The District of Columbia Sentencing Commission

2005 PRACTICE MANUAL

THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA VOLUNTARY SENTENCING GUIDELINES

for

PLEAS AND VERDICTS ENTERED ON AND AFTER JUNE 14, 2004

Effective June 14, 2005

District of Columbia
Sentencing Commission

441 Fourth Street, NW, Suite 830 South, Washington, D.C. 20001
(202) 727-8822 – Fax (202) 727-7929

Hon. Frederick H. Weisberg,
Chairman

Hon. Harold L. Cushenberry
Brian Forst, Ph. D.
Laura E. Hankins, Esq.
Hon. Ramsey Johnson
Hon. Phil Mendelson
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Patricia Riley, Esq.
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Earl J. Silbert, Esq.
Anne Seymour
Julie Stewart

Non-voting members:
Brenda Baldwin-White, Esq.
Nola Joyce
Thomas R. Kane, Ph.D.
Cranston J. Mitchell

Kim S. Hunt, Ph.D.
Executive Director

To all recipients of the 2005 Practice Manual:

As Director of the District of Columbia Sentencing Commission, I am pleased on behalf of the Commission to provide the 2005 edition of the Practice Manual for the District of Columbia Voluntary Sentencing Guidelines, which replaces the 2004 Practice Manual. The 2005 Practice Manual should be used for all sentences on and after June 14, 2005. An electronic version of the 2005 Practice Manual is available at www.sentencing.dc.gov.

The most significant changes to the 2004 Practice Manual are concisely listed in Appendix J of the 2005 Manual. The Commission would like to draw particular attention to the new rules governing the calculation of criminal history scores, particularly the rules regarding prior out-of-state convictions (section 2.2.6).

The Commission continues to encourage questions from criminal justice practitioners concerning the applicable sentencing range or options for individual cases under the Sentencing Guidelines. If you have a Sentencing Guidelines application inquiry, please do not hesitate to contact us at (202) 727-8822. The Commission provides information to assist in understanding and applying the Sentencing Guidelines. Though the information provided is not binding on the court or parties in any case, the Commission may be able to assist practitioners in efficiently interpreting the Sentencing Guidelines. Moreover, the issues raised by the inquiries may be used to improve future editions of the Practice Manual.

Sincerely,

Kim S. Hunt
Director

Sentencing Guidelines at a Glance

1. To determine the Offense Severity Group, find the offense of conviction on the Chart of Felony Offenses. Offenses are listed in alphabetical order by common name (Appendix C) or by statutory citation (Appendix C-I). Go to the fourth column of either chart which provides the Offense Severity Group for that offense. You can also use the Offense Ranking Chart (Appendix D), which groups offenses by severity level. See § 2.1.

2. Calculate the offender's criminal history score, using the formulas in § 2.2.

3. Using the Drug Grid (Appendix B) for drug offenses and the Master Grid (Appendix A) for everything else, find the row for the Offense Severity Group on the vertical axis and the column for the criminal history score on the horizontal axis. The box at the intersection of the Offense Severity Group and the criminal history score displays the sentencing options for this conviction. See § 8.1.

4. Every box contains a prison sentence range. White boxes indicate that a prison sentence is the only option. Dark gray boxes indicate that either prison or a short split sentence (ESS all but six months or less, but not all of it) may be imposed. Light gray boxes indicate that prison, a short split sentence or straight probation (ESS all) may be imposed.
   a. If the judge wants to impose a sentence of probation (light gray boxes only), the judge should impose a term of incarceration in the appropriate range and the period of supervised release for that offense, suspend execution of all of it (ESS all), and impose any amount of probation up to the five-year maximum with the same terms and conditions that are currently available. See § 3.4.
   b. If the judge wants to impose a short split sentence (the light gray or dark gray boxes), the judge should impose a term of incarceration in the appropriate range plus the period of supervised release for that offense, suspend execution of all but six months or less of the prison term, but not all of it (ESS all but . . .), suspend execution of the period of supervised release, and impose any amount of probation up to the five-year maximum with the same terms and conditions that are currently available. See § 3.5 and Appendix G
   c. If the judge wants to impose a prison sentence (all boxes), the prison sentence must be within the range set forth in the box , unless one of the departure principles applies. For example, in Box 2B of the Drug Grid, a prison sentence should be no lower than 16 months nor higher than 36 months. See § 3.6, § 7.7. A long split, where both the time imposed and the time to be served initially (e.g., in Box 2B of the Drug Grid, 36 months ESS all but 16 months) are both within the prison range, is considered a prison only sentence.

5. Several factors may alter the options or take the conviction out of the box entirely:
   a. A sentence cannot be lower than the mandatory minimum. See § 3.7.
   b. Aggravating and mitigating circumstances may be used in unusual cases if the court determines there is a substantial and compelling reason to depart from the grid range. See § 5.2
   c. If enhancement papers have been filed and/or statutory enhancements proven, the higher number in the prison range is raised by the statutory multiplier or amount. See Chapter 4.
   d. Rule 11(e)(1)(C) pleas control the sentence regardless of the otherwise applicable guideline range. See § 5.1.

6. If there are multiple convictions sentenced on one day:
   a. calculate the sentence for each conviction; and
   b. apply the concurrent/consecutive rules. See Chapter 6.

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Chapter 1. OVERVIEW

1.1 Statement of Purpose and Principles

The District of Columbia Sentencing Commission ("the Commission") was charged with developing a comprehensive structured sentencing system for D.C. or explaining why no such system was needed.

In examining the existing system, the Commission discerned disparity in sentencing, some of which could be explained by legitimate sentencing factors relating to the nature of the crime or the background of the offender, but some of which was apparently attributable to differences in judicial philosophy. Both truth in sentencing and basic fairness require that similarly situated offenders should receive similar sentences for committing the same crime in essentially the same way and that offenders receive different sentences where either the nature of the offense or the history of the offender is different. The Commission thus concluded that the District could benefit from a comprehensive structured sentencing system, and the Commission embarked upon the difficult task of creating workable sentencing guidelines.

Following the lead of other jurisdictions and an earlier effort in the District, the Commission developed a grid to plot two of the dominant factors in sentencing: the offense of conviction (on the vertical axis) and the criminal history of the offender (on the horizontal axis). At the intersection of these two factors on the grid, each box contains the sentencing options and prison ranges for that particular combination of the crime of conviction and criminal history of the offender. The Master Grid has 45 boxes and the Drug Grid has 15 boxes. There is considerable overlap between adjoining boxes, both horizontally and vertically; but, in general, as the seriousness of the offense and the criminal history of the offender increase, the length of the prison sentences increase and the alternatives to incarceration decrease.

In creating these boxes, the Commission did not attempt to create prison ranges and sentencing options based upon what the Commission as a whole thought might be appropriate for that combination of offense of conviction and criminal history of the offender (a normative method). Instead, the options and ranges in each box were based on historical data from the Superior Court Criminal Information System computer over the past eight years, with some adjustment for consistency and symmetry. See Appendices A, B, E and F. The Commission took the historical approach because it was not the intent of the Commission overall to either lengthen or shorten average sentences. The Commission's goal was to create a sentencing system that would reduce disparity and increase the likelihood that similarly situated offenders would be treated similarly. In developing the grid, the Commission attempted to move sentences toward the historical center, without shifting that center either up or down. Although the prison ranges are relatively broad, they nevertheless limit discretion to approximately the middle 50 percent of historical prison sentences.[1] The guidelines also permit a sentence of probation if, historically, at least 25 percent of cases in a given box resulted in probation. Similarly, a short split sentence (X months,

[1]For old law (indeterminate) cases, the Commission used the minimum prison sentence that was imposed (e.g., ten years if the sentence was 10-30 years). For new law (determinate) cases, the Commission used the prison sentence that was imposed.

ESS all but 6 months (or less but not all) followed by probation) is permissible if, historically, at least 25 percent of the cases in a given box resulted in either probation or a short split. Although the guidelines permit probation or a short split under these circumstances, such a sentence is not required.

The Commission also established standards for departing from the recommended prison ranges in extraordinary cases, rules for imposing concurrent or consecutive sentences, and adjustments and exceptions to sentencing "in the box." Together, the grids, standards, rules, adjustments and exceptions form the Sentencing Guidelines for the District of Columbia. Any sentence that is meted out in conformity with these Guidelines is a "guideline compliant" sentence. Any sentence that does not, is not a "guideline compliant" sentence.

The guidelines should give judges, practitioners, defendants, crime victims, and the community at large a better understanding of the likely consequences of criminal behavior and greater confidence that sentences will be predictable and consistent. Although the guidelines are voluntary, the Commission expects a high degree of compliance. Nevertheless, judges are free to impose any lawful sentence they choose. Sentences under the guidelines, just like sentences before the guidelines, are not appealable except when they are unlawful. In order to assist the Commission in evaluating the guidelines, judges will be required to acknowledge that they have followed the guidelines, to provide the departure principle(s) upon which they relied to sentence "outside the box," or to state why they did not use the guidelines.[2]

In the end, sentences in the District of Columbia are supposed to:

(1) Reflect the seriousness of the offense and the criminal history of the offender;
(2) Provide for just punishment and afford adequate deterrence to potential criminal conduct of the offender and others; and
(3) Provide the offender with needed educational or vocational training, medical care, and other correctional treatment.

D.C. Official Code § 24-403.01(a). The Commission hopes that the process of developing and implementing voluntary guidelines for the District of Columbia will contribute to these goals.

For further information on the development of the guidelines, see the 2003 Report, which can be found at http://sentencing.dc.gov.

[2] Throughout these instructions, we use the words such as "must" and "are required to." These should be read to mean, "if a judge wants to impose a guidelines compliant sentence, he or she 'must' or 'is required to,' etc." If a judge elects not to use the guidelines (which we hope he or she does not), such exhortations would have no meaning.

1.2 Key Features of the Sentencing Guidelines

The key features of the Sentencing Guidelines are:

1.2.1 *Voluntary Guidelines*

These guidelines are voluntary. This means that judges are not required to follow them. It also means that a lawful sentence cannot be appealed whether or not the judge complies with the guidelines or the procedures recommended in these instructions.

In order to eliminate unwarranted disparities in sentencing, the Commission hopes for and expects a high degree of compliance. We will have the opportunity during the next two and a half years -- and thereafter -- to make adjustments if necessary. The Commission welcomes comments and suggestions.

1.2.2 *Two Grids: the Master Grid and the Drug Grid*

Each grid contains groups of offenses, ranked by level of severity, along the vertical axis, Groups 1-9 on the Master Grid and Groups 1-3 on the Drug Grid. Both grids contain five groups of criminal history scores, along the horizontal axis, listed as Columns A-E. See § 7.5, Appendices A and B.

When the offense of conviction and the criminal history score are determined, the sentencing options for that conviction are found in the box where offense row and criminal history column intersect.

1.2.3 *Ranking of Offenses*

The Commission has ranked all felonies in the D.C. Official Code in groups by level of severity. Ranking was based principally on a sense of where the offense belonged (using typical, rather than atypical, examples of each offense) and historical sentencing practices. There are nine groups of offenses on the Master Grid (from First Degree Murder While Armed in Group 1 to Receiving Stolen Property in Group 9) and three groups on the Drug Grid (from distribution while armed in Group 1 to attempt distribution in Group 3). See Appendices C, C-I, and D.

The Offense Severity Group is based on the offense of conviction, see § 7.20, and not upon the underlying conduct. There is no discretion to decide in which group to place the offense of conviction. The Commission has attempted to assign every felony in the D.C. Official Code to an Offense Severity Group. If you encounter a D.C. Official Code felony that has not been assigned to an Offense Severity Group, please inform the Commission and it will rank it appropriately.

1.2.4 *Criminal History Scores*

There are a series of rules for computing a criminal history score that depend primarily on (1) the number and severity of prior convictions and adjudications and (2) the length of time between the imposition or the expiration of the defendant's last sentence and the commission of the instant offense.

1.2.5 *Sentencing Options*

All boxes have a prison option. The numbers within the box indicate the range within which the prison sentence must fall, unless a departure principle applies. See Chapter 5, § 7.7. Note that the higher number in the box would change (expanding the range within the box) if a statutory enhancement applies.[3] See Chapter 4, § 7.9.

Some boxes (dark gray) permit a short split sentence. A "short split" sentence is one where the time to be served initially is six months or less. A short split sentence is permissible in any box where, historically, at least 25% of the cases resulted in either a short split or probation. To impose a short split, the court must impose a prison sentence that falls within the prison range in that box, suspend execution of all but six months or less of that sentence -- but not all of it -- and impose up to 5 years probation. A straight prison sentence also is permissible in these boxes.

Some boxes (light gray) permit a probation sentence. Probation is an option in any box where, historically, 25% or more of the cases resulted in a sentence to probation. To impose probation, the court must impose a prison sentenced that falls within the prison range in that box, suspend execution of all of it [ESS all] and impose up to 5 years probation. A short split, described in the previous paragraph, or a straight prison sentence also is permissible in these boxes. See § 3.7.

The remaining boxes (white or unshaded) permit only a prison sentence, unless a departure principle applies. See Chapter 5.

1.2.6 *Statutory Enhancements*

The system accommodates statutory enhancements by raising the higher number in the box by the same percentage or ratio as the statutory maximum is increased. See Chapter 4.

1.2.7 *Departure Principles*

There are non-exclusive lists of aggravating and mitigating factors that permit the court to sentence outside of the box. If the court finds one of the enumerated factors to be substantial and compelling in a given case, the court is not bound by the grid options and ranges. Similarly, if

[3] A statutory enhancement applies only where the government has followed appropriate procedures for notifying the defense (indicting the enhancement; filing papers) and the enhancement is proven.

the court finds another substantial and compelling reason, comparable in gravity to the enumerated factors, that aggravates/mitigates substantially the seriousness of the offense or the defendant's culpability, the court is not bound by the grid options and ranges. There are no limitations on the sentence the court can impose if it finds a substantial and compelling reason to depart.[4] Any legal sentence may be imposed. See Chapter 5.

1.2.8 *Rules for Consecutive and Concurrent Sentences*

There are rules for imposing consecutive or concurrent sentences in some cases. Judicial discretion applies in other cases. See Chapter 6. See also § 5.2.4.

