



The Sentencing Reform Act of 1984 and Sentencing Guidelines

The Untapped Potential for Judicial Discretion Under the
Federal Sentencing Guidelines: Advice for Counsel *Gerald Bard Tjoflat*

Flexibility and Discretion Available to the Sentencing Judge
Guidelines Regime *Edward R. Becker*

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; Sentencing *Jerry D. Denzlinger*
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anagement *Mark H. Luttrell*

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YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In "The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel," Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

ACQUISITIONS

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The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel

BY GERALD BARD TJOFLAT

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Introduction

EVER SINCE the Federal sentencing guidelines went into effect in late 1987, judges and commentators have criticized the Federal sentencing guidelines for placing excessive restrictions on judicial discretion.¹ The guidelines, it has been said, reduced the judge's role to operating a computerized sentencing mechanism. The discretion traditionally enjoyed by the sentencing judge and the Parole Commission had been transferred to the prosecutor, who, with his or her uneasy accomplice, the defense attorney, could now manipulate sentences at will by picking the charge triggering the desired penalty.

These criticisms, however, fail to appreciate the significant discretion the sentencing judge retains under the guidelines. After 3 years of considering appeals from sentences imposed under the guidelines, I have become convinced that attorneys have yet to take full advantage of the mechanisms for judicial discretion built into the guidelines. The continued failure of counsel competently to participate in the adversarial process of guideline sentencing has resulted in a number of unfortunate consequences. A judge who receives no assistance from an incompetent defense attorney unfamiliar with the proper arguments in favor of a downward departure may impose an excessively harsh sentence. Similarly, the same judge, now lacking the guidance of considered arguments by the prosecutor urging an upward departure, may impose an improperly lenient sentence. Furthermore, sentencing judges who decide on a downward or upward departure from the guideline sentence may do so for reasons or in ways not contemplated by the guidelines.

Perhaps most importantly, the failure to appreciate the scope of judicial discretion and the accompanying inability to conceive of relevant arguments in favor of a departure from the guideline sentences result in backroom agreements where assistance to the Government's case is exchanged for reduced charges. These backroom deals frustrate the purposes of the sentencing guidelines and remain immune from judicial review, as the sentencing judge cannot intervene in the absence of a plea agreement, and the appellate court has nothing to review in the absence of an

appeal. The guidelines can only ensure honesty, uniformity, and proportionality in sentencing if the arguments relating to the imposition of a particular sentence find their expression in open court. Honesty in sentencing falls by the wayside if sentencing hearings do not reflect the true basis for the imposed penalty. Uniformity in sentencing suffers as clandestine charging arrangements encourage discriminatory prosecution in violation of constitutional equal protection guarantees and shake the public's confidence in the criminal justice system. Proportionality in sentencing vanishes as sentences, instead of reflecting the seriousness of the offense and the personal culpability of the defendant, reflect the defendant's willingness to provide assistance and his or her lawyer's inability to articulate departure rationale during the sentencing hearing.

Although incompetent advocacy in sentencing hearings under the guidelines comes in many shapes and sizes, I will focus my remarks on the failure of counsel to exploit judicial discretion to alter the offense level assigned to a particular offense. In their arguments to the sentencing judge, defense attorneys and prosecutors alike tend exclusively to appeal to the judge's discretion to assign the defendant to an offender category other than the one suggested by the guidelines. As a result, judicial discretion to depart from the heartland sentences of the guidelines remains largely untapped.

As this article addresses the failure of attorneys to make appropriate use of clear statements delineating the importance and scope of judicial discretion in guideline sentencing, I will rely heavily on legislative pronouncements, policy statements, and commentaries defining judicial discretion under the guidelines. This article will briefly discuss the relevant purposes of the sentencing guidelines and will then present a general outline of the factors contributing to the establishment and the imposition of sentences under the guidelines, paying particular attention to the distinction between horizontal, offender-related, and vertical, offense-related, components of guideline sentencing. Following an exploration of the role and scope of judicial sentencing discretion under the guidelines, the article will conclude with some practical suggestions regarding the development of arguments

to guide judicial discretion in guideline sentencing.

