Considering the Advisory Guideline Range.”

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

17.04.06.02 Departure Policy Statements

Together, Parts H and K set out the Commission’s policies on the factors that may or may not be considered in departing from, or fixing a sentence within, the guideline range. Before *Booker* excised § 3553(b)(1) from the Sentencing Reform Act, these parts strictly limited the district court’s authority to sentence outside the guideline range; departures were available only when a case presented an aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” See § 5K2.0(a), (b), p.s. Now, with the exception of special government-sponsored downward departures, courts more often sentence below the guideline range based on § 3553(a) factors than on the limited and generally restrictive departure grounds listed in Chapter Five.⁷⁹

Under § 3553(a)(5), the court must consider “any pertinent policy statement” issued by the Commission. In *Gall v. United States*, 128 S. Ct. 586 (2007), the Supreme Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the Guidelines’ policy statements prohibit, i.e., voluntary withdrawal from a conspiracy, or deem “not ordinarily relevant,” i.e., age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.⁸⁰ *Id.* at 598-602. In approving the sentence and the factors upon which it was based, the Court made no mention of the Commission’s conflicting policy statements. Thus, the policy statements restricting consideration of factors are simply not “pertinent” in light of § 3553(a)(1) & (2). Or, as the Court said in *Rita*, many of these policy statements “do not generally treat certain defendant characteristics in the proper way.” 127 S. Ct. at 2468. The bottom line is that a sentencing court may not deny a below-guideline sentence based on a factor that is pertinent to one or more purposes of sentencing simply because one of the Commission’s policy statement deems the factor never or not ordinarily

⁷⁹ In fiscal year 2008, judges imposed below-guideline sentences based on “departures” alone in only 2.1% of cases, on “departures” with *Booker* in another 1.2% of cases, and on grounds that did not involve “departures” at all in 10.1% of cases. See U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table N.

⁸⁰ See U.S.S.G. §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5. While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, see U.S.S.G. § 3E1.1 cmt. n.1(b), acceptance of responsibility is a prohibited ground for departure. See U.S.S.G. § 5K2.0(d)(2).

relevant. *See, e.g., United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009); *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009); *United States v. Hamilton*, slip op., 2009 WL 995576, *3 (2d Cir. April 14, 2009).

Nonetheless, a sentencing court is free to “depart” in certain circumstances.⁸¹ Part H states the Commission’s policy that many important offender characteristics, including age, education and vocational skills, employment record, family ties and responsibilities, and community ties, are “not ordinarily relevant” in determining the propriety of a departure. U.S.S.G. ch. 5, pt. H, intro. comment. The operative word is “ordinarily” - in exceptional cases, one or more of those characteristics may support a departure. Even in the ordinary case, those characteristics are often relevant in deciding where to sentence within the guideline range, or whether to impose a sentence outside the range under *Booker* and § 3553(a).⁸²

Part H also sets out Commission policy that certain characteristics can never support a departure, including drug or alcohol dependence or gambling addiction (§ 5H1.4, p.s.), role in the offense (§ 5H1.7, p.s.), lack of guidance as a youth (§ 5H1.12, p.s.), and -- in most sex cases -- family and community ties (§ 5H1.6, p.s.). In accordance with a congressional directive, policy statement § 5H1.10 provides that certain characteristics are never relevant to the determination of the sentence: race, sex, national origin, creed, religion, and socio-economic status. *See* 28 U.S.C. § 994(d). After *Booker*, characteristics limited or prohibited from consideration by the *Guidelines Manual* may nevertheless be relevant to sentencing under § 3553(a). *See Gall*, 128 S. Ct. at 600–02 (approving consideration of defendant’s youth, immaturity, and drug addiction in sentencing below guideline range); *United States v. Pinson*, 542 F.3d 822, 838–39 (10th Cir. 2009) (courts have wide discretion to rely on discouraged factors).

Part K authorizes a downward departure on the government’s motion if the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” § 5K1.1, p.s.; *cf.* 18 U.S.C. § 3553(e). (Cooperation is discussed in Section 17.08, “Plea Bargaining and Sentencing.”) For departures on grounds other than cooperation, policy statement § 5K2.0 states general principles and provides special rules for downward departures in child and sex offenses. Generally, a departure may be warranted when a case presents a circumstance that the Commission has identified as a potential departure ground; it may also be warranted in an “exceptional” case, based on a circumstance the Commission has not identified, a circumstance it considers “not ordinarily relevant” under Part H, or a circumstance that, although taken into account in determining the guideline range, is present to an exceptionally great (or small) degree. § 5K2.0(a)(2)–(4).

⁸¹ In addition to the policy statements in Chapter Five, a number of Chapter Two guidelines have commentary suggesting grounds for departure from the prescribed offense level. *See, e.g.,* § 2B1.1 cmt. n.19 (encouraging upward or downward departures for some economic offenses); § 2D1.1 cmt. n.14 (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for large-scale drug offenses); § 2K2.1 cmt. n.11 (same, large-scale or dangerous firearms offenses); § 2L1.2 cmt. n. 7 (authorizing upward or downward departure when applicable offense level substantially overstates or understates seriousness of prior conviction).

⁸² In FY 2008, courts sentenced below the range, relying on *Booker*, and citing factors discouraged by Part 5H 2,088 times. *See* 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 25B.