1.2.9 *Exceptions*

(a) Rule 11(e)(1)(c) pleas control the sentence or sentencing range regardless of the otherwise applicable grid options or prison range.
(b) Every offense with a mandatory minimum is found in a box whose prison range contains that mandatory minimum. The guidelines do not change the mandatory minimums and the court has no discretion to sentence below the mandatory minimum.

1.3 Effective Date

The Sentencing Guidelines apply to all felony cases where verdicts and pleas are entered on and after June 14, 2004.

1.4 Use of Sentencing Guidelines Manual in Effect on the Date of Sentencing

The sentencing court shall use the Sentencing Guidelines Manual in effect on the date that the defendant is sentenced. The 2005 Manual is effective on June 14, 2005. The amendments to the 2004 Manual, which are included in the 2005 Manual, are listed in Appendix J.

1.5 Pilot project

The sentencing guidelines are being implemented initially as a pilot project. The purpose for introducing the guidelines as a pilot project is to give the Commission the opportunity to assess implementation, discover where the problems lie, and make such adjustments as may be necessary based on experience rather than prediction. While all sentencing guideline systems are continuously being updated and refined, there should be greater flexibility during this pilot project to revise the basic design than we would anticipate when a more permanent system is adopted in the future.

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[4] The only exceptions to this rule are Aggravating Factor #10 and Mitigating Factor #11, which allow the judge to depart if the application of the rules for consecutive or concurrent sentencing result in a sentence that is too lenient or too harsh respectively. The limitations are explained in Chapter 5.

Note: The sentencing guidelines apply to ALL felonies being sentenced before ALL judges during this pilot project.

1.6 Continuing Role of the Commission

1.6.1 *Monitoring and Refining the Guidelines*

The Commission will be monitoring the implementation of the guidelines, collecting data and making recommendations on adjustments that should be made both during the pilot project and thereafter. Two issues that the Commission will be examining are whether the options and ranges need to be adjusted and whether the offenses are ranked properly, especially for offenses that can be committed in very different ways.

The Commission will also make changes to the Practice Manual to clarify the sentencing guidelines or to create new policy rules where necessary. See Appendix J, which lists new amendments in the June 14, 2005 Practice Manual.

The Commission strongly encourages questions from criminal justice practitioners concerning the applicable sentencing range or options for individual cases under the Sentencing Guidelines. If you have a Guidelines application inquiry, please contact us at (202) 727-8822. The Commission provides information to assist in understanding and applying the Sentencing Guidelines. The information provided is not binding on the court or parties in any case. However, the issues raised by the inquiry may be used to inform subsequent revisions of the Practice Manual.

1.6.2 *Research*

The Commission intends to undertake research to assist its future decision-making processes.

1.6.3 *Automating the Guideline Calculation Process*

The Commission is contracting with an outside vendor to establish a web-based system that will automatically calculate the appropriate sentencing options for each conviction and each case. The system will also capture sentencing data that can be used in monitoring and refining the guidelines.

Chapter 2: FINDING THE RIGHT BOX

The starting point for determining a guideline-compliant sentence, see § 7.3, for each conviction is:

(a) the Offense Severity Group of the offense of conviction; and
(b) the criminal history score of the offender.

The place where these two factors intersect on either the Master Grid or the Drug Grid is the box that contains the sentencing options for that particular combination of offense and offender. We will discuss these elements of sentencing first and then talk about the options within a box, adjusting the box, sentencing outside of the box, and how the boxes fit together in multiple count cases.

2.1 Offense Severity Group

The offense(s) of conviction will be determined by the plea agreement or the verdict. Once the offense(s) of conviction are set, the parties and the court need only refer to Appendix C or C-I. Appendix C is a chart that has all of the felonies that may be prosecuted in the District of Columbia arranged in alphabetical order by common name. Appendix C-I is a chart that has all of the felonies that may be prosecuted in the District of Columbia arranged by D.C. Official Code (2001) cite. Column 4 of each chart provides the Offense Severity Group for each offense. Alternatively, Appendix D is a chart that has the most common felonies that are prosecuted in the District of Columbia arranged by Offense Severity Group.

The Offense Severity Group determines into which row a conviction falls for sentencing purposes. Thus, for example, aggravated assault, found on page 1 of Appendix C, is in Offense Severity Group 6 on the Master Grid ("Master-6"). Distribution of a Controlled Substance, found on page 5 of Appendix C, is in Offense Severity Group 2 on the Drug Grid ("Drug-2").

There should be no question about the group in which an offense is ranked. However, the Commission is aware that some offenses can be committed in vastly different ways. Obstruction of justice is one; robbery is another. Over the course of time, the Commission may move offenses into different groups to accommodate these differences. In the meantime, judges and practitioners should not, except in circumstances that are controlled by a departure principle (see Chapter 5), use a group different from the one in which the offense of conviction falls. If a judge or practitioner finds that an offense or a common method of committing an offense should be ranked differently, it would be most helpful if he or she would pass that observation on to the Commission.

The Offense Severity Groups on the Master Grid are arranged in order from the most serious offenses in Group 1 (e.g., First Degree Murder) to the least serious offenses in Group 9 (Receiving Stolen Property) and on the Drug Grid from Group 1 (Distribution/PWID of a Controlled Substance While Armed) to Group 3 (Attempted Distribution/PWID of a Controlled Substance).

Note: For accessory after the fact convictions, the top and bottom of the applicable guideline range for the underlying offense is reduced by one half. See Appendix C and C-I.

Note: The offense of conviction and not the real offense conduct controls the Offense Severity Group although real offense conduct can be considered in determining where a person should be sentenced within the prison range and in assessing whether a departure should apply. For example, if the defendant committed an armed robbery with a knife but was found guilty of or pled guilty to unarmed robbery, he would be in Group 6 and not in Group 5. Nevertheless, the judge could take the knife into account in considering where in Group 6 to sentence the defendant.

2.2 Criminal History Score

A defendant's criminal history determines into which column a conviction falls for sentencing purposes. There are 5 columns along the horizontal axis, starting with zero to one-half (0 - ½) criminal history points through six-plus (6+) criminal history points.

Scoring a defendant's criminal history depends on the following factors:

(a) prior convictions/adjudications, see § 2.2.1;
(b) whether the prior conviction/adjudication was a felony or misdemeanor; see §§ 2.2.2, 2.2.3, 2.2.4
(c) the Offense Severity Group of the prior felony convictions or adjudications, see § 2.2.2.;[5]
(d) the number of events encompassed in a single case, see § 2.2.5;
(e) whether the prior offense was a criminal conviction or a juvenile adjudication, see §§ 2.2.2, 2.2.3, 2.2.4;
(f) the date on which a sentence or disposition was entered or the date on which a sentence was completed relative to the commission of the crime in the instant case, see §§ 2.2.2, 2.2.3, 7.2.

Note: The defendant may not use the sentencing process in one case to collaterally attack his conviction or sentence in another case. For example, if a defendant's prior conviction is scored for criminal history purposes to determine a "guideline sentence," the defendant may not challenge the validity (as opposed to the existence) of that conviction based on grounds that might otherwise support a collateral attack on the prior conviction.

[5] Out-of-state convictions must be matched to D.C. offenses to determine their Offense Severity Group. *See* § 2.2.6.

2.2.1 *What is a Prior Conviction or Adjudication?*

A prior conviction or adjudication is any conviction or adjudication for which judgment (sentence or disposition) was entered before the day of sentencing in the instant case. The order in which the offenses were committed is irrelevant.

Sentences or dispositions that are entered on the same day as the sentencing in the case at issue are not prior convictions/adjudications. Therefore, they are not counted in computing the prior criminal history score.

2.2.2 *Scoring Prior Convictions/Adjudications*

The first step toward scoring an offender's criminal history is identifying all prior criminal convictions and juvenile adjudications. Convictions and adjudications are scored based upon their type and age. The criminal history score for convictions and adjudications is based upon the Offense Severity Group for that offense (e.g., a prior conviction for ADW is in Master Group 6, just as it is when the instant offense is ADW). Column 4 of Appendix C and C-I provides the Offense Severity Group for all felonies prosecuted under the D.C. Official Code.

Out-of-state and federal convictions and adjudications should be matched as closely as possible to D.C. Official Code offenses by following the rules in section 2.2.6.

Unless lapsed or revived, see § 2.2.3, § 7.15, prior convictions are scored as follows:

3 points	Offenses in Master Grid Groups 1 through 5
2 points	Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1
1 point	Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3
¼ point	All misdemeanors (with a cap of 1 ½ points, that is, only six misdemeanor convictions may count toward the criminal history score, although all misdemeanor convictions may be considered by the judge in choosing the appropriate sentence within the applicable guideline box).

Note: When scoring prior convictions for accessory after the fact, score as follows when the underlying offense falls into the following boxes:

groups 1-3: 3 points
groups 4-5: 2 points
groups 6-9: 1 point

Note: Sentences under the Youth Rehabilitation Act are counted like any other adult conviction for scoring purposes even if the prior YRA conviction was "set aside" for non-law enforcement purposes.

Unless lapsed, see § 2.2.4, prior juvenile adjudications are scored as follows:

1 ½	points	Offenses in Master Grid Groups 1 through 5
1	point	Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1
½	point	Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3
0	points	All misdemeanors

Juvenile adjudications are capped at 1 ½ points unless there is more than one adjudication for an offense in Master Grid Groups 1-5. In that case, each of the offenses in Master Grid Groups 1-5 counts for 1 ½ points and adjudications in Master Grid Groups 6-9 and Drug Grid Groups 1-3 are not counted in the criminal history score. As with convictions, all adjudications may be considered by the judge in choosing the appropriate sentence from the applicable guideline box.

2.2.3 *Which Prior Convictions Count?*

A prior conviction counts for scoring purposes if any portion of its sentence falls within the ten-year window. In other words, if the amount of time between the completion of the sentence[6] for the prior conviction and the commission of the instant offense is 10 years or less, then the prior conviction counts for scoring purposes. For example, if the instant offense were committed on February 9, 2004, then a prior conviction for which parole was completed on February 10, 1994 (within the 10-year window) would count for criminal history scoring purposes.

A prior conviction lapses, that is, it is not scored, if its entire sentence is beyond the ten-year window. In other words, if the amount of time between the completion of the sentence for the prior conviction and the commission of the instant offense is more than 10 years, then the prior conviction lapses. For example, if the instant offense were committed on February 9, 2004, then a prior conviction for which parole completed on February 8, 1994 (beyond the 10-year window) would be lapsed and would not count for criminal history scoring purposes.

Lapsed felony convictions can be revived, however. If any prior felony conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the ten-year window, then all lapsed felony convictions are revived. Lapsed convictions that have been revived by a felony in the ten-year window are scored as follows:

3	points	Offenses in Master Grid Groups 1 through 5
1	points	Offenses in Master Grid Groups 6 and 7 and Drug Grid Group 1
½	point	Offenses in Master Grid Groups 8 and 9 and Drug Grid Groups 2 and 3
0	points	All misdemeanors

[6]A sentence is completed when a person is sentenced, released from prison or finishes probation, parole or supervised release, whichever is latest.

Thus, if the defendant has been sentenced or is serving a sentence (either in jail/prison or on probation, parole, or supervised release) for a felony at any time during the ten years before the commission of the instant offense, all felony convictions are scored. Felony convictions in the ten-year window are scored at their full value; lapsed felony convictions in Master Groups 1- 5 are also scored at their full value; and lapsed felony convictions in Master Groups 6 -9 and Drug Grid Groups 1-3 are scored at one-half their full value; lapsed misdemeanors are not scored at all. If, however, all previous sentences were completed more than ten years before the date of the commission of the instant offense, none of the prior convictions is scored.

As stated above, a prior conviction or adjudication is any conviction or adjudication for which judgment (sentence or disposition) was entered before the day of sentencing in the instant case. This means that sentences or dispositions that were entered after the commission of the instant offense but before sentencing of the instant offense are also scored. They are scored at full value. The order in which the offenses were committed is irrelevant. However, because sentencing of such a prior conviction did not fall within the 10-year window (i.e., the sentence was imposed after the commission of the instant offense), it cannot revive any lapsed felony convictions. A prior felony conviction can revive an earlier felony conviction only if the more recent conviction or any part of its sentence (including incarceration, probation, parole or supervised release) occurred within the 10-year window. See Section 7.27.

Example

Defendant committed an aggravated assault on 8/15/2003 and an armed carjacking on February 9, 2004. He was sentenced in the armed carjacking case first, on 7/23/2004, and in the aggravated assault case second, on 8/29/2004. The armed carjacking would be a prior conviction (Master Group 3) for determining the defendant's criminal history score when he was later sentenced in the aggravated assault case since the sentence was entered before the day of sentencing in the aggravated assault case. However, the armed carjacking cannot be used to revive an earlier robbery conviction for which the sentence was completed on 8/1/1993, more than ten years before the commission of the aggravated assault, because the conviction for armed carjacking did not occur in the 10-year-window prior to the commission of the aggravated assault. If the order of sentencing was reversed, the aggravated assault cannot be used to revive the earlier robbery conviction because the conviction for aggravated assault did not occur in the 10-year window prior to the commission of the armed carjacking. *See* § 9.12, Example 12, for a different result.

Prior convictions for misdemeanors lapse at the same rate as felonies (ten years) but misdemeanors can neither revive other convictions nor be revived. Thus, if the only offense in the ten-year window is a misdemeanor, it does not revive earlier felony offenses. If a sentence for a misdemeanor was completed more than ten years before the commission of the instant

offense, it is not counted, regardless of the number of felony convictions within the ten-year window.

Note: While lapsed convictions are not counted or scored for criminal history purposes, the court may still consider them when determining where a defendant should be sentenced within the applicable box. There is no bar to prosecutors using a lapsed conviction as the basis to indict or file papers for a statutory enhancement.

2.2.4 *Which Prior Adjudications Count?*

Juvenile adjudications for offenses in Master Groups 6 -9 and all Drug Groups count if the amount of time between the date of disposition or date of release from Oak Hill or its functional equivalent, see § 7.19, whichever is latest, and the commission of the instant offense is 5 years or less. Juvenile adjudications for offenses in Master Groups 1 - 5 count if the amount of time between the date of disposition, the date of release from Oak Hill or its functional equivalent, or the date of release from a locked residential facility, whichever is later, and the commission of the instant offense is 5 years or less. If the defendant, as a juvenile, was placed in the locked unit of a multi-level facility then the defendant's entire stay at that facility is treated as if the defendant were in the locked unit unless the defendant can establish that he or she was transferred from the locked unit to a less secure unit and remained there until released from that facility.