Purposes of the Federal Sentencing Guidelines

The sentencing guidelines grew out of the realization that sentencing according to the medical model of rehabilitation had failed.² Prison inmates complained that indeterminate sentences with uncertain release dates constituted cruel punishment. Criminal justice practitioners and criminologists declared imprisonment incapable of advancing rehabilitative purposes.³ Even if imprisonment could rehabilitate, it had become clear that it was impossible to ascertain whether a particular prisoner had in fact been rehabilitated.⁴ Reports documented widely disparate sentences for similar offenders convicted of similar offenses.⁵

In response to the mounting criticisms of a sentencing system that vested wide discretion in the Parole Commission, Congress established the Federal Sentencing Commission to establish uniform Federal sentencing guidelines. The new guidelines were to assure, among other things, "that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases," and "that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it."⁶ The policy statement accompanying the sentencing guidelines summarized the objectives of the Sentencing Commission as follows:

Congress first sought *honesty* in sentencing. . . .

Second, Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.⁷

Vertical and Horizontal Sentence Components

The Sentencing Commission adopted a sentencing table to guide a judge in determining the appropriate sentence range for a particular offense committed by a defendant with a particular criminal history.⁸ The sentencing table represents a grid with a vertical variable "Offense Level" and a horizontal variable "Criminal History Category (Criminal History Points)."⁹ Having decided on the appropriate offense level and criminal history category, the sentencing judge determines the suggested sentence range in a given case by correlating offense level and criminal history category.¹⁰ Every sentence range suggested by the sentencing guidelines therefore combines offense- and offender-related elements.

The Vertical Component: Offense Factors

28 U.S.C. § 994(c) enumerates the factors the Sen-

tencing Commission could take into account in determining the offense level for a given offense:

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;
- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.¹¹

The Horizontal Component: Offender Factors

Subsections (d) and (e) of 28 U.S.C. § 994 specify the factors that the Sentencing Commission was authorized to consider in determining the offender-related element in its sentencing scheme:

- (1) age;
- (2) education;
- (3) vocational skills;
- (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
- (5) physical condition, including drug dependence;
- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;
- (10) criminal history; and
- (11) degree of dependence upon criminal activity for a livelihood.¹²

Pursuant to the rejection of rehabilitative concerns in the context of decisions regarding the imposition and the length of a prison sentence, the Sentencing Commission was instructed to disregard items (2), (3), (6), (7), (8) for devising guidelines regarding decisions of this kind.¹³ In addition to this legislative limitation, the Commission itself decided to disregard items (1), age, and (5), drug dependence, for policy reasons.¹⁴

The sentencing guidelines reflect the remaining factors in various provisions. The sentencing guidelines recognize item (9), role in the offense, though listed as a factor determining the offender-related element, as affecting the offense level assigned to a particular act.¹⁵ Similarly, item (11), degree of dependence upon criminal activity for a livelihood, appears in section 4B1.3, which imposes a mandatory minimum offense level on crimes committed "as part of a pattern of criminal conduct engaged in as a livelihood. . . ."¹⁶

Finally, chapter 4 of the guidelines takes into account item (10), a defendant's criminal history. In part

A of that chapter, prior criminal conduct influences a defendant's criminal history category. In part B, prior criminal conduct is relevant to a defendant's classification as a career offender eligible for "a term of imprisonment at or near the maximum term authorized. . . ."¹⁷

Judicial Discretion in the Federal Sentencing Guidelines

The sentencing guidelines acknowledge the importance of judicial discretion in applying guideline prescriptions to particular offenders in particular cases. From the very outset, judicial discretion formed an integral part of the Sentencing Commission's project to establish a uniform sentencing scheme:

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines.¹⁸

Recall that the Commission was charged with achieving not only uniformity in sentencing, but also proportionality in sentencing. Judicial discretion was required to strike a balance between the competing interests of uniformity and proportionality. It was upon the sentencing judge to ensure that the sentencing guidelines did not run afoul of Justice Powell's insight that "a consistency produced by ignoring individual differences is a false consistency."¹⁹ Accordingly, the Commission was to eradicate only unwarranted sentencing disparities, while leaving sufficient discretion to the sentencing judge to determine whether a particular case warranted a departure from the guideline sentence:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

....

