

Calculating the Guideline Range Then and Now

In most cases, you will want to show, if possible, that the guideline range would be lower today. In some cases, the guideline range drives the original sentence because there was no mandatory minimum in the first place. In other cases, the current sentence is driven by a mandatory minimum, but you will be able to show that it would be eliminated or reduced under current law and/or charging policies, in which case the guideline range comes to the fore.

For Newcomers to the Guidelines

Watch Part 3 of the three-part introduction to the guidelines on the Sentencing Commission's website. It explains the structure of the Guidelines Manual and the guidelines, and the basic application process. The link is here: <http://www.ussc.gov/videos/introduction-federal-sentencing-guidelines>. There are links to additional videos and primers specific to drug offenses, criminal history, relevant conduct, firearms offenses, immigration offenses, and multiple counts at <http://www.ussc.gov/training/online-learning-center>.

Guideline calculation worksheets are available at http://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Worksheets_for_Individuals.pdf.

Be aware that there may have been amendments after the Commission's videos, primers, or worksheets. For example, the worksheets are keyed to the Manual effective November 1, 2010. See *Ameliorating Amendments to the U.S. Sentencing Guidelines*.

Guideline Manuals

You will need the current Manual and the Manual under which the client was sentenced. A new Guidelines Manual is issued on November 1 of each year reflecting changes since the previous version, although amendments are occasionally issued on interim dates when Congress directs an emergency amendment. The client should have been originally sentenced under the version in effect on the date of sentencing unless the version in effect on the date the offense was committed resulted in a lower guideline range, in which case that version should have been used to avoid an ex post facto violation.¹

Current and previous versions of the Guidelines Manual are available at <http://www.ussc.gov/guidelines-manual/guidelines-manual>. Use the pdf version rather than the html version (if you are given a choice for the particular year) because it shows the tables more clearly.

Fed. Sent. L. & Prac. (2014 ed.), database FSLP on Westlaw, contains a chapter on each guideline with interpretive caselaw, not the only caselaw, but a good start.

¹ See USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987).

How to Calculate the Guideline Range Then and Now

1) Look at the calculation in the PSR, any objections to that calculation, any responsive addenda, any sentencing memoranda, and the sentencing transcript to see what guideline calculation the judge used in sentencing the client.

Write down the guideline components and facts upon which each was based.

2) Calculate the guideline range under the current Manual.

The guideline range may be lower today if there has been a subsequent ameliorating amendment that has not already been applied retroactively to reduce the sentence²; the guideline range was increased based on a prior or concurrent offense that no longer qualifies as a predicate under current law; in a drug case, there is now a lower statutory maximum that would cap the guideline range due to the Fair Sentencing Act or the Holder charging policy; or a mistake to the client's detriment was made in calculating the guideline range.³

In addition:

If an aggravating factor that exists in the current Manual did not exist in the old Manual, do not use it, even if you see facts in the PSR that might support it. In that case, the client had no reason to object to the alleged facts or litigate them.

If an aggravating factor that exists in the current Manual *did* exist in the old Manual, but it was not applied – because the judge rejected it, or it was not applied by agreement of the parties,⁴ or it was simply not mentioned, do not use it.

If an aggravating factor that was used to calculate the guideline range has subsequently been eliminated by an ameliorating amendment, obviously, do not use it.

Example

Applicant A, a young woman addicted to methamphetamine and essentially homeless, started selling methamphetamine for a friend who manufactured the drug in a motel room, in exchange

² This would be because (a) the Commission did not make the amendment retroactive, (b) the Commission did make the amendment retroactive but relief was unavailable because a mandatory minimum or the career offender guideline stood in the way, or (c) no one moved for a reduction.

³ See Ameliorating Amendments to the U.S. Sentencing Guidelines; How an Applicant Previously Sentenced as a “Career Offender” Would Likely Receive a Lower Sentence Today; How a Sentence for an Immigration Offense May be Lower if Imposed Today; How a Person Convicted of a Firearms Offense or Who Received a Guideline Increase Because a Firearm “Was Possessed” May Qualify for Commutation Mistakes and Oversights Not Caught at the Time and Never Corrected.

⁴ This would be memorialized in the plea agreement, and in the PSR, usually specified as “Effect of Plea Agreement.”

for which she got methamphetamine for her own use and, at times, a place to sleep. Over a period of several months in 1999 and early 2000, Applicant A sold small amounts of methamphetamine to a confidential informant. She was arrested during a sale of 2 grams, and charged under 21 U.S.C. § 841(b)(1)(A) with possession with intent to distribute 50 grams or more of methamphetamine (actual), which carries a statutory penalty of 10 years to life.