Prior adjudications lapse, that is, they are not counted or scored, if they are beyond the five-year window. See § 7.11. A juvenile adjudication that has lapsed can never be revived. If a defendant in any Group was either sentenced or released from Oak Hill or its functional equivalent or, in Master Groups 1-5, released from a locked residential facility more than five years before the commission of the instant offense, it is not counted, regardless of the number of adjudications or convictions within the five-year window.

Example

Take a juvenile with the following series of placements on a single adjudication:

(a) placed on probation;
(b) probation revoked; committed to YSA and sent to a group home;
(c) aftercare revoked; sent to a staff secure residential facility;
(d) transferred to a locked residential facility;
(e) transferred to Oak Hill;
(f) transferred to a group home; and
(g) released to aftercare to reside with his/her family.

The date of his or her release from Oak Hill would control the calculation of the five year window. If the instant offense was committed more than five years after the date of defendant's release from Oak Hill, this adjudication would lapse for scoring purposes.

Note: While a juvenile adjudication that has lapsed is not counted or scored for criminal history purposes, the court may still consider it when determining where a defendant should be sentenced within the applicable box.

Note: If a defendant is 26 years of age or older at the time of the instant offense, none of his or her juvenile adjudications are scored. Since all orders of the Family Court with respect to a juvenile terminates when he or she reaches 21 years of age, D.C. Official Code § 16-2322(f), there is no possibility of a disposition or release in the five-year window after a person's 26th birthday.

2.2.5 *Scoring Multiple Offenses in a Single Event*

Only the most serious offense arising out of a single event is scored. See § 7.10. This means, for example, that robbery and CPWL convictions arising out of the armed robbery of one or more victims in a single event, see § 8.9, would be scored at two points, since only the more serious offense, the robbery (Group 6), would be counted and not the less serious offense, CPWL (Group 8). However, a robbery and a CPWL arising out of multiple events -- even if they are both charged in a single case -- would be scored at three points, two for the robbery and one for the CPWL.

2.2.6 *Scoring Out-of-state Convictions/Adjudications*

Convictions and adjudications for federal and out-of-state offenses are scored like the closest comparable D.C. Official Code offenses. To determine the closest comparable D.C. Official Code offense:

1. Look at the name of the offense;

2. Examine the statutory elements of the offense;

3. Choose the DC offense that most closely matches the out-of-state offense. Score the out-of-state offense for criminal history purposes just as the most closely matched DC offense would be scored (for example, an out-of-state offense that most closely matches ADW is scored as 2 points, just as is a prior DC ADW conviction).

4. If there are more than one possible DC statutes that "closely match" the out-of-state offense, select the least severe DC statute, whether that statute is a misdemeanor or a lesser felony. (In some cases, the least severe DC statute might actually be a felony even if the out-of-state offense is a misdemeanor. What is most important is how DC classifies the statute.) Importantly, do not look to the underlying conduct of the prior offense to

select the offense that most closely matches; instead compare the elements of the DC and out-of-state offenses.

5. If no comparable DC statute can be found based on the above rules, then the following default rules apply:

   a. Apply one point for all convictions that are classified as felonies by the other jurisdiction;

   b. Apply ½ point for all juvenile adjudications that are classified as felonies by the other jurisdiction;

   c. Apply ¼ point for all convictions that are classified as misdemeanors by the other jurisdiction.

   d. Exception: If defense counsel can demonstrate to the sentencing Court that the conduct criminalized by the other jurisdiction is not currently classified as criminal conduct in DC, then the Court may delete or remove any criminal history points applied by CSOSA for such an offense.

   Note: The same lapse rules apply to out-of state convictions as to D.C. convictions. Thus, a revived out-of-state felony should be scored as ½ point under these default rules, and misdemeanor convictions and juvenile adjudications would not be scored at all

6. If the government determines that the criminal history score for the out-of-state conviction under-represents the severity of the offense, then the government may seek a criminal history departure. This departure principle applies <u>only</u> to out-of-state convictions. If the Court concludes by a preponderance of evidence that the underlying conduct for the out-of state conviction most closely matches a more severe DC offense, then the Court may adjust the criminal history score by applying the same number of criminal history points applicable to the more severe DC offense. In making this determination, the burden of proof is on the government to establish that the conduct for the out-of state conviction more closely matches a more severe DC offense. The Court should apply this departure principle only if it determines that the conduct of <u>conviction</u>, as opposed to alleged conduct or conduct relating to other offenses, more closely matches the more severe DC offense.

   While the parties may not normally bargain over the criminal history score, the parties may agree that the Court should apply a higher and specific value of points as the appropriate score for an out-of state conviction. This would help create certainty at the time of a plea and would reduce resources necessary to litigate the appropriate criminal history score when it is contested. If agreed upon by the parties, CSOSA and the Court should

accept this score when calculating criminal history. This exception to the general rule prohibiting bargaining over criminal history score applies only to out-of-state convictions and is the ONLY EXCEPTION to the general prohibition.

Note: In rare cases, the sentence the court imposed may assist in determining the applicable statute of conviction in the foreign jurisdiction. For example, in North Carolina, "breaking and entering" includes both a misdemeanor (simple breaking or entering) and a felony (intent to commit any felony or larceny). If the criminal history record indicates a prior conviction for "breaking or entering" in North Carolina, and the defendant received a 5-year sentence for that conviction, the prior conviction must be a felony since the maximum penalty for the misdemeanor is 120 days for persons with an extensive criminal history.

Note: Figuring out exactly which D.C. offense most closely resembles an out-of-state offense may not be necessary if the number of criminal history points assigned to it would be the same regardless of whether it comes closer to one offense or another.

Note: Figuring out the exact number of criminal history points is not necessary where a defendant has six or more points (e.g., two prior violent felonies; three prior mid-level felonies; six prior low-level felonies or a combination of these and misdemeanors that add up to six or more points).

The Commission has developed a preliminary list of comparable D.C. offenses for many of the most common Maryland offenses. This list is available at www.sentencing.dc.gov. The Commission will work on comparing additional Maryland, Virginia and Federal offenses to D.C. offenses. It will then work on comparability for common offenses in other jurisdictions. In the meantime, the Commission strongly urges practitioners and judges to call for assistance regarding comparability of specific offenses. Such a call is likely to be more efficient than trying to decide comparability at the time of sentencing in a given case.

2.2.7 *Scoring Convictions/Adjudications for Offenses That Have Been Repealed*

Convictions and adjudications for offenses that have been repealed are scored in the same group as the closest comparable offenses in the current code. For example, Rape and Forcible Sodomy, which were repealed in 1994, were replaced by First-Degree Sexual Abuse. Rape would be ranked in Group 3 and Rape while Armed would be ranked in Group 2.

2.2.8 *Scoring Convictions/Adjudications for Offenses Where Sentencing Severity has Changed Since the Commission of the Prior Offense*

Convictions and adjudications for offenses that were classified as misdemeanors when the prior offense occurred but were subsequently reclassified as felonies should be scored as misdemeanors. For example, distribution of marijuana was a misdemeanor until June 8, 2001, when it was reclassified as a felony in some circumstances. Any distribution of marijuana

conviction for an offense committed before June 8, 2001, therefore, should be scored as a misdemeanor.[1]

2.2.9 *Youth Rehabilitation Act Convictions, Convictions Reversed on Appeal, and Convictions under Statutes Later Held to be Unconstitutional*

A conviction that has been set aside under the Youth Rehabilitation Act is counted.

A conviction/adjudication that was reversed on appeal is not counted.

A conviction/adjudication under a statute which has later been held to be unconstitutional is not counted.

2.2.10 *Military and Foreign Convictions*

Convictions resulting from military offenses are scored if imposed by a general or special court martial. Convictions imposed by a summary court martial or Article 15 proceeding are not scored.

Convictions resulting from a foreign conviction are not scored.

2.2.11 *Convictions for Traffic Offenses*

Convictions for traffic offenses are not scored. However, convictions for Negligent (Vehicular) Homicide, D.C. Official Code § 50-2203.01, and Fleeing Law Enforcement, D.C. Official Code § 50-2201.05, are criminal offenses and are scored. See Appendix C and C-I.

2.2.12 *Defendant's Relationship to Criminal Justice System*

The defendant's status in the criminal justice system (i.e., incarcerated, or on pre-trial release, probation, parole, pretrial or supervised release) at the time he committed the offense is not counted in the criminal history score, although this status may be considered by the judge in choosing the appropriate sentence from the applicable box. Moreover, the sentence in the new

[1] Distribution of marijuana was a misdemeanor under all circumstances before June 8, 2001, when it was reclassified as a felony unless the defendant has not been previously convicted of distributing or possessing with intent to distribute any controlled substances and the amount of marijuana was ½ pound or less. D.C. Official Code § 48-904.01(a)(2)((B). Carrying a pistol without a license was a misdemeanor before August 20, 1994, unless the person had previously been convicted of CPWL or of any felony. Since then, it has also been a felony to carry a pistol outside a person's home or place of business or on land possessed by the person. D.C. Official Code § 22-4504. An attempt to commit a crime of violence was a misdemeanor before August 20, 1994, when it was reclassified as a 5-year felony. D.C. Official Code § 22-1803. Attempt robbery, however, has been classified as a 3-year felony since the Code was enacted in 1901. D.C. Official Code § 22-2802.

case must be imposed consecutively to any sentence that the defendant was serving at the time he or she committed the offense. See Chapter 6.

2.2.13 *Calculating the Overall Score*

Using the principles set forth above, determine the number of points for the most serious offense arising out of a single event. Add the points for all such offenses together.[7] This will yield the criminal history score that will inform you into which column the defendant falls:

0 - ½	points	Column A
¾ - 1 ¾	points	Column B
2 - 3 ¾	points	Column C
4 - 5 ¾	points	Column D
6+	points	Column E

The box at the intersection of criminal history point column and Offense Severity Group row contains the sentencing options for that conviction.

2.3 Criminal History Score Computation

CSOSA will compute the criminal history score as a part of the pre-sentence report. However, it may be advantageous, both in negotiating and evaluating plea agreements to know in advance what the criminal history score is likely to be. The bail report prepared by Pretrial Services generally contains reasonably accurate (although sometimes unverified and incomplete) information on prior and pending cases. Because of the short time frames in which this report is prepared, however, it is not always possible to verify the disposition in all cases where an arrest is registered. An effort will be made by the criminal justice agencies to ascertain whether it is possible to supplement this report fairly early in the process so that the parties will have complete and accurate information upon which to base plea negotiations and decisions. A conviction or adjudication that is "verified" by Pretrial Services, CSOSA, Youth Services Administration, Court Social Services, the U.S. Attorney's Office, the defense attorney, or the court presumptively will be considered to be accurate. However, it may be challenged. If it is, additional documentation may be required. See discussion below.

During the Rule 11 inquiry, the judge should make clear what the maximum legal sentence for the offense is and inform the parties that he or she is not bound by the guidelines and may impose any sentence up to the statutory maximum. The court should also inform the parties that, in determining the appropriate guideline range, he or she will be bound by the true criminal

[7]In most cases, the same criminal history score will apply to all of the convictions in a given case. However, there may be instances where there is more than 10 years between the completion of an earlier sentence and the commission of one offense and less than 10 years between the completion of an earlier sentence and the commission of another offense. This would yield two different criminal history scores. *See* § 9.12, Example 12.

history score of the defendant and not whatever the parties believe the criminal history score to be at the time of the plea. Thus, in situations where, despite the best efforts of the parties at an earlier stage of the process, additional information is disclosed at sentencing that would alter the criminal history score enough to move the defendant into a higher or a lower box for the offense of conviction, the judge must impose a sentence compliant with the actual guideline range. In other words, unless the parties and the judge have agreed to an 11(e)(1)(c) plea (or the judge exercises his or her discretion not to sentence under the guidelines), the judge must use the defendant's actual criminal history when determining a guideline compliant sentence. Finally, the judge should inform the parties that how to apply the guidelines to any case is a matter within the sole discretion of the judge and that the defendant will have no right to appeal if he or she believes that the guidelines have been applied incorrectly. If information comes to light after sentencing that the judge applied the guidelines incorrectly but otherwise imposed a lawful sentence, the judge may modify the sentence under Rule 35 of the Superior Court Rules of Criminal Procedure on a timely filed motion, but the sentence cannot be appealed

Given the degree of overlap in prison ranges from box to box, as the criminal history score increases (or decreases) uncertainty about any particular prior conviction is unlikely to affect prison sentences very much one way or the other. That is, for example, the judge can impose the same compliant prison sentence whether the defendant properly belongs in Column B or Column C, although the sentence would obviously fall into a different part of the range depending on which column was used to determine the sentence. At the margin, however, a change in criminal history could move a defendant into or out of a probation permissible or short-split permissible Box and could lead to a marginally lower or higher sentence. Under such circumstances, a greater effort to verify prior convictions or adjudications is clearly advisable.

An adult conviction (including the date sentence was complete) will be considered verified if (a) the defendant affirms (or does not deny) it; (b) a certified conviction is provided to the judge; (c) other written documentation is provided to the judge,[8] (d) oral representations are made to the judge by CSOSA, Pretrial Services, the U.S. Attorney's Office, the Department of Corrections, the Federal Bureau of Prisons, the United States Parole Commission, defense counsel, or any other reliable person, agency, or entity; or (e) other information is provided that satisfies the judge that the defendant was convicted of a particular offense (or the date sentence was complete). A party, agency, or entity relying on oral representations to verify or disprove a conviction (or date) should indicate the information is orally supported[9] and be prepared, if asked, to provide the name, title, agency, and telephone number of the person from whom the information was obtained and the records from which the person derived the information. The party contesting a prior conviction should notify the opposing party and CSOSA as soon as it receives verification information that it intends to contest a conviction (or date) to allow the non-challenging party and/or CSOSA time to obtain additional documentation/ verification without

[8] For example, a fax on letterhead or email from an official government email address will suffice as written documentation.

[9] An asterisk in the pre-sentence report, for example, should suffice.

the need to delay the sentencing hearing. If the judge finds a genuine contest as to a conviction or date that is orally verified, the judge may order the non-challenging party to provide additional written documentation to resolve the conflict or may order CSOSA to re-verify the disputed information A judge may take judicial notice of the records of the Superior Court.

