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## Sentencing Under the Federal Sentencing Guidelines: An Abridged Controlled Substance Example

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### Summary

Until recently, the federal Sentencing Guidelines determined the sentences meted out as punishment for most federal crimes. Then the Supreme Court declared that as a matter of constitutional necessity the Guidelines must be viewed as advisory rather than mandatory. The Guidelines remain a major consideration nevertheless. The Guidelines system is essentially a scorecard system. The purpose of this report is to give a bare bones description of the score-keeping process with a simple example of how it works in a drug trafficking case.

This report is an abridged version – without footnotes, appendices, or in most instances, quotation marks or citations to authority – of CRS Report RL32846, *How the Federal Sentencing Guidelines Work: Two Examples*.

*Introduction.* Congress created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines in order to eliminate and prevent “unwarranted sentencing disparity.” The statutes that define federal crimes still identify the maximum penalties – and in some cases the minimum sentences – that may be assessed. The Guidelines, however, provide the standards that most often speak to how federal criminals will be punished within those boundaries.

The Guidelines assign most federal crimes to one of forty-three “offense levels” based on the severity of the offense. Every offender is assigned to one of six “criminal history categories” based upon the extent of his or her past misconduct. The combination of offense levels and criminal history categories governs the severity of the penalties assessed under the Guidelines. This is a walk through the Guidelines using as a vehicle a controlled substance sentencing case calculated according to the Guidelines’ score-keeping procedure:

- I. Find the applicable guideline which sets the base offense level for the crime(s) of conviction (i.e., the level assigned based on the nature of the offense).

- A. Add levels to account for the presence of any aggravating factors indicated in the guideline
- B. Subtract levels to account for any mitigating factors designated in the guideline.
- II. Adjust (levels added and subtracted) for:
  - A. Victim related
  - B. Role in the offense
  - C. Obstruction & Accepting responsibility
  - D. Multiple counts
- III. Find criminal history category (assign points for criminal record).
- IV. Consider career offender alternative (required in some cases).
- V. Consider whether departures are appropriate
- VI. Determine the Guideline sentence using sentencing table (final offense level points/criminal history points = sentencing range).

*Base offense level.* Korakis, a drug courier in an ecstasy smuggling and marketing scheme, pleaded guilty to conspiracy to possess ecstasy and marijuana with the intent to distribute it in violation of 21 U.S.C. 841(a)(1), 846. The Statutory Index, U.S.S.G. App.A, identifies U.S.S.G. §2D1.1 as the applicable Guideline section. The Drug Quantity Table in subsection 2D1.1(c) sets the base offense level according to the type and amount of the controlled substance involved. The type and amount of controlled substances involved include not only those that form the basis for the offense of conviction, but also the types and amounts of controlled substances in any related “relevant conduct.” Korakis transported two packages of unmarked pills and delivered them to a second courier, who was later arrested with what the Probation Service’s presentencing report determined to be 960.8 grams of a mixture of containing MDMA and methamphetamine in pill form and 6,044 grams of hashish. In order to provide a uniform sentencing standard in cases involving more than one type of controlled substance, section 2D1.1 includes Drug Equivalency Tables which allow conversion into a uniform marijuana equivalency standard. When as here pills contain more than one controlled substance, the higher equivalent is used. Under the Drug Equivalency Tables, 1 gram of hashish is treated as the equivalent of 5 grams of marijuana; 1 gram of MDMA is treated as 500 grams of marijuana, but 1 gram of methamphetamine is treated as 2 kilograms (2000 grams) of marijuana. Thus, Korakis’ base offense level is the base offense level for 1,951.82 kilograms (1, 951,820 grams) of marijuana (30220 grams for the hashish (5 x 6044 grams) plus 1,921,600 grams for the methamphetamine mix (2000 x 960.8). Under 2D1.1(c) the base offense level for 1,951.82 kilograms of marijuana is 32 (at least 1,000 KG but less than 3,000 KG of marijuana). Base offense level: 32.

Section 2D1.1 modifies the base offense level to account for several aggravating and mitigating factors, some which are found in Korakis’ case and some which are not. The factors inapplicable to Korakis include: (1) possession of a dangerous weapon (+2 levels); (2) operating a plane or other smuggling conveyance (+2 levels); (3) trafficking in prison (+2 levels); (4) Internet marketing (+2 levels); and (5) various manufacturing-related increases (+2 to +6 levels depending upon the circumstances). The facts in *Korakis*, however, do implicate a few of the modifications mentioned in section 2D1.1. Korakis argued that as a simple “mule” he was entitled to the 2 level reduction, but the court rejected his argument on the basis of evidence of more substantial participation than that of a simple courier. His offense level remained the same. Adjusted offense level: 32.

