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# CHAPTER 9

# 30 Years After: What the Federal Sentencing Guidelines Have Meant for Criminal Tax Enforcement

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## Synopsis



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VER: [SC_00755-Master:13 May 17 02:10][MX-SECNDARY: 12 May 17 07:53][TT-: 23 Sep 11 07:01 loc=usa unit=00750-ch0009vol069] 0





## ¶ 900 INTRODUCTION

In 1970, renowned pianist, conductor, and television performer Skitch Henderson filed a 1969 personal income tax return showing he had donated a $350,000 library of music arrangements to the University of Wisconsin. Skitch was perhaps best known as *The Tonight Show*'s original orchestra director, whose distinctive laugh rivalled cast mate Ed McMahon's. Once the IRS scrutinized the donation, Skitch's story unraveled: the music arrangements had been donated a year later (in 1970); they were nearly worthless; Skitch had apparently fabricated supporting valuations by Leonard Bernstein and Henry Mancini; and the supposed donation-acceptance letter from the UW library director was deemed a forgery.[1]

The IRS likes nothing better than prosecuting celebrities, because the cases all but ensure that there will be widespread coverage of—and deterrent effect from—the prosecution. Skitch Henderson fit the bill. He was charged with various tax crimes and, in contrast to most defendants, he went to trial.

He was convicted of two charges of filing false returns, and the IRS got what it was looking for: multiple New York Times articles. As the sentencing approached, the IRS had every reason to be confident of a lengthy sentence, as Henderson was facing a six-year statutory maximum sentence, he went to trial instead of pleading guilty, and he tried to cover up the crime through false documents and appraisals. At the sentencing hearing, Judge Edward Weinfeld suggested a lengthy sentence was appropriate when he commented, "One is moved to wonder . . . why a man who had achieved a position of public esteem and enjoyed the benefits of our society and was under no economic compulsion resorted to the methods used here to defraud the public treasury . . . . The public interest requires that criminal laws be enforced thoroughly and evenhandedly whether one held high public office, is a public figure or an unknown citizen." The judge insisted a prison sentence was important, commenting that "If those who attempt to violate the tax laws . . . upon conviction receive the proverbial slap on the wrist and fine that they can well afford to pay, the deterrent force of the sentence upon the rest of the community is gone."[2]

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[1] "Skitch Henderson Indicted on Taxes," New York Times, July 3, 1974 (Arnold Lubasch), available at http://www.nytimes.com/1974/07/03/archives/skitch-henderson-indicted-on-taxes-skitch-henderson-indicted-on.html.

[2] "Skitch Henderson Given Six Months," New York Times, January 18, 1975 (Arnold Lubasch),

0003 [ST: 1] [ED: 100000] [REL: 69] **Composed:** Fri Jul 28 10:40:02 EDT 2017
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What sentence did the Court impose—against someone who falsified documents, went to trial, and committed tax fraud of around $100,000 ($640,000 in today's dollars)—in order to send a message to other would-be tax violators? Six months in jail.[3]

The IRS and federal prosecutors didn't think an appropriately stern message was being sent with six-month sentences for cases like Skitch Henderson's. That's why, in the context of sentencing reform and imposing sentencing guidelines in 1987, the government pushed for harsher sentences for tax offenders. That effort paid off: the same conduct in 2017—evading $640,000 in tax, going to trial, and forging documents—would generate an advisory guideline sentence of between 41 and 51 months, a far cry from the six months Henderson received.

But the trend of higher tax-crime sentences which occurred after the enactment of the sentencing guidelines seems to be ebbing. In the wake of *United States v. Booker*,[4] which in 2005 turned the guidelines from mandatory to advisory, and recent research showing the remarkably low recidivism rate for tax offenders, tax sentences appear poised to return to those imposed under the pre-guideline days of Skitch Henderson. It took a long and tortuous journey to find ourselves heading back to where we started.