A juvenile adjudication (or the date the defendant was released from Oak Hill, its functional equivalent or, where relevant, a locked residential facility) generally can be verified and challenged by the same methods as adult convictions. In addition, oral representations may be made by Youth Services Administration and Court Social Services to verify an adjudication (or date). The date of release from a locked or multi-level residential facility can be established only through written documentation; oral representations will not suffice.[10] If written documentation of a release date within the five-year window cannot be obtained, then the date of disposition or the date of release from Oak Hill or its functional equivalent, whichever is later, will control for purposes of determining when the adjudication has lapsed.

Note: There may be situations where the parties and/or the judge disagree with respect to the criminal history score in a way that would place the defendant in different boxes but, because of the overlap in boxes, the difference might not be significant for the sentencing judge. In such cases, the judge may not need to decide the exact number of criminal history points in order to impose sentence. However, the judge should notify the Commission that the criminal history score was unresolved but the sentence imposed was in the overlap zone.

Note: There may also be situations where the parties disagree about the exact criminal history score, but the defendant would be in the same criminal history column either way. For example, the range in column C is from 2 to 3¾ criminal history points. If the prosecution claims that the defendant has been convicted of distribution of cocaine on three separate occasions (for a total of 3 points) and the defense claims that the defendant has only two such prior convictions (for a total of 2 points), he will be in column C regardless of which party is correct. In such cases, the judge may impose a sentence without resolving the dispute.

2.4 Challenging the Criminal History Score.

Sentencing hearings should be scheduled so that the pre-sentence report is completed and provided to both parties at least two weeks prior to the hearing to give the parties the opportunity to assess the accuracy of the guideline calculation.

If a party intends to challenge the accuracy of the criminal history score, that party should immediately notify the other party and CSOSA providing information on why the challenging party believes a particular conviction or date is incorrect. See § 5.2.5, Departure Procedures.

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[10] The burden is on the defendant to establish the date of transfer from a locked to unlocked unit of a multi-level facility. This may be done by oral representations under the terms and conditions as other oral representations.

If a party knows that it will challenge the criminal history score and that it will submit evidence or information, not introduced at trial or a pretrial hearing, that the other party might want to contest, the moving party should notify the other party and the judge as early as possible so that sentencing will not have to be continued. The Commission anticipates that sentencing will proceed in the future much like it has in the past and that it would be the rare case where witnesses would be sworn or evidence taken in open court during the sentencing hearing.

Chapter 3: SENTENCING WITHIN THE BOX

The Commission anticipates that most cases will be sentenced within the box. There are 45 boxes on the Master Grid and 15 boxes on the Drug Grid. In some boxes, a prison sentence is the only option. In some boxes, either a prison sentence or a short split sentence is an option. In the remaining boxes, a prison sentence, a short split sentence, or probation is an option. The boxes are clearly marked:

White/unshaded	Prison only
Dark gray/dark shaded	Prison or a short split
Light gray/light shaded	Prison, a short split, or probation

In determining the parameters of the boxes, the Commission relied on both old law (indeterminate) and new law (determinate) historical data from 1996-2003. Starting from the principle that guideline sentences should fall in the middle 50% of historical sentences, the Commission determined that probation should be available when, in the past, 25% or more of the sentences in that box were probation sentences. Similarly, a short split sentence should be available when, in the past, 25% or more of the sentences in that box were either probation or a short split sentence. For all boxes, the range for the length of prison sentences represents what historically has been the middle 50% of prison sentences for that box. Some adjustments were made for continuity and symmetry. See 2003 Annual Report, Chapter 3, for a discussion of the Commission's methodology.

3.1 What Cannot Be Considered

Except for hate crimes involving a sentencing enhancement under D.C. Official Code §§ 22-2104.01, 22-3703, and 24-403.01(b-2)(2)(A), the following factors may not be considered in sentencing a defendant:

(1) Race;
(2) Gender;
(3) Marital status;
(4) Ethnic origin;
(5) Religious affiliation;
(6) Sexual orientation

3.2 What Can Be Considered

In determining an appropriate sentence within the box, the court may take into consideration any factor other than those listed above.

Any other information that the court could have taken into consideration before the introduction of the voluntary guidelines, may be taken into consideration in determining where a person should be sentenced within the box. None of these reasons, however,

provides a basis for sentencing outside the box unless it relates to a departure principle. See § 5.2, Departures, § 7.7.

3.3 In/Out Decision

In determining the appropriate sentence, the first decision the court must make is the "in/out" decision: whether the defendant should be sent "in" to prison or whether the defendant should be "out" on probation or a short split sentence.[11] For many of the boxes, this decision has already been made. The white boxes are prison only. If the instant offense falls into a white box, then the court must decide "in" to prison unless the court finds that one of the mitigating factors applies and chooses to sentence the offender "out" to probation or a short split as a result. In the shaded boxes, the decision is left to the judge to decide. In the light gray boxes, probation is permissible. Even without finding a mitigating or aggravating factor applicable, the court has the option to impose probation, a short split or straight prison. Each of those "in/out" decisions would be compliant. In the dark gray boxes, a short split sentence is permissible. The court has the option to impose a short split sentence or a straight prison sentence and, absent a finding that a mitigating factor applies, only those in/out options would be compliant. See § 3.4 for further discussion of probation.

In those boxes where probation or a short split is permissible and the judge decides to use one of these options, in order for the sentence to be compliant with the guidelines, the prison term that is imposed and suspended, in all or part, must fall within the range provided in that box.

Example

Box 7A on the Master Grid is light gray which means that it is a probation permissible box. The prison range in Box 7A is 12 to 36 months. A sentence of 24 months plus 3 years supervised release, ESS all, with five years probation would be a guidelines compliant sentence. A sentence of five years probation would not be compliant and would also be illegal because probation cannot follow the suspension of imposition of sentence, *see* D.C. Official Code § 16- 710, unless it is a Youth Rehabilitation Act sentence, *see* D.C. Official Code § 24-903. A sentence of 8 months, ESS all, with five years probation would not be compliant because the minimum prison sentence imposed initially must be at least 12 months. Similarly a sentence of 40 months, ESS all, with five years probation would not be compliant because the maximum prison sentence imposed initially must not be more than 36 months.

[11] The Sentencing Reform Act of 2000 allowed certain terms of incarceration or types of custody to be imposed as a condition of probation. Weekend sentences or sentences to a halfway house for felony convictions may be ordered only as a condition of probation. The U.S. Bureau of Prisons cannot carry out such intermediate sanctions and, therefore, they may only be imposed as a condition of probation. *See* § 10.14 and D.C. Official Code §16-710(b-1).

After the court makes the in/out decision, the court should determine the length of the option chosen. For example, if the court decides "out," then the court must decide how long the probation term should be. See D.C. Official Code § 16-710. If the court decides "in," then the court must determine the length of the prison sentence (including whether to impose a long split). See § 3.6 for further discussion of prison sentences. If the court decides to impose a short split, the court must decide the length of the prison sentence to impose, how much of that sentence to suspend and the length of the term of probation to follow. See § 3.5 for further discussion of short split sentences.

3.4 Probation (ESS All)

Probation is a compliant sentence only in the light gray boxes. To impose probation, the court must impose a prison sentence that falls within the prison range in the appropriate light gray box, suspend execution of all of it [ESS all] and impose up to 5 years probation.[12]

Two principles that the Commission adopted are to some extent in conflict in cells where probation is a permissible sentence: the principle that the guidelines should try to eliminate the top and bottom 25 percent of sentences (except where a departure principle applies), and the principle that probation should be a permissible sentence in any cell where 25 percent or more of the sentences were to probation historically. The Commission recognizes that a portion of historic sentences to probation – like a portion of the most severe sentences imposed historically – were outliers, that is, they were outside the norm given the offense and the criminal history of the defendant. However, unlike exceptionally harsh sentences, which were more easily identified when compared against other sentences, exceptionally lenient sentences were statistically indistinguishable from sentences where probation was indeed appropriate. For this reason, while the Commission was able to exclude from its recommended sentence ranges anomalously "high" sentences, it was not able to impose a comparable bright-line limitation on anomalously "low" probation sentences in every cell. It is therefore incumbent on individual judges to consider the historical percentage of probationary sentences in a given cell when determining whether probation is appropriate in a given case. See Appendices E and F. In making this determination, judges should be guided by the principle that it was the intent of the Commission to eliminate both the top 25 percent and the bottom 25 percent of sentences. It is accordingly the intention and the expectation of the Commission that, just as the guidelines should eliminate a portion of anomalously harsh sentences, so too should the guidelines eliminate a portion of anomalously lenient sentences.

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[12] D.C. Official Code § 16-710 does not authorize probation following suspension of imposition of sentence [ISS)]. *See Schwasta v. United States*, 392 A.2d 1071, 1077 (D.C. 1978) (D.C. Official Code § 16-710 "permits the trial court to grant probation only after it has imposed a sentence and suspended its execution"). The Youth Rehabilitation Act, however, does. DC. Code § 24-903 (the court "may suspend the imposition or execution of sentence and place the youth offender on probation").

Note: The guidelines make no recommendation as to the length or terms or conditions of probation. Any period of probation up to the statutory maximum of 5 years is compliant and the judge may impose any terms or conditions available prior to the guidelines. See D.C. Official Code § 16-710(b).

3.5 Short Split Sentences (ESS All but Six Months or Less)

A short split sentence is a compliant sentence in the shaded (dark gray and light gray) boxes. To impose a short split, the court must impose a prison sentence that falls within the prison range in the appropriate dark gray or light gray box, suspend execution of all but six months or less -- but not all -- of that sentence, and impose up to 5 years probation. If the judge suspends all of the prison term, that would be considered to be probation and not a short split and it would not be compliant in a dark gray box. See § 3.4, supra.

Note: When imposing a short split sentence, the court should (a) impose the prison term and the supervised release term, (b) suspend execution of all but six months or less of the prison term, but not all of it; (c) suspend <u>all</u> of the supervised release time and (d) place the defendant on probation for a period not to exceed five years. See Appendix G.

Note: If the court suspends imposition of sentence (ISS), that is considered to be probation and not a split sentence. ISS sentences are not compliant in the white or dark gray boxes, unless a departure principle applies.

Note: If the court suspends execution of all of the prison term, that is considered to be probation and not a split sentence. "ESS all" sentences are not compliant in the white or dark gray boxes, unless a departure principle applies.

3.6 Prison

Prison is a compliant sentence in all of the boxes on both grids. Each box has two numbers. The lower number represents the fewest number of months for a compliant prison sentence; the upper number represents the greatest number of months for a compliant prison sentence.

The court may impose any prison sentence within the range specified in the box where the offense of conviction and criminal history score of the offender intersect. For example, a person convicted of armed robbery who has previously been convicted of attempted robbery in the ten-year window and, therefore, has one criminal history point would be in Box 5B. In Box 5B, the prison range is between 48 months and 96 months. The defense can argue that a sentence in the lower part of the range is appropriate and the prosecution can argue that a sentence in the higher part of the range is merited. Unless a principle applies that would expand the box or take the case "out of the box," the court must sentence within the established range to be in compliance with the guidelines.

The court may also impose a "long-split" sentence, that is, a sentence where the amount of time to be served after a portion of the entire prison term is suspended, still falls within the range for prison sentences in that box. See § 7.17. Thus, both the sentence imposed and the portion to be served initially would fall within the prison range in that box.

Note: Column 6 does not have an upper number for the prison range but rather a plus sign. A defendant with a criminal history score that places him or her in Column 6 can be sentenced to any period or incarceration up to the statutory maximum (less, of course, the amount reserved for back up time for non-Class A felonies).

3.7 Mandatory Minimums

Mandatory minimums are the one exception to the amount of discretion the court has in imposing a guideline compliant sentence within the box. The guidelines do not change statutory mandatory minimums. A sentence cannot be lower than the mandatory minimum even if lower sentences are otherwise available in that box.

Offenses that require a mandatory minimum sentence are:

First-degree murder of a police officer	LWOR
First-degree murder	30 years
Armed carjacking	15 years
Carjacking	7 years
Crimes of violence while armed with a firearm -- 2nd offense	10 years
Crimes of violence while armed with a firearm -- 1st offense	5 years
Crimes of violence while armed -- 2nd offense	5 years
Possession of a firearm during a crime of violence/dangerous crime	5 years

3.8 Statutory Minimums

Some offenses have a statutory minimum that is <u>not</u> a mandatory minimum. For these offenses, the judge must impose at least the statutory minimum sentence, but may be able to suspend all or part of it depending on applicable sentencing box and where the statutory minimum fits within that box if at all.

All but two of statutory minimums are either are below or within the prison range in the lowest possible box for that offense and criminal history score, so that these statutory minimums do not conflict with guideline prison ranges and the same options are available for these offenses as for any other in the same Offense Severity Group (prison only, long splits, short splits, or probation). However, two statutory minimums are much higher than the guideline ranges in Columns A through D: 84 months for enticing a child (M8) after a conviction for a crime of violence and 60 months for maintaining a place to manufacture, distribute or store narcotic or abusive drugs (D2). For these offenses, the judge should impose the statutory minimum and then, depending on the judge's in/out and sentence length decisions, should suspend at least the portion of the sentence that exceeds higher number in the prison range. The judge has the option to suspend more,

but (absent a departure or enhancement) should not do less to result in a guideline compliant sentence.

A complete list of offenses with statutory minimums can be found in Appendix I.

Example 1

The statutory minimum for first degree burglary is 60 months. The guideline prison range for a person convicted of first degree burglary with zero criminal history points in Box 5A is 36 to 84 months. It is a prison only box. The judge must impose the statutory minimum of 60 months (and could impose a guideline compliant sentence of up to 84 months). However, since the defendant is a first offender, the judge might decide to suspend execution of 24 months of the prison sentence (60 months ESS all but 36 months) and place the defendant on probation for five years. A long split sentence such as this is compliant with the guidelines and with the statute.

Example 2

The statutory minimum for second degree burglary is 24 months. The guideline prison range for a person convicted of second degree burglary with zero criminal history points in Box 7A is 12 to 36 months. Box 7A is a light gray box. It is a prison, short split, or probation permissible box. A sentence of 12 months would be a guidelines compliant sentence, but would not be a legal sentence. The judge must impose the statutory minimum of 24 months (and could impose a guideline compliant sentence of up to 36 months). If the judge believes that a shorter prison sentence or no prison sentence is appropriate, he or she has the following guideline compliant options: (1) impose a sentence of 24 months and suspend execution of all but 12 months (a long split); (2) impose a sentence of 24 months and suspend execution of all but 6 months or less (a short split); (3) impose a sentence of 24 months and suspend execution of all of it (probation). For each of these options, the judge could then place the defendant on probation for up to five years.