The failure to qualify for the mitigation adjustment to which low level offenders are entitled also cost Korakis a 2 level increase because his offense involved methamphetamine smuggling, counterbalanced by a 2 level “safety valve” reduction available to low level, first time, cooperative offenders. Adjusted offense level: 32.

*Adjustments.* Role in the offenses adjustments are a common feature of controlled substance cases as the discussion of section 2D1.1 above makes clear. There are five role in the offense adjustments: (1) leaders (+4 levels for organizer or leader of a crime with 5 or more participants or that is otherwise extensive; +3 levels for a manager or supervisor of such a crime; +2 levels for an organizer, leader, manager or supervisor of any other criminal activity); (2) minor players (- 4 levels for minimal participants; - 2 levels for minor participants); (3) abuse of trust or use of a special skill (+ 2 levels); (4) a Fagan enhancement (+ 2 levels for the use of a minor); and (5) use of body armor (+4 levels for the use of body armor during a drug trafficking crime or a crime of violence; +2 levels for a drug trafficking or violent crime involving the use of body armor). Had Korakis been able to claim reduced participation he would have been entitled to offense level reductions both an adjustment and a reduction under §2D1.1 in the calculation of his initial sentencing level. But he was not and the other role in the offense adjustments did not apply either. Adjusted offense level: 32.

*Obstruction & Accepting Responsibility.* Although obstruction of justice adjustments are fairly common in controlled substance cases, the issue did not arise in *Korakis* under either the general obstruction or the enhancement Guideline for dangerous flight. But he did qualify for the general 2 level acceptance of responsibility reduction and an additional 1 level reduction for an early guilty plea. Adjusted offense level: 29.

*D. Multiple Counts.* To account the conviction of a defendant for more than one crime without pancaking charges involving essentially the same misconduct, the Guidelines apply a “grouping” procedure under which similar offenses are grouped together. Once the multiple crimes for which the defendant has been convicted have been collected in closely related groups, the offense level applicable to each group is determined using the highest offense level attributable to the most serious crime within the group with one exception; for the crimes whose offense levels depend upon the amount of money stolen, or the extent of damage caused, or the amount of drugs manufactured or dealt – the amounts are cumulated. The offense level for each group having been determined, the group with the highest offense level is assigned a “unit” as is any group whose offense level is within 4 levels of the lead group (any group within 5 to 8 offense levels of that of the lead group is assigned a half unit; other groups are disregarded). The offense level for the lead group is then increased by the total number of units (add 1 level for 1.5 units; 2 levels for 2 units; 3 levels for 2.5 or 3 units; 4 levels for 3.5 to 5 units; and 5 levels for more than 5 units). The resulting total offense level of the lead group is the basis for the defendant’s final sentencing. Korakis pleaded guilty to a one count indictment and thus his case did not trigger the adjustments for cases involving multiple counts. Adjusted offense level: 29.

*Criminal History Category.* As a general rule an offender’s criminal record determines his or her criminal history category (for each offense level there are six permissible sentencing subcategories arranged according to the seriousness of the defendant’s criminal history). Points are assessed for past convictions, for misconduct committed while under judicial supervision such as bail or parole, and for crimes of

violence. Past criminal activities not only determine a defendant's criminal history category point total, but also provide the basis for increasing a defendant's offense level, as in the case of (a) career criminals; (b) professional criminals; (c) armed career criminals; and (d) recidivist sex offenders. The career offender Guidelines cover any adult offender convicted of a controlled substance crime or crime of violence following two prior convictions for similar offenses. Offenders who qualify are assigned a criminal history category of VI and the higher of (1) the offense level that applies based on their present conviction or (2) the career offender offenses levels which except for higher demands in the case of certain firearms offenses range from an offense level of 37 down to one of 12 based on the maximum penalty for the offense of their present conviction. If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13 (not less than 11 with an acceptance of responsibility reduction). The armed carrier criminal provision can only be triggered by firearms possession offenses; it limits its controlled substance predicates to 10 year felonies; and in some cases it will recognize a criminal history category of IV. The sex offender enhancement has no necessary nexus to any controlled substance offense. None of these modifications applied to Korakis who was found to have a criminal history category of I. Adjusted offense level: 29. Criminal history category: I.