## ¶ 901 PRE-1987

Before the guidelines, federal sentences were all over the map. Judges had unfettered discretion to sentence anywhere up to the statutory maximum sentence and did not even have to state reasons for their sentences. That meant different judges could impose starkly different sentences on offenders who committed similar crimes and had similar criminal histories, with no concern of being reversed on appeal. Adding to this judge-specific variability was the variability inherent in the indeterminate sentencing system. Under that system, if within the statutory maximum, courts could impose a sentence as a range such as 15 years to life. Prisoners would then apply to the Parole Commission to be released as early as possible within the range set at sentencing. The Parole Commission would determine whether the prisoner had been "rehabilitated," and if so, would release the prisoner. This approach, which was also highly subjective, exacerbated the discrepancy in outcomes between similarly situated defendants.

In 1984, after a decade-long effort encompassing scores of meetings and many failed attempts, Congress passed the Comprehensive Crime Control Act of 1984 ("Act"), which ushered in sweeping changes to federal sentencing. The House and

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available at http://www.nytimes.com/1975/01/18/archives/skitch-henderson-given-six-months-he-is-also-fined-10000-on.html.

[3] *Id.*

[4] 543 US 220 (2005).

Senate had slightly different takes on why sentencing reform was important. The House Judiciary Committee report stated the purposes of the legislation were to reduce unwarranted sentencing disparity, improve the quality of information available to sentencing judges, ensure efficient use of prisons, incapacitate dangerous offenders, encourage non-custodial alternatives, and provide more-severe non-prison punishment for white-collar and corporate crime.[5] Others in the Senate appeared more concerned with boosting sentences.[6] The principle unifying both houses of Congress was that something needed to be done to reduce unwarranted sentencing disparities.[7]

In looking at how to remedy the problem of unwarranted sentencing disparity, Congress considered a number of remedies, including mandatory minimum sentences, guidelines, and the abolition of parole. The House Judiciary Committee wanted to ensure that any changes wouldn't increase prison overcrowding and or shift the balance of power away from judges and into the hands of prosecutors.[8] Noting that parole was doing more harm than good, the Act scrapped both indeterminate sentences and parole in order to increase certainty and fairness.[9]

The Act adopted three reforms that continue to this day. First, it defined the purposes of sentencing, which at a high level were fairness and certainty, with proportionality to harm being a central theme of fairness. Second, the Act established the United States Sentencing Commission and directed the Commission to develop guidelines to assist judges to exercise their sentencing discretion. Ancillary to the guidelines was requiring judges to examine the guidelines and "publicly justify any departure from them."[10] Third, given that judges had to make a record of why they imposed a particular sentence, the government and defendants could appeal sentences.[11]

In addition to creating the Commission and setting the guidelines in motion, the Act laid out the factors judges should consider at sentencing, and was later codified at 18 U.S.C. § 3553(a). The guidelines are just one of seven factors required to be considered at sentencing.

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[5] Report 98-1017, 98th Congress, 2nd Session, Judiciary Committee Report on the Sentencing Revision Act of 1984, at 31 ("House Report").

[6] Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, United States Sentencing Commission (June 18, 1987), at 7–8 ("Supplemental Report").

[7] Supplemental Report, at 7–8.

[8] House Report, at 32.

[9] *Id.* at 35.

[10] *Id.* at 35–36.

[11] *Id.* at 36.

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VER: [SC_00755-Master:13 May 17 02:10][MX-SECNDARY: 12 May 17 07:53][TT-: 23 Sep 11 07:01 loc=usa unit=00750-ch0009vol069] 0



**Factors To Be Considered in Imposing a Sentence**

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed—

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(C)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for—

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;

. . .

**(5)** any pertinent policy statement—

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

**(7)** the need to provide restitution to any victims of the offense.[12]

The House Judiciary Committee report also stressed the importance of only incarcerating persons who needed to be jailed, and encouraged non-prison alternatives where appropriate, including for white collar cases. "The Committee believes that it is best, whenever possible, to use effective alternatives to imprisonment."[13]

## ¶ 902 PRE-GUIDELINE SENTENCING STATISTICS

As part of the Act, the Sentencing Commission started collecting sentencing data to "assist in the development, implementation, monitoring, and evaluation of the guidelines."[14] The Commission reviewed data from nearly 100,000 federal convictions over a two-year period. The data-collection function was one of the most important aspects of the 1984 Act, as it breathes life into the guidelines every year by quantifying what is working and what isn't working and thereby informing the annual discussion on how to amend the guidelines.