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

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

In certain districts, policy statement § 5K3.1 allows departures of up to 4 levels, pursuant to an early disposition program authorized by the Attorney General. § 5K3.1, p.s. (Such "fast track" programs are discussed in Section 17.08, "Plea Bargaining and Sentencing.")

17.04.07 Chapter Six – Sentencing Procedures and Plea Agreements

Chapter Six contains policy statements for preparing and disclosing the presentence report, resolving disputed sentencing issues, and considering plea agreements and stipulations. These policies generally track the provisions regarding plea bargains and sentencing procedures in Federal Rules of Criminal Procedure 11 and 32. These procedures are also discussed in Section 17.08, "Plea Bargaining and Sentencing."

17.04.07.01 The Presentence Report; Dispute Resolution

The policy statements of Chapter Six provide for the preparation of a presentence report in most cases, and recommend that written objections to the report usually be submitted before sentencing. U.S.S.G. § 6A1.1, p.s.; § 6A1.2, p.s. comment. (backg'd); *see also* FED. R. CRIM. P. 32(c)(1), (d), (f)(1), (i)(1)(D) (requiring written report and timely written objections in most cases). Under a 2007 amendment, Rule 32 requires that the report discuss both guideline-related facts and "any other information that the court requires, including information relevant to the factors under § 3553(a)." FED. R. CRIM. P. 32(d)(2)(F). Presentence reports are further discussed in Section 17.09, "Sentencing Procedure."

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

unidentified informant may be considered only when there is good cause for anonymity, and the declarations are sufficiently corroborated. § 6A1.3, p.s. cmt. (backg'd), ¶ 2.

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

The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence. § 6A1.3, p.s. cmt. (backg'd), ¶ 3. However, the courts are divided over whether a higher standard may be used for guideline determinations, especially when a particular fact-finding will have a significant impact on the sentence imposed. *See United States v. Garth*, 540 F.3d 766, 773-74 & n.2 (8th Cir. 2008) (collecting cases). *See also* Section 17.09, "Sentencing Procedures." Particular Guidelines require a higher standard of proof in specific contexts. *See, e.g.*, U.S.S.G. § 3A1.1(a) (to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt).

As of this date, U.S.S.G. § 6A1.3, p.s., is inaccurate and outdated in several respects, as discussed in *Testimony of Alan Dubois and Nicole Kaplan Before the Commission Public Hearing on "The Sentencing Reform Act of 1984: 25 Years Later"* at 52-54 (2/10/09), available at http://www.fd.org/pdf_lib/Dubois%20and%20Kaplan%20Testimony%20Final.2.10.09.pdf.

If the court intends to "depart" from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, U.S.S.G. § 6A1.4, p.s., and FED. R. CRIM. P. 32(h) require the court to provide reasonable notice that it is contemplating such a ruling, specifically identifying the grounds for the departure. *See generally Burns v. United States*, 501 U.S. 129 (1991). The Supreme Court recently held that similar notice is not necessary when the court contemplates a sentence outside the guideline range under § 3553(a) and *Booker. Irizarry v. United States*, 553 U.S. ___, 128 S. Ct. 2198, 2202-04 (2008). Nonetheless, in the rare case when the *factual* basis for a non-guideline sentence comes as a surprise, the judge should grant a continuance: "Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial." *Id.* at 2203. *See* FED. R. CRIM. P. 32(i)(1)(3) (requiring court to allow parties to comment on "matters relating to an appropriate sentence").

Crime victims have a right to notice of a public proceeding involving sentencing, and a right to be "reasonably heard" at such a proceeding, which is not a right to "speak" in all circumstances. *See* 18 U.S.C. § 3771(a)(2), (4); U.S.S.G. § 6A1.5, p.s.; FED. R. CRIM. P. 32(i)(4)(B) & 2008 advisory committee note. Note that defendants have a right under the Due Process Clause to notice and the opportunity to challenge any information that may be used to deprive them of life, liberty or property at sentencing, including victim impact statements and information provided by victims

regarding restitution.⁸³ This right is protected through various provisions of Rule 32 and Rule 26.2, which require notice in the presentence report; the opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; the opportunity to file a sentencing memorandum and argue orally to the court; the opportunity for a hearing; the right to obtain witness statements, to have witnesses placed under oath and to question witnesses at any such hearing; and the right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i); FED. R. CRIM. P. 26.2(a)-(d), (f). These protections apply to information about victim impact and restitution. See *United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007); *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009); FED. R. CRIM. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e). For in-depth coverage of the Crime Victims' Rights Act and the Federal Rules of Criminal Procedure promulgated in response thereto, see *Victim Rights*, available at http://www.fd.org/odstb_VictimRights.htm.

17.04.07.02 Plea Agreements

Chapter Six, Part B sets out procedures and standards for accepting plea agreements. See U.S.S.G. §§ 6B1.1-6B1.4. The standards vary with the type of agreement. See FED. R. CRIM. P. 11(c)(1). Plea agreements are discussed in Section 17.08, "Plea Bargaining and Sentencing." While the parties may stipulate to facts as part of a plea agreement, policy statement § 6B1.4(d) states that such a stipulation is not binding on the court. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant "the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." § 6B1.2, p.s. cmt. (backg'd), ¶ 5.

17.04.08 Chapter Seven - Violations of Probation and Supervised Release

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

17.04.09 Chapter Eight – Sentencing of Organizations

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

17.04.10 Appendices

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

⁸³ See *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).