*Departures.* In the interest of uniformity, the Guidelines seek to limit the circumstances under which a sentence outside of the ranges otherwise called for by the Guidelines may be recommended. The Guidelines countenance departure from the sentence otherwise called for (1) upon the request of the government in recognition of the defendant's cooperation with authorities; (2) where the criminal history provisions do not adequately reflect the seriousness of the defendant's past criminal record; and (3) in cases where there exists an aggravating [or, in cases other than those involving child crimes or sex offenses, a mitigating] circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.

Korakis sought to no avail an exceptional circumstance downward departure under the general provisions, arguing that he had no knowledge that MDMA pills with which his coconspirator was arrested contained methamphetamine and that his immigration status would subject him to harsher treatment than would otherwise have been the case. His argument rejected, his offense level remained unchanged. Adjusted offense level: 29. Criminal history category: I.

*Sentencing Table.*

*Imprisonment.* A total offense level of 29 with defendant criminal history category of I resulted in a Guidelines range of 87 to 108 months imprisonment under the Sentencing Table for Korakis. The Guidelines sentencing range may only be applied within the statutory maximum and any statutory minimum that applies to the crime of conviction. In Korakis' case, however, the range was well below the maximum for the offense of conviction for which there was no mandatory minimum.

**SENTENCING TABLE**

(in months of imprisonment)

|        | Offense<br>Level | Criminal History Category (Criminal History Points) |                |                  |                 |                   |                    |
|--------|------------------|---|----------------|------------------|-----------------|-------------------|--------------------|
|        |                  | I<br>(0 or 1)                                       | II<br>(2 or 3) | III<br>(4, 5, 6) | IV<br>(7, 8, 9) | V<br>(10, 11, 12) | VI<br>(13 or more) |
| Zone A | 1                | 0-6   | 0-6            | 0-6              | 0-6             | 0-6               | 0-6                |
|        | 2                | 0-6   | 0-6            | 0-6              | 0-6             | 0-6               | 1-7                |
|        | 3                | 0-6   | 0-6            | 0-6              | 0-6             | 2-8               | 3-9                |
|        | 4                | 0-6   | 0-6            | 0-6              | 2-8             | 4-10              | 6-12               |
|        | 5                | 0-6   | 0-6            | 1-7              | 4-10            | 6-12              | 9-15               |
|        | 6                | 0-6   | 1-7            | 2-8              | 6-12            | 9-15              | 12-18              |
| Zone B | 7                | 0-6   | 2-8            | 4-10             | 8-14            | 12-18             | 15-21              |
|        | 8                | 0-6   | 4-10           | 6-12             | 10-16           | 15-21             | 18-24              |
|        | 9                | 4-10  | 6-12           | 8-14             | 12-18           | 18-24             | 21-27              |
| Zone C | 10               | 6-12  | 8-14           | 10-16            | 15-21           | 21-27             | 24-30              |
|        | 11               | 8-14  | 10-16          | 12-18            | 18-24           | 24-30             | 27-33              |
|        | 12               | 10-16   | 12-18          | 15-21            | 21-27           | 27-33             | 30-37              |
|        | 13               | 12-18   | 15-21          | 18-24            | 24-30           | 30-37             | 33-41              |
|        | 14               | 15-21   | 18-24          | 21-27            | 27-33           | 33-41             | 37-46              |
|        | 15               | 18-24   | 21-27          | 24-30            | 30-37           | 37-46             | 41-51              |
|        | 16               | 21-27   | 24-30          | 27-33            | 33-41           | 41-51             | 46-57              |
|        | 17               | 24-30   | 27-33          | 30-37            | 37-46           | 46-57             | 51-63              |
|        | 18               | 27-33   | 30-37          | 33-41            | 41-51           | 51-63             | 57-71              |
|        | 19               | 30-37   | 33-41          | 37-46            | 46-57           | 57-71             | 63-78              |
|        | 20               | 33-41   | 37-46          | 41-51            | 51-63           | 63-78             | 70-87              |
|        | 21               | 37-46   | 41-51          | 46-57            | 57-71           | 70-87             | 77-96              |
|        | 22               | 41-51   | 46-57          | 51-63            | 63-78           | 77-96             | 84-105             |
|        | 23               | 46-57   | 51-63          | 57-71            | 70-87           | 84-105            | 92-115             |
|        | 24               | 51-63   | 57-71          | 63-78            | 77-96           | 92-115            | 100-125            |
| Zone D | 25               | 57-71   | 63-78          | 70-87            | 84-105          | 100-125           | 110-137            |
|        | 26               | 63-78   | 70-87          | 78-97            | 92-115          | 110-137           | 120-150            |
|        | 27               | 70-87   | 78-97          | 87-108           | 100-125         | 120-150           | 130-162            |
|        | 28               | 78-97   | 87-108         | 97-121           | 110-137         | 130-162           | 140-175            |
|        | 29               | 87-108  | 97-121         | 108-135          | 121-151         | 140-175           | 151-188            |
|        | 30               | 97-121  | 108-135        | 121-151          | 135-168         | 151-188           | 168-210            |
|        | 31               | 108-135   | 121-151        | 135-168          | 151-188         | 168-210           | 188-235            |
|        | 32               | 121-151   | 135-168        | 151-188          | 168-210         | 188-235           | 210-262            |
|        | 33               | 135-168   | 151-188        | 168-210          | 188-235         | 210-262           | 235-293            |
|        | 34               | 151-188   | 168-210        | 188-235          | 210-262         | 235-293           | 262-327            |
|        | 35               | 168-210   | 188-235        | 210-262          | 235-293         | 262-327           | 292-365            |
|        | 36               | 188-235   | 210-262        | 235-293          | 262-327         | 292-365           | 324-405            |
|        | 37               | 210-262   | 235-293        | 262-327          | 292-365         | 324-405           | 360-life           |
|        | 38               | 235-293   | 262-327        | 292-365          | 324-405         | 360-life          | 360-life           |
|        | 39               | 262-327   | 292-365        | 324-405          | 360-life        | 360-life          | 360-life           |
|        | 40               | 292-365   | 324-405        | 360-life         | 360-life        | 360-life          | 360-life           |
|        | 41               | 324-405   | 360-life       | 360-life         | 360-life        | 360-life          | 360-life           |
|        | 42               | 360-life  | 360-life       | 360-life         | 360-life        | 360-life          | 360-life           |
|        | 43               | life  | life           | life             | life            | life              | life               |