The first year for which they published sentencing data was 1986, which aided the Commission in setting the initial guidelines adopted in 1987. In 1986, the median sentence imposed against tax offenders who received some jail time was 12 months, and the mean sentence was 23 months. The published data in 1986 do not reflect what percentage of tax offenders received a sentence.[15]

As the first guidelines were effective November 1, 1987 and only applied to criminal conduct occurring thereafter, the 1987 and 1988 guidelines would have covered pre-guidelines conduct in tax cases, which generally are brought years after the conduct occurred. In 1987, the median sentence imposed in tax cases was again 12 months, and the mean sentence dipped to 19 months.[16] 1988 was similar, with the median tax sentence at 12 months and the mean tax sentence at 21 months.[17]

## ¶ 903 THE GUIDELINES

It took about three years for the Sentencing Commission to finalize the Federal

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[12] 18 USC § 3553(a).

[13] House Report, at 41.

[14] Supplemental Report, at 9.

[15] National Corrections Reporting Program, 1986, at pages 54–55, available at https://www.bjs.gov/content/pub/pdf/ncrp86.pdf.

[16] National Corrections Reporting Program, 1987, at pages 58–59), available at https://www.bjs.gov/content/pub/pdf/ncrp87.pdf.

[17] National Corrections Reporting Program, 1988, at pages 57–58), available at https://www.bjs.gov/content/pub/pdf/ncrp88.pdf.

Sentencing Guidelines before they were presented to Congress and then took effect on November 1, 1987. For the most part, the guidelines hewed to Congress' stated intent, in that they strove for uniformity and proportionality.[18] The Commission had a robust debate about how to use the guidelines to control crime, with one camp focusing primarily on "just desserts" for the offender and another camp focusing more broadly on how each sentence would affect the crime rate.[19] The Commission concluded that the two focuses should yield the same results in most cases, and didn't try to resolve the philosophical differences.[20]

The Commission was acutely aware that attempts to increase uniformity could destroy proportionality. In addition, in creating guidelines to fit all cases, the Commission was worried that the resulting complexity could make the system unworkable.[21]

### ¶ 1 Lobbying For Longer Tax Sentences

During the public commentary period, the Commission reached out to a well-known tax practitioner, Harvey Silets. Silets and his associate Susan Brenner responded in a Winter 1986 article.[22] Silets and Brenner began by evaluating the 1986 draft guidelines, and noted that the rehabilitation model of sentencing and incarceration had been discredited. Turning specifically to tax offenses, Silets successfully criticized, as "constitutionally impermissible," the burden shifting contained in the draft approach—later dropped—of assuming an offender's unreported income was earned illegally and requiring the offender to prove it was earned legally.[23] The fact that this presumption made it into the 1986 draft guidelines shows how harshly the Commission viewed tax crimes and how desperately they wanted to increase sentences. Silets and Brenner also urged—with less success—the Commission to de-emphasize the tax loss in determining the appropriate sentence for tax offenders. The authors noted in support something that has been lost in the current guidelines, that "it may not be appropriate to treat a $100,000 tax evasion when 6 million dollars of taxes were paid with the return in a similar fashion to a $100,000 tax evasion when only $20,000 of taxes was paid with the return."[24] Presumably, this was dropped because it would have resulted in

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[18] Supplemental Report, at 13.

[19] *Id.* at 15–16.

[20] *Id.*

[21] *Id.* at 13.

[22] Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September 1986, 77 J Crim L & Criminology 1069

[23] *Id.* at 1099.

[24] *Id.* at 1105. The article quotes a letter from another tax practitioner, who suggested that the tax guidelines instead be driven by the percentage of tax evaded. "The argument in favor of this approach is that these persons [who understate 100% of their liability but one's liability is $20,000 and the other's is $200,000] are equally culpable." *Id.* at 1105, n. 99.

sentencing disparity based on wealth, but if the focus is on the offender and not the damage to the Treasury then this approach has some facial appeal.