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.²⁰

As the Senate Report accompanying this subsection of 28 U.S.C. § 991 points out, "[t]he key word in discussing unwarranted sentence disparities is 'unwarranted.' The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of

persons convicted of similar offenses who have similar records."²¹

The Sentencing Commission, in its attempt to determine the appropriate penalties for the wide range of Federal offenses, could only specify the sentence ranges for an abstract model of each offense, a "heartland" case derived from statistical analysis of prison sentences served during a given time period.²² In determining the penalty for these abstract norm cases, the Commission sought to implement the sentencing purposes enumerated in 28 U.S.C. § 991: retribution, deterrence, specific deterrence or incapacitation, and rehabilitation.²³

This establishment of sentencing ranges for abstract norms must be carefully distinguished from the actual imposition of a particular sentence on a particular defendant. The Commission realized the inherent limitations of assigning sentence ranges to statistical averages and therefore decided to equip the sentencing judge with the discretion to depart from the sentence range specified in the guidelines:

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted.²⁴

Specifically, the sentencing judge may deviate from the suggested sentence range in cases presenting "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."²⁵

The sentencing judge on the judicial level is instructed to apply the sentencing guidelines with an eye to the same sentencing purposes underlying the Commission's establishment of the guidelines on the legislative level: retribution, general deterrence, specific deterrence or incapacitation, and rehabilitation.²⁶

The guidelines delineate the scope of judicial discretion in two ways. On a general level, 28 U.S.C. § 994 specifies the offense- and the offender-related circumstances the Commission considered in establishing the norm sentences of the guidelines. On the level of particular offenses, the sentencing judge must now look to the legislatively defined circumstances underlying the Commission's efforts, as well as to the sentencing factors, policy statements, and commentaries the Commission has used to carry out its mission.²⁷

Guiding Judicial Discretion

After laying out the purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines, it is now time to illustrate the ways in which attorneys can develop proper arguments to guide the

sentencing judge's discretion in a particular case.

Ideally, the sentencing hearing under the sentencing guidelines is an adversarial hearing on the presentence investigation report compiled by the probation officer. Leaving aside factual agreements pertaining to the report, the sentencing hearing offers defense attorneys and prosecutors the opportunity to argue for a departure from the sentence range prescribed by the guidelines. As both sides present arguments in reference to the policy considerations underlying the sentencing guidelines in an effort to convince the judge that the case at hand presents "aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission,"²⁸ a detailed record emerges, which not only allows the sentencing judge to make a considered decision, but also enables the appellate court to conduct a meaningful review of the sentence in the case of an appeal.

Unfortunately, the reality of sentencing hearings falls far short of this ideal. As attorneys fail to present the judge with helpful arguments for or against a departure, sentences are imposed on an improper basis or on no recognizable basis at all. The following pointers seek to bridge the gap between reality and ideal in guideline sentencing.

The judge's discretion in altering the offense level prescribed by the guidelines has been virtually ignored. Instead, attorneys, perhaps unable to rid themselves of the vestiges of rehabilitative sentencing, have focused almost exclusively on the offender-related element of guideline sentencing. As illustrated above, unless a defendant faces a finding of having engaged in a criminal livelihood or has received a non-prison sentence, the defendant's criminal record remains as the only factor affecting the offender-related element of his or her sentence.²⁹ The judge's discretion in considering the defendant's criminal record, however, is extremely limited. For example, the judge has no discretion to disregard prior offenses not sufficiently related to the instant offense. Arguments regarding the relevance of prior convictions are limited to the question of whether or not two or more prior sentences were imposed in related cases.³⁰ According to the guidelines, a judge may alter the offender-related element only "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. . . ."³¹

Aside from the issue of prior sentences imposed in related cases, judicial discretion to alter the offender-related element of a guideline sentence is therefore limited to the overall impression of uncontested factors. The judge's exercise of this limited discretion is in turn

restricted to consideration of only two of the four sentencing rationales underlying the guidelines: retribution and specific deterrence, or incapacitation.³² Arguments by counsel regarding the overall impression of a defendant's criminal record may therefore make no reference to considerations of general deterrence or rehabilitation.