3.9 Statutory Maximums

Some offenses have a statutory maximum less back-up time that is less than the maximum sentence in the applicable sentence box. For these offenses, the judge cannot impose a sentence greater than the statutory maximum less back-up time.

Example

The statutory maximum for attempt robbery is 3 years (36 months). D.C. Official Code § 22-2802. The amount reserved for incarceration following revocation of release (back-up time) for this offense is one year. D.C. Official Code § 24-203.1(b)(7). Thus, the maximum sentence that can be imposed, absent an enhancement, is 24 months. Attempt robbery is in Group 8. The higher number in the prison range in boxes 8B, 8C, and 8D is greater than 24 months. Therefore, the maximum sentence that can be imposed in each of these boxes for attempt robbery is 24 months and not 28, 32, or 36 months respectively.

Chapter 4: ADJUSTING THE BOX

There are statutory provisions that do not change the options in a box, but expand the prison range that is available in the box. These include enhancements based on the status of the victim (senior citizen victims, bias-related offenses, and citizen patrol victims), repeat offenses, third strike laws, statutory aggravating factors for murder and sex offenses, drug- and gun-free zones, and selling drugs to minors. See Appendix H.

If enhancement papers have been filed or if a statutory enhancement has been proved to the fact finder, the top of the prison range is increased by the same percentage or amount as the statutory multiplier or cap. Note that the bottom of the range does not change, only the top.

Example

The guideline prison range for an armed robbery by a person with no prior record is 36 to 84 months. (Master Grid Box 5A) D.C. Official Code § 22-3601 enhances the penalty for enumerated crimes if committed against an individual who is 60 year of age or older. If the victim of the armed robbery is a senior citizen and the enhancement was indicted and proved, the range becomes 36 to 126 months because armed robbery of a senior citizen carries 1 ½ times the penalty of armed robbery of a non-senior citizen (84 months x 1 ½ = 126 months).

The court should apply only one of two or more enhancements. In such a case, the court may, but need not, select the enhancement that raises the top of the range by the greatest percentage.

Note: When deciding where within the expanded box to sentence the defendant, the court may consider that enhancements based on prior convictions, (i.e., "repeat papers") may be based on the same convictions that have determined the criminal history score.[13] Thus, the same conviction that contributes to moving the defendant to the right on the sentencing grid, exposing the defendant to a higher sentencing range, may also increase the top of the range through the operation of the enhancement rule. In determining where within the expanded box to sentence the defendant in such a situation, the court may consider the dual effect of the prior record.

Note: A conviction for accessory after the fact reduces by one-half both the top and the bottom of the prison range available in the box applicable to the underlying offense.

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[13]In some cases, repeat papers will be filed based on convictions that do not contribute to the criminal history score. For example, if the prior conviction has lapsed according to the guideline rules, see Chapter 2, then the prior conviction will not be counted toward the defendant's criminal history score but that conviction may still be the basis for the filing of repeat papers. Similarly, if the defendant has six criminal history points, additional convictions will not be counted toward the defendant's criminal history score.

Chapter 5: SENTENCING OUTSIDE OF THE BOX

There are three ways to sentence outside of the otherwise applicable box:

(1) Rule 11(e)(1)(C);
(2) A departure principle; or
(3) A decision by a judge not to use the sentencing guidelines.

5.1 Superior Court Rule of Criminal Procedure 11(e)(1)(C)

A Rule 11(e)(1)(C) plea agreement that is accepted by the court controls the applicable sentence. This means that if the parties and the court agree to a particular sentence or sentencing range, it need not fall "within the box."

5.2 Departures

5.2.1 *Departure Principles*

One of the bedrock principles underlying the development of the guidelines was that like offenses/ offenders should be sentenced alike and different offenses/offenders should be sentenced differently. The grid was designed with typical conduct for the offenses in mind and the ranges are quite broad, preserving the judge's discretion to take into account factors other than the offense of conviction and the criminal history of the offender in a guideline compliant sentence. The Commission, therefore, anticipates that most offenders will be sentenced "within the box." However, there are extraordinary cases where such a sentence would not serve the ends of justice. Consequently, the Commission developed a non-exclusive list of aggravating and mitigating factors to permit sentencing outside of the grid options or ranges. If the judge finds one of the enumerated factors to be substantial and compelling, the judge is not bound by the grid options and ranges. Similarly, the judge may use the "catchall" departure (Aggravating Factor #11; Mitigating Factor #10) if the judge finds another substantial and compelling reason, comparable in gravity to the enumerated factors, that aggravates/mitigates substantially the seriousness of the offense or the defendant's culpability. Under such circumstances, the judge is not bound by the grid options and ranges. Any legal sentence may be imposed.

The judge must state on the record the aggravating or mitigating factor upon which he or she relies in sentencing outside of the box. If the judge applies the catchall Aggravating Factor #11 or Mitigating Factor #10, then the judge must state on the record what substantial and compelling basis he or she found that was comparable in gravity to the enumerated aggravating and mitigating factors. In those cases where the judge has found both aggravating and mitigating factors, the balance should weigh more heavily on one side or the other before a departure is granted.

5.2.2 *Aggravating Factors*

(1) There was deliberate cruelty to a victim or there was gratuitous violence inflicted upon a victim in a manner substantially beyond that normally associated with this offense.

(2) A victim was particularly vulnerable due to age or reduced physical or mental capacity, which was known or should have been known to the defendant, unless that vulnerability constituted an element of the offense of conviction.

(3) A victim sustained a "devastating injury." Devastating injury is defined as a physical or mental injury that results in one or more of the following:

- (a) Permanent and substantial impairment of the person's employment opportunity and/or lifestyle;
- (b) Permanent, gross disfigurement; or
- (c) Medical confinement and/or immobilization for a period of more than three months.

(4) The crime committed or attempted was substantially premeditated, as evidenced by a high degree of planning or sophistication or planning over an extended period of time.

(5) The defendant committed for hire or hired another to commit any one of the following offenses: murder; manslaughter; first degree sexual abuse; kidnapping; mayhem/malicious disfigurement; aggravated assault; assault with intent to commit any of the foregoing; assault with intent to kill; assault with a deadly weapon; or arson.

(6) The offense was part of an enterprise significantly related to organized crime or high-level drug trafficking. This aggravating factor does not apply in cases charging only distribution or possession with intent to distribute a controlled substance where the defendant's only connection to organized crime or high-level drug trafficking is street level drug trafficking.

(7) The defendant threatened, bribed, attempted to bribe, induced, or attempted to induce a victim, a member of the victim's family, or a potential witness, or any other person to withhold truthful testimony or provide false testimony, or otherwise attempted to obstruct justice, unless the defendant is separately convicted of an offense that arises out of the same conduct.

(8) The offense is a violation of Chapter 32 of Title 22 of the D.C. Official Code, which involves an intended or actual monetary loss substantially greater than what would normally be associated with the offense or any one or more of the following:

- (a) The offense(s) involved multiple victims or multiple incidents per victim;
- (b) The defendant has been involved in other conduct similar to the current offense(s) as evidenced by the findings of criminal, civil or administrative law proceedings or the imposition of professional sanctions; and/or
- (c) The defendant used his or her position of confidence or fiduciary responsibility to facilitate the commission of the offense(s).

(9) The offender, in attempting to gain or while holding public office by appointment or election, betrayed the public trust by his or her unlawful conduct.

(10) The consecutive/concurrent sentencing policy results in a guideline sentence so lenient in relation to the seriousness of the offense and the history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on

this factor shall not result in a sentence that exceeds the sentence that would result if all guideline sentences were consecutive.

(11) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1-10 above, which aggravates substantially the seriousness of the offense or the defendant's culpability.

Note: Going to trial is not an aggravating factor and should not be used to go outside of the box.

5.2.3 *Mitigating Factors*

(1) A victim was an aggressor, initiator, willing participant in, or provoker of the incident to such a degree that the defendant's culpability is substantially less than that typically associated with the offense.

(2) Before detection in a crime other than a crime of violence, the defendant compensated or made a good faith effort to compensate victim(s) for any damage or injury sustained.

(3) The defendant participated under duress, coercion, threat or compulsion insufficient to constitute a complete defense, but which significantly reduces the defendant's culpability.

(4) The offense was principally accomplished by another, and the defendant manifested extreme caution or sincere concern for the safety and well-being of a victim.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired significantly, though not sufficiently to constitute a complete defense. Voluntary use of alcohol or other drugs should not be considered in relation to this mitigating factor.

(7) The defendant has provided substantial assistance to law enforcement in the detection or prosecution of other offenders, and departure for this reason does not demean the seriousness of the defendant's crime or create an unacceptable risk to the safety of the community.

(8) The guideline sentence calls for incarceration but, after consultation with corrections authorities, the court determines that the defendant, by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility.

(9) The consecutive/concurrent sentencing policy results in a guideline sentence that is so excessive in relation to the seriousness of the offense and history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence that is less than the sentence that would result if all guideline sentences are concurrent.

(10) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1 to 9 above, which does not amount to a defense but which substantially mitigates the seriousness of the offense or the defendant's culpability.

Note: The entry of a guilty plea is not a mitigating factor and should not be used to go outside of the box but it may be used to determine what sentence to impose within the box.

5.2.4 *No Limits on the Kind and Duration of a Sentence if there is a Substantial and Compelling Reason to Depart*

If the judge has a sufficient reason to sentence outside of the box, there are no constraints (other than statutory limits) on the exercise of the judge's discretion. Any legal sentence may be imposed. Judges should consider the purposes of these guidelines and should incorporate into their sentences, to the extent possible, the principle of proportionality, reserving the maximum sentence for the worst offenses and offenders and the minimum sentence for the least serious offenses and least culpable offenders, and departing from the grid options and ranges only to the extent necessary to account for the aggravating or mitigating factor that necessitated the departure.

There are two exceptions to the principle that a sentence of any legal length may be imposed if the judge finds a substantial and compelling reason to depart from the otherwise applicable box: Aggravating Factor #10 and Mitigating Factor #9. If the judge decides that the application of the concurrent rules in a case would result in a sentence that is too lenient, the judge may depart on the basis of Aggravating Factor #10. The sentence resulting from a departure based solely on Aggravating Factor #10 cannot be higher than the sentence the judge could impose if s/he ran all of the sentences consecutively. Similarly, if the judge decides that the application of the consecutive rules in a case would result in a sentence that is too harsh, the judge may depart on the basis of Mitigating Factor #9. The sentence resulting from a departure based solely on Mitigating Factor #9 cannot be lower than the sentence the judge could impose if s/he ran all of the sentences concurrently.

5.2.5 *Departure Procedures*

While judges are free to develop their own sentencing procedures, the guidelines system will require a level of coordination between the parties, the court and CSOSA heretofore not regularly practiced. To ease the transition, the Commission recommends procedures and practices to give all parties sufficient notice to prepare for the sentencing hearing. These practices are not designed to encourage mini-trials, but rather to avoid blind-siding one party or the other at the time of sentencing and to avoid the necessity for a continuance for matters that could have been disposed of easily with some notice.

The Commission encourages judges and the parties to follow these procedures (or those adopted by the judge to the extent they differ). However, failure to follow such procedures should not bar either party from arguing a departure. Constitutional demands of due process and effective assistance of counsel require that the parties be allowed to argue all potentially applicable factors at the sentencing hearing. On balance, continuing the sentence hearing is a better use of resources than litigating post-conviction claims on the issue.

Sentencing hearings should be scheduled so that the pre-sentence report is completed and provided to both parties at least two weeks prior to the hearing to give the parties the opportunity to determine whether they will seek a departure.

If a party intends to rely on a departure principle at sentencing, that party should provide notice in writing to the other party and the court at least one week prior to sentencing. The notice should include a statement of reasons why the sentencing range is inappropriate, the evidence or information to be relied upon, and the substantial and compelling reason that necessitates or justifies the departure.

If a party knows that it will seek a departure and that it will submit evidence or information, not introduced at trial or a pretrial hearing, that the other party might want to contest, the moving party should notify the other party and the court as early as possible so that sentencing will not have to be continued. The Commission anticipates that sentencing will proceed in the future much like it has in the past and that it would be the rare case where witnesses would be sworn or evidence taken in open court during the sentencing hearing.

If the judge, sua sponte, intends to consider a departure principle not raised by the parties, the judge should provide notice in writing to the parties at least one week prior to sentencing. The notice should set forth the basis on which the judge will consider such a sentence.

The sentencing data form provides a place to enter the aggravating or mitigating factor(s) the judge relied upon in sentencing outside of the box. If the judge uses one of the "catchall"provisions, he or she must state the basis upon which he or she relied and why it is a substantial and compelling reason of comparable gravity with the enumerated factors.

Note: A judge's failure to follow the procedures set forth above or to follow his or her own procedures is not a basis for appeal.

5.3 Not Using the Guidelines

The guidelines are voluntary. The Commission will compile statistical data regarding judges who do not follow the guidelines, but does not intend to identify judges by name. There are no sanctions for failing to follow the guidelines and any lawful sentence is not appealable whether or not it complies with the guidelines. As a consequence, a judge retains total discretion to impose any lawful sentence. Because of the principles and procedures used in developing the guidelines, the Commission hopes and expects that judges will find a sentence that fits both the offense and the offender in the grid options and ranges or will apply a departure principle when there are substantial and compelling reasons to do so.

The sentencing data form will provide a place for the judge to indicate that he or she is not using the guidelines and to explain his or her reasoning for this decision. It is critically important for judges to inform the Commission why he or she believes the guidelines are not suitable for a particular combination of an offense and offender.

Note: The judge's decision to use or not use the guidelines or to impose or not impose a guideline-compliant sentence is not appealable by either party.

Chapter 6: CONSECUTIVE AND CONCURRENT SENTENCES

The court should first determine the sentence for each conviction in a verdict or plea. The following are the rules for imposing these sentences concurrently or consecutively.

6.1 Consecutive Sentences

The following sentences must be imposed consecutively:

For crimes of violence: multiple victims in multiple events; multiple victims in one event, and one victim in multiple events for offenses sentenced on the same day.[14] See § 7.4.