### ¶ 2 Tax Guidelines Were Shaped Primarily by General Deterrence

Section 2T of the Federal Sentencing Guidelines applies to tax offenders. As opposed to the middle course taken on many other issues, beginning with the first guidelines in 1987 the Commission came down heavily in favor of general deterrence (deterrence of other would-be offenders) as opposed to "just desserts" for tax offenders. They even admitted as much in the commentary to the section dealing with tax crimes:

> *The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.*[25]

The Background section of the Application Notes to the 2T guidelines goes further, stating:

> *This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.*
>
> . . .
>
> *Roughly half of all tax evaders are now sentenced to probation without imprisonment, while the other half receives sentences that require them to serve an average [median] prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion* ***and to somewhat increase average sentence length****. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. Current estimates are that income taxes are underpaid by approximately $90 billion annually.*
>
> *Although currently some large-scale evaders serve as much as five years in prison,*

[25] USSG § 2T (1987).

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VER: [SC_00755-Master:13 May 17 02:10][MX-SECNDARY: 12 May 17 07:53][TT-: 23 Sep 11 07:01 loc=usa unit=00750-ch0009vol069] 0



*in practice the average sentence length for defendants sentenced to a term of imprisonment does not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than $10,000 in taxes is about nine months, while the corresponding figure for those evading over $100,000 in taxes is about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than $100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.*[26]

## ¶ 904 HOW THE TAX GUIDELINES WORKED BETWEEN 1987 AND 2005'S *BOOKER* DECISION

### ¶ 1 Overview

The application of the guidelines to a tax crime requires several steps, ultimately resulting in a "Guideline Range" that reflects the minimum and maximum number of months to which a defendant may be sentenced. As originally enforced before *Booker*, the sentencing judge was required to sentence the defendant within a narrow range, subject to special circumstances that might warrant a "departure" below or above that range. This made arguments surrounding the guidelines paramount to the final sentence, as judges rarely entertained departures.

The guidelines employ a sentencing grid, where one axis is the Offense Level—how bad the crime was—and the other axis is Criminal History. Most tax offenders have no criminal history and end up in Criminal History Category I, the lowest category. There are rules about which convictions count and which do not—those more than 10 years old, those with a very short sentence, etc.—that could still result in offenders having zero or just one criminal history point and being in the lowest criminal history along with those who are true first offenders. Because of this lack of criminal history, for most tax offenders, the Offense Level is the sole determinant of the guideline range.

In determining the appropriate guideline range in 1987 as well as now, the first step is determining the applicable guideline section. Tax crimes are covered by Section 2T of the guidelines. The second step is to determine the offense-level points associated with "base offense level" for the crime and whether the crime has any "specific offense characteristics" that would add points. For tax crimes, the computation of "tax loss" is central to this determination.

Prior to the 1993 Amendments, there were a few different definitions of "tax loss" depending upon whether the crime charged was tax evasion (U.S.S.G. § 2T1.1 (1992)), filing a false tax return (U.S.S.G. § 2T1.3 (1992)) or some other tax offense. In tax evasion or false tax return cases, the tax loss was generally determined to be 28% of

[26] USSG § 2T1.1 (1987) (emphasis added).

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VER: [SC_00755-Master:13 May 17 02:10][MX-SECNDARY: 12 May 17 07:53][TT-: 23 Sep 11 07:01 loc=usa unit=00750-ch0009vol069] 0



the amount of the omitted gross income, 28% of the amount of any false deductions, and 100% of the amount of any false credits. If the taxpayer was a corporation, a 34% figure was used in lieu of 28%.[27]

"Tax Loss" focuses on the "criminal deficiency." Not all potential adjustments to an income tax return are "criminal items"; many items may be civil in nature and don't count toward the criminal tax loss calculation that drives the guideline sentence. Both the Commentary to the guidelines and decisions of the Courts of Appeal indicate that items which are civil in nature should not be considered when determining the "tax loss" for sentencing purposes.[28] The 1993 Amendments consolidated the various "tax loss" definitions for the major tax crimes.

### ¶ 2 Possible Adjustments To Base Offense Level

After the determination of "tax loss" is made, it must be determined whether there are any adjustments to the base offense level. If the income involved was derived from an illegal source and is greater than $10,000, the base offense level is increased by two. If the taxpayer used "sophisticated means" to engage in the tax crime, the offense level is increased by two.