In contrast, the judge may consider a far greater range of more flexible factors when determining the appropriate offense-related element of a guidelines sentence. While the offender-related factors enumerated in 28 U.S.C. § 994(d) can, in the case of a non-career offender facing a prison sentence, be reduced to the defendant's criminal record, the vast majority of offense-related factors listed in 28 U.S.C. § 994(c) remain applicable to all cases. Item (1), grade of the offense, leaves the judge with no discretion. Items (2), the circumstances of the offense, and (3), the nature and degree of harm caused by the offense, may or may not have been considered by the Sentencing Commission, depending on the number and specificity of the special circumstances enumerated in the guidelines.³³ Even in cases where the Sentencing Commission has explicitly considered items (2) and (3) in the guideline pertaining to a given crime, the judge still retains discretion to depart as the offense level prescribed by the guidelines, though explicitly reflective of the kind of circumstance, may fail to take account of the degree to which that circumstance was present in a particular case.³⁴

With respect to items (4) through (7), it could be argued that the Commission could not have fully considered them even if it had wanted to do so. A consideration of the community view of the gravity of the offense,³⁵ the public concern generated by the offense,³⁶ the deterrent effect of a particular sentence,³⁷ and the current incidence of the offense in the community and in the Nation³⁸ clearly requires a novel inquiry in each particular case within its sociological and temporal context. Consider, for example, defendant A, who stands convicted of smuggling an unlawful alien in the Federal district court of Idaho, and defendant B, who is convicted of the same offense in the Southern District of California, San Diego.³⁹ At the sentencing hearing for defendant A, the Federal defender in Idaho might remind the judge of the low incidence of alien smuggling in Idaho, the absence of any deterrent effect of a prison sentence considering the offense's rarity, the virtual nonexistence of concern among Idahoans about alien smuggling, and the corresponding perception of alien smuggling as a crime of little gravity. In contrast, the assistant United States attorney in San Diego could point to the high incidence of alien smuggling in Southern California, the significant deterrent effect a severe penalty would have

among farmers, the growing concern among Southern Californians about the importation and mistreatment of migrant farm workers from Mexico and other Latin American countries, and the emerging community perception of alien smuggling as a serious offense.

Conclusion

Unfortunately, attorneys have so far failed to seize the opportunities for judicial discretion embedded in the offense-related element of guideline sentencing. Even the discussions of the offender-related element, i.e., the defendant's criminal record, which tend to dominate sentencing hearings rarely go beyond defense counsel's appeal for a merciful interpretation of the defendant's record. These calls for mercy generally fail to present arguments framed in the retributive or incapacitationist terms demanded by the guidelines.

It is my sincere hope that this article will encourage attorneys to familiarize themselves with the standards for judicial discretion contained in the guidelines and to refer to these standards in the arguments during sentencing hearings. The ability of the sentencing guidelines to fulfill their tripartite mission of ensuring honesty, uniformity, and proportionality in sentencing stands and falls with counsel's ability to enunciate relevant arguments during the sentencing hearing as the judge may not *sua sponte* depart from the guideline range without given prior notice to counsel.⁴⁰

The sentencing guidelines therefore will more successfully advance their purposes if attorneys well-versed in the provisions of the guidelines turn guideline sentencing hearings into the meaningful adversarial process they were designed to be. I hope this article takes a first step in that direction.

NOTES

¹See, e.g., Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938 (1988); Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Stan. L. Rev. 465, 466 n.8 (1990).

²Senate Comm. on the Judiciary, Comprehensive Crime Control Act of 1983, S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983) [hereinafter Senate Report].

³*Id.*

⁴*Id.*

⁵*Id.* at 38, 41-50.

⁶*Id.* at 39.

⁷United States Sentencing Commission, *Federal Sentencing Guidelines Manual* 2 (1990 ed.) [hereinafter *Federal Sentencing Guidelines Manual*].

⁸*Id.* at 236.

⁹*Id.*

¹⁰Sentencing Guidelines § 1B1.1.

¹¹28 U.S.C. § 994(c) (1988).

¹²28 U.S.C. § 944(d).

¹³28 U.S.C. § 944(e).