*Probation, Substitute Incarceration & Supervised Release.* Probation eligibility under the Guidelines is very limited. It extends only to defendants for whom the maximum permissible sentence of imprisonment under the Guidelines is no more than 6 months (Zone A) or to defendants whose maximum is no more than 1 year, if the court imposes some form of incarceration rather than imprisonment (i.e., weekend or nighttime imprisonment, home confinement, etc.) (Zone B). The maximum permissible term of probation for a defendant with an offense level 6 or higher is 5 years; below offense level 6, the maximum term of probation is 3 years. Defendants sentenced at offense level 19 or above (Zones C and D) are ineligible for probation. In cases when the offense level carries a maximum term of imprisonment of not more than 16 months (Zone B or C), the sentencing court may impose a term of substitute incarceration (intermittent confinement, community confinement, or home detention). Defendants, like Korakis, sentenced at offense level 29, criminal history category I are ineligible for probation or substitute incarceration. They are, however, subject to the statutory and Guideline provisions for supervised release which in Korakis' case amount to a term of 3 years.

*Restitution, Fines & Other Economic Sanctions.* Restitution in drug cases is the exception rather than the rule. The Guidelines establish a fine schedule according to offense level. They call for a fine of between \$15,000 and \$150,000 for crimes at Korakis' offense level of 29, but the court need not impose a fine where the defendant is unable and unlike to become able to pay any fine imposed. If the court does not impose or waives the fine imposed, it may impose alternative sanctions. *Korakis* does not mention a fine. Federal courts must impose a special assessment of \$100 for felony violations of federal law and lesser amounts for misdemeanors; Korakis would have been assessed a special assessment of \$100. As is the case with several other federal crimes, property derived from and used to facilitate a controlled substance violation is subject to confiscation. There are two procedure under which the property may be confiscated. The government may elect to treat the property as the defendant and initiate civil forfeiture proceedings. Or it may chose to accomplish the confiscation as part of the defendant's criminal trial. These criminal forfeitures which become operable upon conviction are announced as part of the sentencing process. Although confiscation, accomplished either through criminal or civil forfeiture procedures, is a common consequence of a controlled substance violation, *Korakis* does not mention the prospect of confiscation. Several tax statutes and a few others authorize the court to assess the costs of prosecution against defendants convicted of violating their commands. The statutes under which Korakis was convicted are not among them. Section 3555 of title 18 authorizes sentencing courts to order a defendant to pay for the cost of victim notification up to a maximum of \$20,000; the Guidelines permit the court to set off the cost against any fine imposed. The issue does not appear to have arisen in *Korakis*.

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