If the tax crime involves five or more persons or was otherwise extensive, the base offense level can be adjusted upward based upon the defendant's role in the offense. Leaders and managers of an extensive criminal activity may receive higher sentences and minimal participants may receive lower sentences.[29] If a taxpayer willfully obstructs or impedes an investigation, the Court may also increase the base offense by two levels.[30]

Perhaps the most important adjustment a tax defendant must consider is "acceptance of responsibility." When the Court believes the defendant has accepted responsibility for the offense, there is a two-level reduction in the base offense level. In cases where the base offense level is 16 or greater, a three-level reduction is available in some circumstances.[31] Acceptance of responsibility can shorten the period of incarceration by six months and in many cases could mean the difference between incarceration in a prison-type facility and a lesser punishment, such as confinement in a community treatment facility, home detention or straight probation.

Tax defendants going to trial will generally find it difficult to obtain an acceptance of responsibility adjustment where there is a factual dispute and the Court finds that the

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[27] Tax loss does not include interest or penalties. USSG § 2T1.1 (1987–2016).

[28] USSG § 2T1.1, Commentary (1987); *United States v. Harvey*, 996 F2d 919 (7th Cir 1993); *United States v. Meek*, 998 F2d 776 (10th Cir 1993); *United States v. Daniel*, 956 F2d 540 (6th Cir 1992).

[29] USSG §§ 3B1.1 and 3B1.2 (2016).

[30] USSG § 3C1.1 (2016).

[31] USSG § 3E1.1 (2016).

Government's version of the facts is the correct version. On the other hand, if the defendant goes to trial on a technical or constitutional issue and has otherwise accepted responsibility for his conduct, the two-level reduction for acceptance of responsibility should be available.

### ¶ 3 Final Steps

The adjusted offense level is then considered with the defendant's criminal history to determine the guideline range. Based upon the guideline range, the sentencing judge has specified sentencing options which may include probation, imprisonment, community confinement and monetary fines. Finally, a determination must be made concerning whether there are grounds for the sentencing judge to "depart" from the guideline range and give the defendant a lesser sentence (a "downward departure") or a greater sentence (an "upward departure"). From 1987 until 2005's *Booker* decision, departures were the only way for judges to sentence outside the narrow guideline range.

## ¶ 905 *BOOKER*: THE SUPREME COURT MAKES THE GUIDELINES MERELY ADVISORY

In 2005, after a series of cases hinting that the Supreme Court might view the mandatory nature of the guidelines as unconstitutional, the Supreme Court decided *United States v. Booker*.[32]

In *Booker*, Justice Stevens, writing for the 5–4 majority, found that the Sixth Amendment applies to the federal sentencing guidelines and concluded that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[33] The Court responded to concerns about the resulting disruption on the federal criminal justice system by noting that:

> [I]n some cases jury fact finding may impair the most expedient and efficient sentencing of defendants. But the interest of fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest of concluding trials swiftly.[34]

Having determined that the federal sentencing guidelines suffered the same constitutional infirmity as the Washington State guidelines, there were a number of possible remedies. The Court could have held that the guidelines as a whole were not

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[32] *Booker*, 543 US at 268.

[33] *Id.* at 244.

[34] *Id.* (internal citation omitted).

severable and the entire statute was unconstitutional. We then would have been back to the pre-guideline discretionary sentencing system. The Court could have found the objectionable portions severable from the guidelines and required any additional fact finding be made by juries—the preferred choice of Justice Scalia. The Court, consisting of a separate majority opinion authored by Justice Breyer, in what has come to be known as the "remedy" opinion, chose neither and instead found that the guidelines could be made compatible with the Constitution by severing the provision of the sentencing statute (18 USC §3553(b)(1)) that made the guidelines mandatory. The Court concluded that provision must be "severed and excised" as must one other statutory section, § 3742(e), that depends upon the guidelines mandatory nature. The Court held:

> So modified, the Federal Sentencing Act, the Sentencing Reform Act of 1984, as amended, 18 U.S.C. Section 3551 *et seq.*, 28 U.S.C. Section 991 *et seq.*, *makes the guidelines effectively advisory*. It requires a sentencing court to consider guideline ranges, *see* 18 U.S.C. A. Section 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well. *See* Section 3553(a) (Supp. 2004). [Emphasis added.][35]

