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## Sentencing Under the Federal Sentencing Guidelines: An Abridged Terrorism Related 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 terrorism related case.

This report is an abridged version – without footnotes, appendices, and most of its quotation marks and citations of 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 terrorism related case, with sentencing 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 the sentencing table (final offense level points/criminal history points = sentencing range).
  - A. Imprisonment
  - B. Probation
  - C. Supervised release
  - D. Restitution
  - E. Fine
  - F. Forfeiture
  - G. Special assessments.

Biheiri was convicted of various immigration-related false statements in violation of 18 U.S.C. 1015(a) and 18 U.S.C. 1425(a) which the government unsuccessfully asserted had facilitated the support of overseas terrorist activity. He was sentenced to 12 months imprisonment, a fine of \$15,000, a \$100 special assessment, and 3 years of supervised release.

*Base offense level.* The Statutory Index, U.S.S.G. App.A, identifies section 2L2.2 as applicable to both the 18 U.S.C. 1015(a) and the 18 U.S.C. 1425(a) violations. Section 2L2.2 carries a base offense level of 8 with the possibility of increases for aggravating factors apparently not implicated in Biheiri's case. The base offense level for each violation (18 U.S.C. 1425 and 18 U.S.C. 1015) was: 8

*Adjustments - Victim-Related.* The Guidelines allow for four so-called victim-related offense level adjustments: (1) hate crimes or vulnerable victims; (2) official victims; (3) restrained victims; and (4) terrorism. The government sought an adjustment only under the terrorism Guideline in *Biheiri*. The terrorism adjustment Guideline assigns an additional 12 offense levels "if the offense [or any related crime that constitutes relevant conduct] is a felony that involved, or was intended to promote, a federal crime of terrorism," establishes a minimum offense level of 32 in such cases, and tops out the defendant's criminal history score at VI regardless of his or her prior criminal record. The section has obvious application when the offender has been convicted of a federal crime of terrorism, but it may also apply when a crime of terrorism has the necessary relationship to the crime of conviction to qualify under the Guideline and constitute "relevant conduct" for purposes of the Guideline. The government asserted that Biheiri had engaged in financial transactions with a designated terrorist, who had connections to HAMAS, in violation of the International Emergency Economic Powers Act (IEEPA). The statute of limitations barred prosecution of the IEEPA allegations directly, but the government asserted that IEEPA violations might be used as the basis for an adjustment

under section 3A1.4. It failed first because it could not prove that the IEEPA violations were committed in preparation for or in any other way “relevant” to the immigration violations that constituted the crimes of conviction and second because it failed to prove that the IEEPA violations constituted a “federal crime of terrorism.” When a crime is related to the obstruction of a terrorism investigation or proceeding it may also warrant application of section 3A1.4, but the enhancement was unavailable in *Biheiri* because the government could not show that the false statements obstructed its investigation. Offense level adjustment 0 . Adjusted offense level for each violation: 8 .

*Role in the Offense.* There are five role-in-the-offense adjustments: (1) leadership (+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). The *Biheiri* court refused to assess a 4 level role in the offense increase under the theory that Biheiri’s activity involved the federal agencies and employees to whom the false statements were made (thereby qualifying as the supervisor in a crime involving 5 or more participants), but did conclude that a 2 level adjustment was appropriate in view of Biheiri’s supervision of two other participants in his scheme. Offense level adjustment: +2 . Adjusted offense level for each violation: 10 .

*Obstruction & Accepting Responsibility.* Obstruction of justice makes an increase of 2 levels appropriate, as does reckless endangerment during flight. No question of either obstruction of justice adjustment arose in *Biheiri*. The Guidelines also permit an adjustment in cases where the defendant accepts responsibility; a decrease of 2 levels as a general rule and a decrease of 1 level in cases otherwise carrying an offense level of 16 or more where the defendant signals his intent to plead guilty before the government has had to invest major time and effort preparing for trial. Biheiri warranted no such adjustments. Offense level adjustment 0 . Adjusted offense level: 10 .

*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 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. Biheiri’s offenses were grouped together. No adjustment for multiple groups was necessary and the offense levels for the two violations were counted as one within the single group. Had the offense level

for the violation of either 18 U.S.C. 1015 or 1425 been higher, it would have been used. Offense level adjustment 0. Adjusted offense level: 10.

*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. By operation of U.S.S.G. §3B1.4 a terrorism adjustment results in the assignment to criminal history category VI, regardless of the offender's criminal record. There are past criminal activities which 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 career criminals; professional criminals; armed career criminals; and recidivist sex offenders. Biheiri would appear to have had little if any criminal record of prior convictions. Adjusted offense level: 10. Criminal history category: I.

*V. 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.

The government sought an upward departure in *Biheiri*, but the court decided that none of the circumstances or consequences of [Biheiri's] offenses of conviction appear to be atypical so as to take the case out of the heartland of the applicable Guideline. Final offense level: 10. Criminal history category: I.

*Sentencing Table.*

*Imprisonment.* The Guideline's Sentencing Table (below) indicates that the permissible sentencing range for offense level 10, criminal history category I is not less than 6 nor more than 12 months imprisonment. Although the Guideline ranges must fall within the statutory maximum and any statutory minimum for the crime of conviction, the range in *Biheiri* was well within the maximum for the statutes of conviction (18 U.S.C. 1015 carries a 5 year maximum; 18 U.S.C. 1425, a 10 year maximum). Biheiri was sentenced to 12 months imprisonment.

## SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
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
Zone A 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
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
Zone B 9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C 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
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
Zone D 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.* 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. With an offense level of 10, Biheiri would have been eligible for probation coupled with some form of incarceration other than imprisonment, but the court elected to sentence him to imprisonment at the top of the applicable range. 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). Again with an offense level of 10, the court might have sentenced Biheiri to some form of substitute incarceration but elected not to.

*Supervised Release.* Unless otherwise provided by statute, defendants sentenced to imprisonment for more than a year *must* also be sentenced to a term of supervised release to be served after they leave prison. The court *may* impose a term of supervised release upon defendants sentenced to imprisonment for a year or less. Maximum terms of supervised release range from 1 to 5 years depending on the seriousness of their offense. Biheiri was sentenced to a 3 year term of supervised release.

*Restitution, Fines & Other Economic Sanctions.* The court may also order defendants to make restitution; or unless required by statute, the court may forego a restitution order if “(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process”. There was no evidence of a restitution order in *Biheiri*. The Guidelines establish a fine schedule according to offense level for the crime of conviction. The court need not impose a fine where the defendant is unable and unlikely to be able to pay any fine imposed. If the court does not impose or waives the fine imposed, it may impose alternative sanctions. In Biheiri’s case, the Guidelines call for a fine of not less than \$2,000 nor more than \$20,000; the court imposed a fine of \$15,000. In addition, Federal courts must impose a special assessment of \$100 for felony violations of federal law and lesser amounts for misdemeanors. Biheiri was assessed a special assessment of \$100. Criminal forfeitures which become operable upon conviction for certain offenses are announced as part of the sentencing process. There were no criminal forfeiture provisions implicated in *Biheiri*. 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 Biheiri 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 *Biheiri*.

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