The sentence imposed for a new offense(s) committed while the defendant was under sentence must run consecutively to any sentence imposed as a result of revocation of probation, parole, or supervised release or to the sentence being served at the time the new offense was committed.[15]

Offenses for which a consecutive sentence is required by statute.

Note: Only one crime of violence per victim per event needs to be sentenced consecutively to the others. Everything else can be either consecutive or concurrent. See § 9.16, Example 16.

Example

On February 9, 2004, the defendant held up a cab at gunpoint and robbed the driver and the passenger. Several days later the defendant held up the same cab at gunpoint and robbed the driver and a different passenger. He was convicted of four counts of Armed Robbery and four counts of Possession of a Firearm During a Crime of Violence. This example has multiple victims (the cabdriver and passengers) in multiple events (two armed robberies), and one victim (the cabdriver) in multiple events (two armed robberies). Armed Robbery and PFCOV are both in Group 5. Assuming defendant had no prior record, he will be sentenced in Box 5A, a prison only box with a range of 36 to 84 months. Each of these offenses, however, carries a mandatory minimum of 60 months. The sentences for each of the four armed robberies must be consecutive since one victim was robbed twice and there are two other victims. The two PFCOV's in each event should be sentenced concurrently since they will eventually merge. The PFCOV's for the first and second events can be sentenced either consecutively or concurrently to each other and to the armed robberies. Thus, the minimum sentence for these offenses is 240 months (4 AR's times the mandatory minimum of 60 months); the maximum sentence for these offenses is 504 months (4 AR's plus 2 PFCOV's times the maximum of 84 months). If the judge believes that the minimum sentence is too harsh, he or she may apply Mitigating Factor #9. Under such circumstances, the sentence cannot be lower than 60 months.

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[14] The word "event" is defined in § 7.10, *infra*.

[15] A defendant who commits an offense while on post-conviction escape status or furlough is considered to be serving a sentence or under sentence at that time.

6.2 Concurrent Sentences

The following sentences must be imposed concurrently:

For **non-violent crimes**: multiple offenses in a single event, such as passing several bad checks.

Offenses for which concurrent sentences are required by statute.

6.3 Judicial Discretion

The court has discretion to sentence everything else either consecutively or concurrently.

Note: The departure principles permit deviating from these principles if the resulting sentence would otherwise be too harsh/lenient. See §§ 5.2.2(10) and 5.2.3(9).

Chapter 7: GLOSSARY

7.1 **Box** -- A box is the place on the Master and Drug Grids where the criminal history score of the offender and the group of the offense of conviction intersect. There are 45 boxes on the Master Grid and 15 boxes on the Drug Grid, which indicate the sentencing options for each combination of offense and criminal history. Boxes are identified by using the number of the offense of conviction group (1-9) and the letter of the criminal history column (A-E). Thus, Box 9A is in the lower left hand corner of the Master Grid and contains the lowest possible sentencing options. Box 1E is in the upper right hand corner of the Master Grid and contains the highest possible sentencing options.

7.2 **Completion of the Sentence** -- A criminal sentence is completed when a person is sentenced, is released from jail or prison, or finishes probation, parole, or supervised release, whichever is latest. A juvenile adjudication is completed when the disposition is entered or when the person is released from Oak Hill or its functional equivalent, see § 7.19, or, in Groups 1-5, from a locked residential facility or the locked section of a residential facility, whichever is latest.

7.3 **Compliant Sentence** -- A sentence is compliant if it is one of the options permitted in the appropriate box. For example, in Box 9A, which is light gray, probation, a short split sentence, or a prison sentence between 1 and 12 months would all be compliant. In Box 1E, which is white, the only compliant sentence would be a prison sentence of not less than the mandatory minimum of 360 months (30 years) nor more than the statutory maximum of 720 months (60 years). A sentence also is compliant if it is within the prison range that is expanded by a statutory enhancement. A sentence also is compliant if it is imposed under Rule 11(e)(1)(C). A sentence also is compliant if the judge departs from the options in the box by applying one of the enumerated aggravating or mitigating factors, including applying the catchall of another substantial and compelling basis comparable in gravity to the other enumerated mitigating and aggravating factors. A judge is not required to explain why s/he imposed a compliant sentence. If the judge departs (applies an aggravating or mitigating factor), however, the judge must indicate which factor(s) was found and if the catchall aggravating or mitigating factor is used, the judge must further indicate what the substantial and compelling basis of comparable gravity was. To summarize, the following sentences are compliant:

(a) a sentence in the appropriate box (including the mandatory minimum, if applicable);
(b) a sentence in the appropriate box as expanded by a statutory enhancement;
(c) a sentenced outside of the box where there is a substantial and compelling reason contained in one of the enumerated aggravating or mitigating factors or one of like gravity; and
(d) a sentence or sentencing range agreed to and accepted under Rule 11(e)(1)(c).

7.4 Crime of Violence – The term "crime of violence" means the following offenses whether armed or unarmed:

Aggravated assault;
An act of terrorism;
Arson;
Assault on a police officer;
Assault with a dangerous weapon;
Assault with intent to commit any felony;
Assault with intent to kill;
Burglary;
Carjacking;
Child sexual abuse;
Cruelty to children in the first degree;
Extortion or blackmail accompanied by threats of violence;
Kidnapping;
Mayhem;
Malicious disfigurement;
Manufacture or possession of a weapon of mass destruction;
Murder;
Negligent homicide;
Possession of a firearm during the commission of a crime of violence only
Riot;
Robbery;
Sexual abuse in the first, second, and third degrees;
Use, dissemination, or detonation of a weapon of mass destruction;
Voluntary manslaughter; or
An attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

7.5 Criminal History Score -- The criminal history score is the total number of points a defendant accumulates for his/her prior convictions and prior adjudications, calculated according to the guideline's rules for scoring. See § 2.2. The criminal history scores range from zero to six or more points and determine where to place the defendant in the five columns, lettered A through E, on the horizontal axis of the grid. The columns contain the following number of points:

A 0 to ½;
B ¾ to 1 ¾;
C 2 to 3 ¾;
D 4 to 5 ¾; and
E 6+ points.

7.6 **Dark Gray or Dark Shaded Boxes** -- These are boxes on the Master Grid and the Drug Grid where a short split sentence is a permissible option. A prison sentence within the indicated range would also be compliant. Any other option, including probation, would not be compliant, absent a departure. There are four dark gray boxes on the Master Grid and three dark gray boxes on the Drug Grid. On the Commission's website, http://acs.dc.gov, the dark gray boxes on the Master Grid and Drug Grid are green. (On a non-color printer, the green boxes will print dark gray but will be light enough that the numbers in the boxes will still be legible.)

7.7 **Departure Principle --** A departure principle is a substantial and compelling reason that permits a sentence outside of the appropriate box, or a "departure." A departure can be based on one or more of the enumerated aggravating or mitigating factors, or another substantial and compelling reason of equal gravity. For example, a probation sentence or a short split in a prison-only box would be a departure if the judge based the sentence on one or more mitigating factors. A prison sentence longer than the higher number in the prison range for a particular box would be a departure if the judge based the longer sentence on one or more aggravating factors. A departure is a compliant sentence. To assist the Commission in data collection and analysis of the efficacy of the guidelines, the judge must indicate upon which mitigating or aggravating factor s/he relied to depart. If the judge uses the catchall (Aggravating Factor #11; Mitigating Factor #10), then the judge must more specifically state what factor s/he found that was substantial and compelling and of equal gravity to the enumerated aggravating and mitigating factors.

7.8 **Drug Grid** --The Drug Grid is a chart that contains the sentencing options for all drug offenses. There are 15 boxes on the Drug Grid, arranged in three rows on the vertical axis and five columns on the horizontal axis. The boxes range from Box 3A, the least serious offense and the lowest criminal history score, to 1E, the most serious offense and the highest criminal history score.

7.9 **Enhancements or Statutory Enhancements --** An enhancement or statutory enhancement is a statutory mechanism for increasing the maximum sentence if certain factors -- such as recidivism, the vulnerability of the victim, etc. -- are present. The guidelines permit the upper number of the prison range in each box to be increased by the same proportion or ratio as the maximum sentence can be increased. See Appendix H, Statutory Enhancements.

7.10 **Event** -- For purposes of determining which offenses count for criminal history scoring purposes, see § 2.2.5, and which offenses must be sentenced consecutively/concurrently, see Chapter 6, the phrase "a single event" means offenses that occur at the same time and place or have the same nucleus of facts. The phrase "multiple events" means offenses that occur at different times or places or have a different nucleus of facts.

Examples

One event: Defendant robs a convenience store. As he is leaving, but still inside the store, he engages in a gun battle with police officer who has the store under surveillance.

Two events: Defendant robs a convenience store at gunpoint. He speeds away from the scene and is stopped for a traffic violation. He shoots at the police officer.

7.11 Five-Year Window -- The five-year window is the five years preceding the commission of the instant offense. If, during this period of time, a person had a juvenile disposition, or was released from Oak Hill or its functional equivalent, or for a Master Group 1 - 5 offenses, was released from a locked residential facility or the locked section of a residential facility, that adjudication is counted toward the criminal history score (with a cap of 1½ points unless there are multiple offenses in Severity Groups 1-5).

7.12 Guidelines --The guidelines are the combination of grids, standards, rules, adjustments and exceptions that provide guidance to the court in imposing a sentence that meets the objective of sentencing like defendants/offenses alike and different defendants/offenses differently.

7.13 In/out Decision -- The in/out decision is the decision to impose a sentence of incarceration (so that the offender will be IN prison) or to impose some form of probation (so that the offender will be OUT of prison) or a combination of the two (split sentence). The in/out decision is the first decision the court makes when determining what sentence to impose. Term length (either the length of the probation term, the lengths of the terms of the short split or the length of the prison sentence) is the second decision the court makes.

7.14 Instant Case -- The instant case is the case being sentenced.

7.15 Lapsed Conviction/Adjudication -- A lapsed conviction/adjudication is one that is not scored for criminal history because it is too old under the applicable rules. See § 2.2.3 for adult lapse period; § 2.2.4 for juvenile lapse period. See also § 2.2.3 for rules on reviving convictions.

7.16 Light Gray or Light Shaded Boxes -- These are the boxes on the Master Grid and the Drug Grid where probation, a short split sentence, and a prison sentence are all permissible and compliant options. There are five light gray boxes on the Master Grid and seven light gray boxes on the Drug Grid. On the Commission's website, http://acs.dc.gov, the light gray boxes on the Master Grid and Drug Grid are yellow. (On a non-color printer, the yellow boxes will print light gray.)

7.17 Long Split Sentence -- A long split sentence is one where the court imposes a sentence within the applicable prison range, suspends execution of all but a term that also falls within the applicable prison range, and places the defendant on probation for a period up to five years. Because both the sentence imposed and the term to be served initially fall within the applicable prison range, this is a compliant sentence. As each box on the Master Grid and the Drug Grid has a prison range recommendation, a long split is a compliant sentence in any box. If either the number of months that the court imposes or the number of months to be served immediately does not fall within the applicable prison range for that box, such a sentence would not be compliant unless some other principle applies. See, e.g.,; § 7.7, Departure Principles; § 7.9, Enhancement or Statutory Enhancement § 7.25, Short split Sentences;

7.18 Master Grid -- The Master Grid is a chart that contains the sentencing options for all offenses except drug offenses, which are on the Drug Grid. There are 45 boxes on the Master Grid, arranged in nine rows on the vertical axis and five columns on the horizontal axis. The boxes range from Box 9A, the least serious offense and the lowest criminal history score to 1E, the most serious offense and the highest criminal history score. Prison sentences increase and sentencing options decrease as one moves from the bottom to the top and from left to right on the chart.

7.19 Oak Hill or its Functional Equivalent -- Oak Hill is the current secure facility for juvenile offenders located in Laurel, Maryland. Its functional equivalent would be facilities such as the former Cedar Knoll or the former Receiving Home, the new detention facility on Mt. Olivet Road, and similar juvenile detention facilities in other jurisdictions such as Cheltenham or the Hickey School in Maryland, Beaumont in Virginia, or Spofford in New York.

7.20 Offense of Conviction -- The offense of conviction is that offense (charge) for which the defendant was convicted and is facing sentencing. The offense of conviction, not real offense conduct, controls a defendant's placement in an Offense Severity Group. This means that if the indictment charged the defendant with Armed Robbery but the defendant was convicted of Robbery, either at trial or by way of guilty plea, the offense of conviction is Robbery in Group 6, not Armed Robbery in Group 5, even if strong evidence exists that the defendant actually committed the robbery while armed. While the offense of conviction controls where on the vertical axis (containing the Offense Severity Groups) this charge falls, the court may consider real offense conduct in accordance with Constitutional principles and general sentencing case law when deciding where within a box to sentence the defendant.

7.21 Offense Severity Group -- All felonies have been placed in a group with offenses of like seriousness as measured by the Commission's understanding of <u>typical</u> offenses and historical sentencing data. These groups are arranged along the vertical axis from Group 1 (first degree murder) to Group 9 (receiving stolen property, etc.) on the Master Grid and from Group 1 (distribution of a controlled substance while armed) to Group 3 (attempt distribution) on the Drug Grid.

7.22 Prior Conviction, Prior Adjudication – For purposes of computing criminal history score, a prior conviction or prior juvenile adjudication is any conviction or juvenile adjudication for which a sentence or disposition was imposed on a day prior to the day of sentencing in the instant case, regardless of the order in which the offenses were committed. Sentences or dispositions imposed on the same day as the sentence in the instant case are not prior convictions or adjudications for criminal history scoring purposes.

7.23 Real Offense Conduct -- Real offense conduct is what the defendant actually did. A defendant's placement in an Offense Severity Group is based on the offense of conviction rather than real offense conduct. Real offense conduct can be taken into consideration in determining where within the appropriate box an offender should be sentenced, and in determining whether there is a departure principle that would take him/her out of the box.

7.24 Revived Conviction -- A revived conviction is a felony conviction for which the sentence was completed more than ten years before the commission of the instant offense that would not be counted toward the criminal history score but for the existence of a sentence for another felony in the ten-year window. Revived convictions for Master Groups 6-9 and Drug Groups 2-3 are scored differently than convictions within the ten-year window. See § 2.2.3. Juvenile adjudications and misdemeanors are never revived themselves and cannot revive earlier felonies or adjudications.