She went to trial and was convicted. Based on information provided by the confidential informant, the PSR stated that Applicant A sold 502 grams of methamphetamine (actual) over the course of 18 months. Applicant A objected to that hearsay allegation, but the judge accepted it, which set her base offense level at 34. *See* USSG § 2D1.1(c)(3) (1998).⁵ The judge also rejected her request for a mitigating role adjustment under § 3B1.2 because, he said, although her role was minor, she was only being sentenced for the drugs she herself handled. Because she had been previously sentenced in state court for four petty shoplifting offenses for each of which she was sentenced to 60 days in jail, suspended in two of the cases, twice for driving without a license for which she received probation, and once for possession of drug paraphernalia for which she was sentenced to 60 days in jail and one year of probation, she had 13 criminal history points and was in criminal history category was VI. With a base offense level of 34 and in CHC VI, her guideline range was **262-327** months.

Original Guideline Calculation

2D1.1(c)(3)	34
Total Offense Level	34

4A1.1(b)	6 points for shoplifting and possession of drug paraphernalia (60 days)
4A1.1(c)	4 points for the shoplifting and driving without a license offenses (no jail time)
4A1.1(d)	2 point for committing the instant offense while on probation for possession of drug paraphernalia
4A1.1(e)	1 point for committing the instant offense less than two years after release from jail for possession of drug paraphernalia
Total points	13
Criminal History Category	VI

Guideline Range	262-327 months
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Guideline Calculation under the Current Manual

In reviewing the PSR, you notice that it says, based on a law enforcement report regarding an interview with the meth cook (who pled guilty and provided information to the government), that Applicant A occasionally picked up items for him that he used to cook meth (*e.g.*, starter fluid, batteries), and on a few occasions disposed of waste material from the process in a dumpster.

⁵ A new Manual was not published in 1999.

You also notice that the current Guidelines Manual provides for a 2-level increase if the offense involved an unlawful discharge of a hazardous substance into the environment, USSG § 2D1.1(b)(13)(A), and that this specific offense characteristic was added after Applicant A was sentenced, *id.*, App. C amend. 605 (eff. 11/1/2000). Do not apply this enhancement. It did not exist at the original sentencing, so Applicant A did not object to the allegation in the PSR or litigate it.

You see that the base offense level for 502 grams of methamphetamine has since increased from 34 to 36. *See* USSG § 2D1.1(c)(2) (2013). But you also see in reviewing Ameliorating Amendments to the U.S. Sentencing Guidelines, that three amendments have since been promulgated that would reduce the guideline range if Applicant A were sentenced today.

First, the Drugs Minus Two amendment effective November 1, 2014 would apply, bringing her base offense level back down to 34. *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014). (For how to deal with the fact that the Commission has voted to make the amendment retroactive, *see* How to Deal With the Retroactive Drugs Minus Two Amendment.)

Second, the commentary to the mitigating role guideline, USSG § 3B1.2, as amended in 2001, *id.*, App. C amend. 635 (Nov. 1, 2001), provides that a defendant who is accountable only for the conduct in which she personally was involved is not precluded from consideration for a mitigating role adjustment. USSG § 3B1.2 cmt. (n.3(A)). This amendment would encourage the judge to give her a 2-level downward adjustment for her minor role. This amendment was not made retroactive. *Id.*, § 1B1.10(c).

Third, the 1 point for committing the instant offense less than two years after release from jail on another offense has been eliminated. *See* USSG § 4A1.1(e) (2009); *id.*, App. C, amend. 742 (Nov. 1, 2010). This reduces her criminal history points to 12, and her criminal history category to V. This amendment was not made retroactive. *See* USSG § 1B1.10(c).

The guideline calculation under the Nov. 1, 2014 Manual would be:

2D1.1(c)(3)	34
3B1.2(b)	-2
Total Offense Level	32

4A1.1(b)	6 points for shoplifting and possession of drug paraphernalia (60 days)
4A1.1(c)	4 points for the shoplifting and driving without a license offenses (no jail time)
4A1.1(d)	2 points for committing the instant offense while on probation for possession of drug paraphernalia
Total points	12
Criminal History Category	V

Guideline Range **188-235 months**

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If the Guideline Range Would Be Higher Today

There will be cases in which the guideline range is higher today than it was at the original sentencing. Until *Booker* was decided and the Commission began receiving explicit feedback that the guidelines were too severe through judicial decisions and a large number of below-guideline sentences, the guidelines were steadily increased and rarely reduced,⁶ often referred to as the “one-way upward ratchet.”⁷ The Commission has issued a number of ameliorating amendments in recent years, but still has much to do to correct this history.

The guideline range could be higher today based on facts that were litigated (and thus legitimately considered today) if the original range was based on a fact that triggered a certain number of points under the Manual used at the time, but the same fact carries more points under the current Manual.

Example

For example, in 1999, Applicant B and several of his friends decided to manufacture and sell MDMA (ecstasy) in the local club scene. After they were unsuccessful in their initial attempts to make MDMA from sassafras plants, they purchased a large quantity of chemicals and used it to make MDMA until November 2000, when one of them was arrested during a controlled buy. At the time of the arrest, they had managed to make and sell approximately 1.2 kilograms of MDMA. Applicant A was charged with and pled guilty within a matter of weeks to conspiracy to manufacture MDMA. The statutory penalty range was 0-20 years. 21 U.S.C. § 841(b)(1)(C). Based on information from a cooperating co-defendant and the testimony of a chemist, the judge found that the conspiracy involved a theoretical yield of 370 kg of MDMA.