¹⁴Sentencing Guidelines ch. 4, pt. A intro. cmt. The guidelines neither explicitly reject nor recognize items (4), mental and emotional condition, and (5), physical condition. The guidelines merely state that, as a matter of policy, the Commission has decided to disregard drug abuse for purposes of sentencing. Insofar as the absence of any comment on the relevance of mental, emotional, or physical condition suggests that a judge may consider these factors in determining the offender-related element of a given sentence, the scope of judicial discretion with respect to these factors is extremely narrow. After all, at the time of sentencing, it will already have been determined that the defendant (1) was of a mental, emotional, and physical condition to stand trial, (2) possessed the requisite intent to commit the offense, and (3) had been of a physical condition such that it was not impossible for him or her to have committed the crime.

¹⁵Sentencing Guidelines § 3B1.1-2.

¹⁶Sentencing Guidelines § 4B1.3.

¹⁷28 U.S.C. § 994(h).

¹⁸Senate Report, *supra* note 2, at 51-52; see also *id.* at 52 ("The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.")

¹⁹*Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 875 (1982).

²⁰28 U.S.C. § 991(b)(1)(B).

²¹Senate Report, *supra* note 2, at 161.

²²Federal Sentencing Guidelines Manual, *supra* note 7, at 4 ("[the Commission] has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources"); see also Senate Report, *supra* note 2, at 177 ("[t]he Commission is directed, as a starting point, to ascertain the average sentence imposed for different categories of cases and the average length of time served in prison when such terms were imposed").

²³The Commission, however, could not consider rehabilitation as a purpose of imprisonment in establishing the guidelines. 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.")

²⁴Federal Sentencing Guidelines Manual, *supra* note 7, at 6.

²⁵18 U.S.C. § 3553(b); see also Senate Report, *supra* note 2, at 78-79 (§ 3553(b) "provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in

its usual form and not in the particularly extreme form present in a particular case.”)

²⁶18 U.S.C. § 3553 (a)(2). As might be expected, a judge is similarly instructed not to impose a prison sentence for the purpose of rehabilitating an offender. 18 U.S.C. § 3582 (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553 (a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”)

²⁷See Senate Report, *supra* note 2, at 167-68 (“[T]he sentencing judge is required to take the policy statements into account in deciding what sentence to impose and it is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of the sentence and corrections program applied to a particular case.”).

²⁸18 U.S.C. § 3553(b).

²⁹See *supra* text accompanying notes 14-17.

³⁰“Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history.” Sentencing Guidelines § 4A1.2.

³¹Sentencing Guidelines § 4A1.3.

³²Section 4A1.3. makes this point at no less than four different places: “If reliable information indicates that the criminal history category does not adequately reflect *the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes. . . .*” (*emphasis added*); “A departure under this provision is warranted when the criminal history category significantly under-represents *the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit*

further crimes.” (*emphasis added*); “There may be cases where the court concludes that a defendant’s criminal history category significantly over-represents *the seriousness of a defendant’s criminal history or the likelihood that the defendant will commit further crimes.*” (*emphasis added*); “This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect *the seriousness of the defendant’s criminal history or likelihood of recidivism. . . .*” (*emphasis added*).

³³While the Commission has published a variety of “Specific Offense Characteristics” for some offenses, *see, e.g.*, Sentencing Guidelines § 2B3.1. (robbery); § 2D1.1. (drug offenses), it has not done so for all offenses, *see, e.g.*, Sentencing Guidelines §§ 2T1.5-8 (fraudulent tax returns, statements, or other documents; failing to collect or truthfully account for and pay over tax; failing to deposit collected taxes in trust account as required after notice).

³⁴See 18 U.S.C. § 3553(b) (“The court shall impose a sentence of the kind, and within the range, referred to [above] unless the court finds that there exists an aggravating or mitigating circumstances of a kind, *or to a degree*, not adequately taken into consideration by the Sentencing Commission” (*emphasis added*)).

³⁵28 U.S.C. § 994(c)(4).

³⁶28 U.S.C. § 994(c) (5).

³⁷28 U.S.C. § 994(c) (6).

³⁸28 U.S.C. § 994(c) (7).

³⁹See Sentencing Guidelines § 2L1.1.

⁴⁰*Burns v. United States*, 111 S. Ct. 2182 (1991).