7.25 Short-Split Sentence -- A sentence where the court imposes a sentence within the applicable prison range, suspends execution of all but six months or less (but not all) of it, and places the defendant on probation up to five years. Absent a departure, it can be used only in the shaded boxes. If the judge suspends execution of all but some period longer than six months, this is a split sentence, but not a short split sentence. See § 7.17, Long Split Sentence.

7.26 Statutory Minimum – A statutory minimum is a minimum sentence prescribed by statute which is not a mandatory minimum. A list of statutory minimum sentences is found in Appendix I.

7.27 Ten-Year Window -- The ten-year window is the ten years preceding the commission of the instant offense. If, during this period of time, a person was sentenced, released from jail or prison, or finished probation, parole, or supervised release, that conviction is said to be "within the 10-year window" and is counted toward the criminal history score. Prior felony convictions that are within the 10-year window can revive lapsed felony convictions.

7.28 Voluntary Guidelines -- The Guidelines are voluntary. This means that judges have discretion to impose any lawful sentence. There are no sanctions for failing to follow the guidelines, though the court is required to explain why it imposed a noncompliant

sentence. Lawful sentences cannot be appealed regardless of whether they comply with the guidelines or not.

7.29 **White or Unshaded Boxes** -- These are the boxes on the Master Grid and the Drug Grid where prison is the only permissible and compliant option, absent a mitigating factor. Altogether there are 35 white boxes on the Master Grid and 5 white boxes on the Drug Grid.

Chapter 8: FREQUENTLY ASKED QUESTIONS

(reserved for future use)

Chapter 9: EXAMPLES

9.1 Example 1 -- Prison Only

Defendant was found guilty of Burglary II (Master Grid Group 7) for an offense committed on 2/9/2004.

Prior convictions (or Criminal history)

Assault With Intent to Kill (DC):	4/15/1997	Yes	3 points
PWID w/ armed (DC):	5/20/2002	Yes	2 points
PWID Cocaine (DC):	9/5/2003	Yes	1 point
			6 points

Explanation of Scoring

The assault with intent to kill conviction (Master Group 5) is 3 points. The PWID w/armed (Drug Group 1) is a 2 point offense and the PWID Cocaine is 1 point. All of them were sentenced less than 10 years before the commission of the instant offense. Thus, they all count. This offender's criminal history score is 6, which puts the defendant in column E.

Sentence

Defendant's current offense and criminal history put him in Box 7E. Box 7E is a prison-only box; in other words, the guidelines recommend that the in/out decision be "in" (prison). The guideline grid calls for a prison sentence of 36+ months. Thus, any sentence of 36 months or more would be a compliant sentence.[16]

A sentence of less than 36 months, a short split sentence, or a probation sentence would not be a compliant sentence unless the judge finds a departure principle. Without a departure principle, a sentence of less than 36 months is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.2 Example 2 -- Probation Permissible

Defendant pled guilty to Carrying a Pistol Without a License (Master Grid Group 8), for an offense committed on 2/9/2004.

[16] In order to keep these examples as simple as possible, we have not incorporated the supervised release portion of the sentence. The Guidelines do not change the statutory requirements for supervised release, the amount of which depends on the maximum sentence for the offense and not on the guideline prison range or the length of the sentence imposed (unless the sentence imposed is one year or less).

Prior convictions

PWID Heroin (DC):	1/21/1996	Yes	1 point

Explanation of Scoring

PWID Heroin (Drug Group 2) is a 1 point offense, which puts the defendant in Column B.

Sentence

The defendant's current offense and criminal history put him in box 8B, in which probation, a short split sentence or a prison sentence are permissible. The judge may impose a prison sentence anywhere in the range of 10 to 28 months for box 8B, suspend imposition of all of it (and the accompanying 3 years of supervised release) and place the defendant on probation for any period up to 5 years, the maximum allowed by statute. The judge may also sentence the defendant to a prison sentence between 10 and 28 months, suspend execution of all but six months or less to be followed by a period of probation up to 5 years. Or the judge can sentence the defendant to a prison sentence between 10 and 28 months. All of these options would be compliant.

A prison sentence of less than 10 months or greater than 28 months or a split other than a short split or a long split would not be a compliant sentence unless there is (a) a statutory enhancement or (b) a departure principle. Without an enhancement or a departure principle, a prison-only sentence of less than ten months or more than 28 months is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.3 Example 3 – Short Split Sentence Permissible

Defendant was found guilty of Possession with Intent to Distribute (marijuana) while armed (Drug Grid Group 1), for an offense committed on 2/9/2004.

Prior convictions

PWID Marijuana (misdemeanor)(DC):	6/7/2002	yes	¼ point
PWID Cocaine (DC):	4/5/2003	yes	1 point
			1¼ points

Explanation of scoring

This offender's criminal history score is 1¼. The PWID marijuana conviction is a misdemeanor and is worth ¼ points. The PWID Cocaine conviction (Drug Group 2) is 1 point. The defendant is thus in column B.

Sentence

The defendant's current offense and criminal history put him in Drug Grid Box 1B, which is a short split permissible box. The judge may impose a short split sentence. For a short split

sentence to be compliant, the judge must impose an incarceration sentence that is within the prison range (36 – 78 months for Drug Box 1B) and suspend execution of all but six months or less. If, however, the judge decides to impose a straight incarceration sentence, the guideline grid calls for a prison sentence of 36 to 78 months. Thus, any sentence to incarceration between 36 and 78 months (including a long split) would be a compliant sentence, as would a short split sentence.

A prison-only sentence greater than 78 months would not be compliant unless there is (a) a statutory enhancement or (b) a departure principle. Similarly, a prison-only sentence of less than 36 months or a probation sentence would not be compliant unless there is a departure principle. Without a departure principle, probation only or a prison-only sentence of less than 36 months or more than 78 months or a split other than a short split or a long split is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.4 Example 4 – Criminal History Issues: Adult Lapse and Misdemeanor Caps

Defendant pled guilty to Assault with a Dangerous Weapon (Master Grid Group 6), for an offense committed on 2/9/2004.

Prior Convictions

UUV (DC):	8/17/1980, sentence ended 10/20/1984	No	
CPWL (DC):	5/3/1990, sentence ended 1/26/1992	No	
Possession of heroin (DC):	7/6/1992	No	
Possession marijuana (DC):	6/16/1999	Ye	¼ point
Simple Assault (DC):	4/29/2000	Ye	¼ point
2nd Degree Theft (DC):	6/7/2001	Yes	¼ point
2nd Degree Theft (DC):	1/12/2001	Yes	¼ point
Shoplifting (DC):	8/10/2002	Yes	¼ point
Possession of marijuana (DC):	12/17/2002	Yes	¼ point
Unlawful Ammunition (DC):	3/8/2003	Yes	¼ point
			1¾ points
		but cap of	1 ½ points

Explanation of Scoring

Because the two felony convictions and the possession of heroin conviction are beyond the 10-year window, they have lapsed. They cannot be revived by misdemeanor convictions and therefore do not count towards criminal history. There are seven non-lapsed misdemeanor convictions, which count for ¼ points each EXCEPT that there is a cap of 1½ points (six misdemeanors) on misdemeanor convictions. As a result, this defendant has a criminal history score of 1½ points, putting him in column B.

Sentence

The defendant's current offense and criminal history put him in Master Grid Box 6B, which is a prison-only box. The prison range is between 24 and 66 months. A compliant sentence would be a prison sentence of no less than 24 months and no greater than 66 months. The lapsed criminal convictions did not count towards criminal history but the judge may consider them when deciding where within the prison range to sentence the defendant. The lapsed convictions are not an aggravating factor that would allow a departure from the prison range, but may be considered if enhancement papers have been filed.

A prison sentence of less than 24 months probation, or a short split, or a prison sentence of more than 66 months would not be compliant unless the judge finds a departure principle. Without a departure, a sentence of less than 24 months or more than 66 months is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.5 Example 5 – Criminal History Issues: Adult Revival and Out-of-State Convictions

Defendant was found guilty of Distribution of Heroin (Drug Grid Group 2), for an offense committed on 2/9/2004.

Prior Convictions

Receiving Stolen Property (felony):	11/22/1975	Yes	½ point
Possession of Heroin:	2/5/1982	No	0 point
PWID Cocaine (DC):	8/17/1983; sentence ended 9/17/1986	Yes	½ point
Attempted Murder (PA):	4/15/1997	Yes	3 points
			4 points

Explanation of Scoring

The Receiving Stolen Property, Possession of Heroin and PWID Cocaine conviction are beyond the 10-year window and so have lapsed. The lapsed possession of heroin conviction is a misdemeanor and can never be revived. The non-lapsed felony conviction in 1997, however, revives the lapsed felony convictions. The revived Receiving Stolen Property conviction and the revived PWID cocaine conviction are ½ points each. The attempted murder conviction in Pennsylvania most closely matches DC's assault with intent to kill; therefore, it would be a group 5 offense worth 3 criminal history points. The final criminal history score is 4 points, putting this defendant in column D.

Sentence

The defendant's current offense and criminal history put him in Drug Grid Box 2D, which is a short split permissible box. Thus the judge may impose either a short split or a prison sentence (including a long split). In either case, the judge must impose a prison sentence that is within the prison range (24 – 48 months for Drug Box 2D). For a short split sentence, the court may then suspend execution of all but six months or less. Thus, any sentence to incarceration between 24 and 48 months would be a compliant sentence, as would a short split sentence.

A prison sentence of less than 24 months or more than 48 months (including a long split), or a prison sentence between 24 and 48 months ESS all and placing the defendant on probation would not be compliant unless the judge finds (a) a statutory enhancement, or (b) a departure principle. Without an enhancement or departure principle, a prison sentence of less than 24 months or more than 48 months or probation is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.6 Example 6 – Criminal History Issues: Juvenile Adjudications

The defendant pled guilty to Aggravated Assault (Master Grid Group 6), offense committed on 2/9/2004.

Prior Adjudications

2nd Degree Sex Abuse (juv.)(DC):	1/02/1996	No	
released from Oak Hill,	2/3/1998	No	0 points
Unregistered Firearm (juv)(DC):	5/6/1999	No	0 points
Armed Robbery (juv)(DC):	9/8/1999	Yes	
released from Oak Hill	3/4/2001	Yes	1 ½ points
PWID Cocaine (juv)(DC):	4/5/2001	Yes	½ point
Carjacking (juv)(DC):	7/8/2001	Yes	
released from Oak Hill	11/30/2003	Yes	1 ½ points
			3 ½ points
	but cap of 1½ except for Master 1-5		3 points

Explanation of Scoring

The 2nd degree sex abuse adjudication was over 5 years ago. This adjudication has lapsed and cannot be revived. Unregistered firearm is a misdemeanor offense and juvenile misdemeanors are not counted towards criminal history regardless of when they were committed. The armed robbery adjudication is 1½ points, PWID cocaine is ½ points and carjacking is 1½ points. Juvenile adjudication criminal history points normally cap at 1½points, except that the armed robbery and the carjacking offenses are both group 5 offenses and therefore not subject to the juvenile cap. The PWID cocaine offense is subject to the cap. Thus, the criminal history for this defendant is 3 points, 1½ each from the armed robbery and the carjacking, but, practically speaking, no points from the PWID cocaine because of the cap. Three points puts the defendant in column C.

Sentence

The defendant's current offense and criminal history put him in Master Grid Box 6C, which is a prison-only box. The prison sentence is 30 to 72 months.
A prison sentence of less than 30 months or more than 72 months, a short split sentence, or probation would not be compliant unless the judge finds (a) a statutory enhancement, or (b) a departure principle. Without an enhancement or departure principle, a prison sentence of less

than 30 months or more than 72 months or probation is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

9.7 Example 7 -- Mitigating Factor

Defendant was found guilty of Armed Robbery (Master Grid Group 5), for an offense committed on 2/9/2004.

Prior Convictions

Armed Robbery (DC):	9/3/2000	yes	3 points

Explanation of Scoring

This offender's criminal history score is 3 for the prior armed robbery conviction. Three points puts the defendant in column C.

Sentence

The defendant's current offense and criminal history put him in Master Grid Box 5C, which is a prison-only box. The guideline grid calls for 60 to 108 months. Thus, any prison sentence between 60 and 108 months would be a compliant sentence. However, this defendant substantially assisted law enforcement in the apprehension of other offenders who, along with the defendant, were involved in a series of home invasions. As a result, the judge can sentence below the lower number of months in the sentencing range (60 months) by stating that he or she found a substantial and compelling mitigating factor (in this case, Mitigating Factor #7, providing substantial assistance to law enforcement) to depart downward. If the judge applies a guideline mitigating factor, this downward departure is a compliant sentence. The guidelines make no recommendation as to how far downward the judge should depart, but encourage judges to take into account proportionality to other defendants and other offenses in determining how far below the minimum sentence they should go.

9.8 Example 8 -- Aggravating Factor

Defendant pled guilty to Aggravated Assault (Master Grid Group 6), for an offense committed on 2/9/2004, victim was a disabled person.

Prior Convictions

Simple Assault (DC):	4/2/2000	Yes	¼ point
Simple Assault (DC):	9/11/2001	Yes	¼ point
PWID Cocaine (DC):	0/3/2002	Yes	1 point
			1 ½ points

Explanation of scoring

This offender's criminal history score is 1½. The only felony conviction is PWID Cocaine, which is a 1 point offense. The remaining two offenses are misdemeanors, which count for ¼ points each. All of them are in the 10-year window. A score of 1½ puts the defendant in Criminal History column B.

Sentence

The defendant's current offense and criminal history put him in Master Grid Box 6B, which is a prison-only box with a sentencing prison range of 24 to 66 months. Thus, any prison sentence between 24 and 66 months would be a compliant sentence. However, the judge found Aggravating Factor #2, that the defendant assaulted a victim who was "…particularly vulnerable due to age or reduced physical or mental capacity." As a result, the judge can sentence above the higher number of months in the sentencing range (66 months) by stating that he or she found a substantial and compelling aggravating factor to depart upward. If the judge applies a guideline aggravating factor, this upward departure is a compliant sentence. The guidelines make no recommendation as to how far upward the judge should depart but encourage judges to take into account proportionality to other defendants and other offenses in determining how far above the maximum sentence they should go.

9.9 Example 9 -- Enhancements

Defendant was found guilty of Distribution of Cocaine in a Drug Free Zone for an offense committed on 2/9/04.