Under USSG § 2D1.1, the base offense level for offenses involving MDMA is calculated by converting the quantity of the mixture or substance of MDMA involved in the offense into its “marijuana equivalent.” Before May 1, 2001, 1 gram of MDMA was equivalent to 35 grams of marijuana. *See* USSG § 2D1.1 (2000). On May 1, 2001, the Commission promulgated an emergency amendment increasing the marijuana-to-MDMA ratio from 35:1 to 500:1. *See* USSG App. C, amend. 609, and made the amendment permanent effective November 1, 2001, *see* USSG App. C, amend. 621.

Though Applicant B was sentenced in September 2001, the conspiracy ended when he was arrested in November 2000. The judge was required to apply the less severe version of the Manual in effect at the time the offense was committed. *See* USSG § 1B1.11 (b)(1); *Miller v. Florida*, 482 U.S. 423 (1987)). Under the 2000 Manual, 370 kg of MDMA (the theoretical yield amount) was equivalent to 12,950 kg of marijuana, which corresponded to a base offense level

⁶ *See, e.g.*, Baron-Evans & Stith, *Booker Rules*, 160 U. Penn. L. Rev. 1631 (2012).

⁷ Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

36. The judge applied a 2-level aggravating role increase under § 3B1.1(c) because Applicant B had an associate's degree in chemistry and supervised another participant during the manufacturing process, and then a 2-level reduction for acceptance of responsibility (on the prosecutor's urging, the court declined to apply the third point because Applicant B challenged the use of a theoretical yield for purposes of drug quantity and the court held a lengthy evidentiary hearing). Applicant B's total offense level was 36. He had one prior conviction for driving without insurance, for which he was sentenced to one year probation, and three prior convictions for possession of marijuana, for which he received suspended sentences. In Criminal History Category III, the corresponding guideline range was 235-293 months.

Original Guideline Calculation

2D1.1(c)(2)	36
3B1.1(c)	+2
3E1.1(a)	-2
Total Offense Level	36

4A1.1(c)	4 points for driving without insurance and simple possession offenses
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Total points	4
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Criminal History Category III

Guideline Range 235-293 months

Guideline Calculation under the Current Manual

You see that under the 500:1 marijuana-to-MDMA ratio in effect today, 370 kg of MDMA would be equivalent to 185,000 kg of marijuana, which corresponds to a higher base offense level of 38. *See* USSG § 2D1.1(c)(2) (2013). You see that the Drugs Minus Two amendment effective November 1, 2014 would not bring his base offense level back down to 36 because under that amendment, "90,000 KG or more" of marijuana corresponds to base offense level 38. *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014).

You also see that while a government motion is still required in order to be eligible for the third level of reduction for acceptance of responsibility, USSG § 3E1.1(b) (2013), the commentary to USSG § 3E1.1 has been amended to make clear that the prosecutor may not decline to move for the third point for reasons not identified in § 3E1.1 (i.e., to avoid preparing for trial), and the court "should" grant the motion when made. Applicant B timely pled guilty, and today, the prosecutor would likely move for, and the court would grant, the third level of reduction for acceptance of responsibility. USSG § 3E1.1 cmt.(n.6) (2013).

The guideline calculation under the Nov. 1, 2014 Manual would be:

2D1.1(c)(1)	38
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3B1.1(c)	+2
3E1.1(a)	-3
Total Offense Level	37

4A1.1(c)	4 points for driving without insurance and simple possession offenses
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Total points	4
Criminal History Category	III

Guideline Range	262-327 months
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What to Do?

Less specificity where possible may be a good thing in such a situation. For example, you may be able to show that a mandatory minimum that drives the current sentence would be eliminated or reduced under current law and/or charging policies. Or you may be able show that the career offender guideline would not apply today. If so, you have already shown that the sentence would be lower today. Especially if the client has already served, or will serve within the next few years, the time that would have been required by the original guideline range (if a mandatory minimum or the career offender guideline had not trumped it), there is no need to say anything further.

If the client was sentenced before *Booker* or after *Booker* but before its relevant progeny, or had no opportunity to argue for a variance because of a trumping mandatory minimum, show that the judge would likely impose a sentence below the guideline range today to an extent below the original guideline range. In a case like Applicant B's, you can show, with reliable evidence, that the Commission's decision to increase the marijuana-to-MDMA ratio to 500:1 was not based on empirical evidence, that judges impose below-guideline sentences in the vast majority of MDMA cases, and that a judge today would likely vary to a 1:1 marijuana equivalency under *Kimbrough*, which would correspond to a base offense level 26 and a guideline range of 70-87 months. See *How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today*.