Prior Convictions

Distribution of Cocaine	8/24/89		
sentence finished	1/9/94	No	0 points

Explanation of Scoring

The sentence for defendant's only prior conviction was completed more than ten years before the commission of the instant offense. Therefore, for scoring purposes, it is not counted and the defendant has zero criminal history points.

Sentence

Defendant's current offense and criminal history score put him in Drug Grid box 2A, in which the court may impose a prison-only sentence (including a long split), a short split sentence, or straight probation. The prison range in Drug Grid box 2A is 12 to 30 months. In this case, there are two factors that can raise the upper number. First, the current offense is distribution of cocaine in a drug free zone. Under D.C. Official Code § 48-904.07a(b), the maximum sentence for this offense is twice that for simple distribution of cocaine. Therefore, the upper number in

the prison range is raised to 60 months (2 x 30 months = 60 months). Second, if enhancement papers were filed in this case under D.C. Official Code § 48-904.08, the maximum sentence for a second drug offense is twice that of the first. The 8/24/89 conviction for distribution of cocaine that was not counted for scoring purposes can nonetheless be used for enhancement purposes. Therefore, the upper number in the prison range is raised to 60 months (2 x 30 months = 60 months). In this case, a prison sentence of 12 to 60 months, a short split sentence, or straight probation would be compliant.

Note: The fact that there are two enhancements in this example does not mean that the upper number is raised twice. In situations where one enhancement is greater than the other, the court would have the option of applying the higher of the two.

9.10 Example 10 -- Concurrent sentences

Defendant was found guilty of two offenses: Unauthorized Use of a Vehicle (Master Grid Group 8) and Possession of a Prohibited Weapon (Master Grid Group 9). Both offenses were committed on 2/9/2004.

Prior Convictions

Bail Reform Act (felony)	6/17/98	Yes	1 points

Explanation of scoring

Defendant has one prior convictions for a 1-point offense. A score of 1 point puts the defendant in Criminal History column B.

Sentence

The defendant's current offenses and criminal history put him in Master Grid Box 9B and Box 8B. These light gray boxes indicate that probation is a permissible sentence, as is a short split or a straight prison sentence. First, the judge should make the in/out decision. If the judge decides not to impose a term of probation but to sentence the defendant to a term of incarceration, the prison range for the PPW is 3 to 16 months and for the UUV is 10 to 28 months. The judge should impose a sentence for EACH offense that is within the prison range for that offense. Because these are nonviolent crimes, multiple offenses, one transaction (a search of the car incident to the arrest for the UUV found a prohibited weapon), the guidelines rule is that these sentences should be run concurrently. Unless the judge finds that the resulting sentence would be too lenient (Aggravating Factor #10), these sentences must be imposed concurrently. It also would be a compliant sentence to give a term of probation for each offense or a short split sentence.

9.11 Example 11 -- Consecutive sentences

Defendant pled guilty to two counts of Armed Robbery (Master Grid Group 5), for separate offenses that were committed on 2/9/04.

Prior Convictions

No prior convictions. This offender's criminal history score is zero, which puts the defendant in criminal history column A.

Sentence

The defendant's current offenses and criminal history put him in Master Grid Box 5A, which is a prison-only box. The prison range is 36 to 84 months. The judge should impose a sentence for EACH offense that is within the prison range for that offense. The defendant was convicted of two crimes of violence, multiple victims, multiple transactions (wielding a knife, the defendant had robbed one pedestrian and then a few minutes later robbed another pedestrian.) The guideline rules call for consecutive sentences in such cases. Unless the judge finds that the resulting sentence would be too harsh (excessive) (Mitigating Factor #9), these sentences must be imposed consecutively.

9.12 Example 12 -- Criminal History counts for one offense, not for another

Defendant was found guilty of one count of Armed Robbery (Master Grid Group 5), for an offense committed on 2/9/04, and one count of First-Degree Burglary while armed [BI w/a] (Master Grid Group 3) for an offense that was committed on 3/17/03. Sentencing on the same day.

Prior convictions

		Armed Robbery 2/9/2004		Burglary I while armed 3/17/2003	
Armed robbery	8/23/1974	No	0	Yes	3 points
Attempted robbery	4/07/1979	No	0	Yes	½ points
Robbery	11/23/1984	No	0	Yes	
sentence ended	7/29/1993	No	0	Yes	2 points
			0 points		5 ½ points

Explanation of scoring

The sentences in all of the defendant's prior cases were completed beyond the 10-year window in the armed robbery case. In other words, they were completed more than ten years before he committed the armed robbery on 2/9/04. Therefore, none of them count in calculating the defendant's criminal history score for that offense. However, the sentence for the 11/23/84 robbery was not completed until 7/29/93, within the 10-year window or less than ten years prior

to the commission of the 3/17/03 BI w/a. It is therefore counted fully at 2 points (Master Grid 6). The same case revives the older felony convictions, but one of them counts for half, ½ point for the attempted robbery (Master Grid 8) and the other counts fully, 3 points for the Armed Robbery (Master Group 5).

This offender's criminal history score is 5 ½ points for the BI w/a while armed, which puts the defendant in criminal history column D. The defendant's criminal history score is zero points for the armed robbery, which puts the defendant in criminal history column A.

Sentence

The defendant's current offenses and criminal history put him in Master Grid Box 5A for the armed robbery and Master Grid Box 3D for the first-degree burglary while armed. Both of these boxes are prison-only boxes. The prison range for Box 5A is between 36 and 84 months. The prison range for box 3D is between 126 and 216 months. Because these are crimes of violence that were committed on separate occasions, they must be sentenced consecutively. Thus, the minimum possible aggregate sentence would be 162 months (36+126) and the maximum possible aggregate sentence would be 300 months (84+216).

A prison sentence of less than 162 months (13½ years) or more than 300 months (25 years), a short split sentence, or probation would not be compliant unless the judge finds (a) a statutory enhancement, or (b) a departure principle. Without an enhancement or departure principle, a prison sentence of less than 162 months or more than 300 months or probation is a noncompliant sentence and the judge should explain why he or she is not following the guidelines in this case.

If enhancement papers had been filed in this case, the offenses that did not count for the criminal history score in the armed robbery case could, nonetheless, count as two prior crimes of violence that would subject the defendant to a maximum sentence of life without release under D.C. Official Code § 22-1804a(a)(2). Under these circumstances, any aggregate sentence between 162 months and the statutory maximum would be compliant.

9.13 Example 13 -- Order of sentencing

A co-defendant of the offender in Example 12 was found guilty of one count of Armed Robbery (Master Grid Group 5), for an offense committed on 2/9/04, and one count of First-Degree Burglary while armed [BI w/a] (Master Grid Group 3) for an offense that was committed on 3/17/03. Sentencing in the Armed Robbery case was the day before sentencing in the BI w/a case.

Prior convictions

AR – no prior convictions
BI w/a – the AR is a prior conviction, 3 points

Explanation of scoring

At the time the AR was sentenced, the defendant had no prior convictions. The BI w/a was still pending sentencing even though the BI w/a was committed before the AR was. Because the AR was sentenced before (on a different day) the BI w/a, it is a prior conviction for the BI w/a and counts for 3 points.

The defendant's criminal history score is zero points for the armed robbery, which puts him/her in criminal history column A. This defendant's criminal history score is 3 points for the first-degree burglary while armed, which puts him/her in criminal history column C.

Sentence

The defendant's current offenses and criminal histories put him in Master Grid Box 5A for the armed robbery and Master Grid Box 3C for the first-degree burglary while armed. Both of these boxes are prison-only boxes. The prison range for Box 5A is between 36 and 84 months. The prison range for box 3C is between 114 and 204 months. The rule requiring consecutive sentences applies only to offenses sentenced on the same day. See § 6.1. These cases were sentenced on different days. Therefore, in sentencing the BI w/a, the court has discretion to determine whether it should run consecutively to or concurrent with the armed robbery.

9.14 Example 14 -- Rule 11(e)(1)(C) plea

Defendant pled guilty to ADW (Master Grid Group 6) for an offense committed on 2/9/2004.

Prior convictions (or Criminal history)

None.

Explanation of scoring

N/A.

Sentence

The government and the defendant agreed to a Rule 11(e)(1)(C) plea. They agreed that if the defendant pled guilty to ADW, the sentence would be 24 months, ESS all, and 3 years probation. The parties also agreed that the defendant would spend the first six months in a halfway house as a condition of probation. See D.C. Official Code § 16-710(b-1). The defendant's case falls in box 6A (dark gray), which permits a short split sentence. However, if a short split sentence instead of a probation sentence were imposed, the initial period of incarceration of six months or less would be controlled by the Bureau of Prisons, which cannot send a person to a halfway house at the beginning of a sentence. By agreeing to six months in a halfway house as a condition of probation, the parties could ensure that the defendant would be sent to a halfway house in the District of Columbia so that he or she could maintain his or her employment. Box

6A does not permit an entirely suspended sentence with probation (absent a departure based on a mitigating factor). However, if the court accepts the Rule 11 (e)(1)(C) plea, the court may (in fact, must) impose the agreed-upon sentence of 24 months, ESS all, three years probation with the first six months in a halfway house. This is a compliant sentence. The judge need explain only that the sentence was imposed pursuant to a Rule 11 (e)(1)(C) plea. The judge, of course, does not have to accept an 11(e)(1)(C) plea agreement.

9.15 Example 15 – Long Split

Defendant pled guilty to ADW (Master Grid Group 6) for an offense committed on 2/9/2004.

Prior convictions

Possession (heroin) (DC):	3/8/1998	Yes	¼ point
Possession drug paraphernalia (DC):	6/11/2000	Yes	¼ point
Possession (cocaine) (DC):	1/10/2001	Yes	¼ point
Uttering (DC)	9/20/2002	Yes	1 point
			1¾ points

Explanation of scoring

The possession charges are all misdemeanors and are counted ¼ points each. The Uttering (Master Group 9) is 1 point.

Sentence

The defendant's current offense and criminal history put him in Master Grid Box 6B. Box 6B is a prison-only box. For any number of reasons, the judge might find that a split sentence is appropriate in the instant case, perhaps "to have more time hanging over the defendant's head" than if the judge imposed a straight prison sentence followed by supervised release. The judge could impose a "long split." In a long split, both the sentence the judge imposes and the time to be served initially must fall within the prison range in the appropriate box. The prison range for Box 6B is 24 to 66 months. Thus, the judge could impose a sentence of 60 months and 3 years of supervised release and suspend all but 24 months of the prison term and the period of supervised release and place the defendant on probation for five years. Because both prison terms fall within the range, it is a compliant sentence, even in a prison-only box.

Note: It would not be permissible for the judge to impose a sentence of 60 months and suspend execution of all but 12 months since, in a long split, both sides have to be in the box and 12 months is below the prison range in Box 6B. It would also not be permissible for the judge to impose a sentence of 72 months and suspend execution of all but 24 months since 72 months is above the prison range in Box 6B

Note: Because prison is an option in every box on both grids, a "long split" is also a compliant option in every box as well, as long as the sentence imposed and the time to be served initially (the time left unsuspended) fall within the box's prison range.

9.16 Example 16 -- Multiple counts; merger; mandatory minimums

Defendant was found guilty of armed robbery (operable firearm) (M5); 2 counts of APO with a dangerous weapon (M6), two counts of ADW (M6), 3 counts of PFCOV (M6), and CPWL (M8) in a case where he robbed a store clerk at gunpoint and shot at two plain clothes police officers who spotted the defendant identified themselves, and ordered him to stop.

Prior convictions

Distribution (cocaine) (DC):	7/23/2001	Yes	1 point

Explanation of scoring

Distribution of cocaine is a Drug Grid 2 offense which carries 1 point. This would put defendant in column B.

Sentence

Both Master Grid 5B and Master Grid 6B are prison only boxes. Master Grid 8B is a prison, short split, or probation permissible box. There are three victims (store clerk and two police officers) regardless of whether this is considered to be one event or two events (armed robbery as one; shooting of police as two). Armed robbery, APO w/ dangerous weapon, ADW, and PFCOV are violent crimes. Therefore, one of these offenses for each victim must be sentenced consecutively to one offense for each of the others. Both Master Grid 5B and Master Grid 6B offenses are prison only boxes. Master Grid 8B is a prison, short split, or probation permissible box. Armed robbery (operable firearm) and PFCOV are in Box 5B which has a prison range of 48 to 96 months. However, both offenses have a mandatory minimum of 60 months. CPWL is not a crime of violence.

The Court of Appeals instructs that a sentence should be given for each offense even though ultimately some of the above offenses will likely merge: ADW into APO w/ dangerous weapon and the two counts of PFCOV for the shooting of the police officers. The possible sentencing options are as follows:

Armed robbery (operable pistol)	60 -- 96 months	MM
APO w/ dangerous weapon (officer 1)	24 -- 66 months	
ADW (officer 1)	24 -- 66 months	
APO w/ dangerous weapon (officer 2)	24 -- 66 months	
ADW (officer 2)	24 -- 66 months	
3 counts PFCOV (one for each of the above)	60 -- 96 months	MM

CPWL	6 -- 24 months	(or probation or short split)

Applying the consecutive/concurrent rules, the lowest possible aggregate sentence that could be given in this case is:

(1)(a)	Victim 1: Armed robbery (operable pistol)	60 months
(1)(b)	Victim 2: APO w/dangerous weapon for first officer concurrent with ADW and ADW (which will merge)	24 months
(1)(c)	Victim 3: APO w/ dangerous weapon for second officer concurrent with ADW (which will merge)	24 months
(2)	(1)(a), (b), and (c) consecutive to each other	108 months
(3)	PFCOV for APO w/ dangerous weapon of second officer (60 months) concurrent with PFCOV for APO w/ dangerous weapon of first officer (60 months) which will merge, concurrent with PFCOV for AR (60 months), which will not merge if different events, and concurrent with (2)	--
(4)	CPWL (6 months) concurrent with (2)	--

Applying the consecutive/concurrent rules, the highest possible aggregate sentence that could be given in this case is:

(1)	Armed robbery	96 months
(2)	APO w/ dangerous weapon merges w/ADW	66 months
(3)	APO w/ dangerous weapon merges with ADW	66 months
(4)	PFCOV for armed robbery	96 months
(5)	PFCOV for APO w/ dangerous weapon of second officer (96 months) concurrent with PFCOV for APO w/ dangerous weapon of first officer ((96 months) which will merge	96 months
(6)	CPWL	28 months
(7)	(1) through (6) consecutive to each other	448 months

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(reserved for future use)