## ¶ 906 HOW THE GUIDELINES AFFECTED SENTENCES FOR TAX OFFENDERS PRE- AND POST-*BOOKER*

### ¶ 1 Overview

As noted above, before the guidelines took effect, about half of tax offenders received straight probationary sentences and the ones that did receive jail time received an average of 12 months. Despite the imposition of the guidelines and the stated intention to "somewhat increase average sentence length," the average tax sentence remained at 12 months until 1991, when it dipped to just 9 months.[36] https://www.bjs.gov/content/pub/pdf/ncrp89.pdf; 1990 report available at https://www.bjs.gov/content/pub/pdf/ncrp90.pdf; 1991 report available at https://www.bjs.gov/content/pub/pdf/ncrp91.pdf. The mean sentence over the same period fluctuated between 16 and 21 months, despite that the median sentence was almost constant at 12 months. No statistics were reported for 1992, and as noted above the tax guidelines changed in 1993. It takes about three years for most offender-unfriendly guideline changes to be reflected in sentences, and the effects of the 1993 tax guideline changes arrived right on cue in 1996. In 1993, the average sentence returned to 12 months until

[35] *Id.* at 246.

[36] It appears the Commission equates "median" with average, as the Guidelines reference an "average" sentence of 12 months, which is the same number as the median sentence. 1987 sentencing statistics show the median tax sentence as 12 months, with a mean sentence as 19. National Corrections Reporting Program, 1987, available at https://www.bjs.gov/content/pub/pdf/ncrp87.pdf; 1988 report available at https://www.bjs.gov/content/pub/pdf/ncrp88.pdf; 1989 report available at

1996, when it started its generally upward trajectory with a jump to 15 months.[37] In 1997 the average was 15 months, in 1998 and 1999 it dipped to 12, and from 2000 through 2015, the average slowly increased to a peak of 18 months, only to decrease to 16 or 17 months in the past two years.[38] Notably, the Sentencing Commission appears to have started reporting the median sentence instead of the mean sentence as the "average" sentence starting in 2005, as the reported average sentences in certain reports jumps to 30 months, but the five-year summary of tax sentencing reflects averages of 16 or 17 months. In 1996, the Commission began reporting not only the average sentence, but also the percentage of offenders who received a custodial sentence. In 1996, just as in 1987, less than half—only 40.2 percent—of tax offenders received a custodial sentence.[39] Although between 1996 and 2015 the average sentence slowly crept up from 12 months to 17 months and appears to have plateaued at 16 or 17 months, over the same period the percentage of tax offenders receiving a custodial sentence shot up faster, peaked, and appears on the way down.[40] By 1998, the incarceration rate hit 50 percent; by 2003, it was 62 percent; in 2005—the year

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[37] National Corrections Reporting Program, 1993, available at https://www.bjs.gov/content/pub/pdf/cfjs9304.pdf; 1994 report available at https://www.bjs.gov/content/pub/pdf/cfjs9404.pdf; 1995 report available at https://www.bjs.gov/content/pub/pdf/cfjs9504.pdf; and 1996 report available at https://www.bjs.gov/content/pub/pdf/cfjs9604.pdf.

[38] National Corrections Reporting Program, 1997, available at https://www.bjs.gov/content/pub/pdf/cfjs9704.pdf; 1998 report available at https://www.bjs.gov/content/pub/pdf/cfjs9805.pdf; 1999 report available at https://www.bjs.gov/content/pub/pdf/cfjs9905.pdf; 2000 report available at https://www.bjs.gov/content/pub/pdf/cfjs0005.pdf; 2001 report available at https://www.bjs.gov/content/pub/pdf/cfjs0105.pdf; 2002 report available at https://www.bjs.gov/content/pub/pdf/cfjs0205.pdf; 2003 report available at https://www.bjs.gov/content/pub/pdf/cfjs0305.pdf; 2004 report available at https://www.bjs.gov/content/pub/pdf/cfjs0405.pdf; 2005 report available at https://www.bjs.gov/content/pub/html/fjsst/2005/tables/fjs05st502.cfm; 2006 report available at https://www.bjs.gov/content/pub/html/fjsst/2006/tables/fjs06st502.pdf; 2007 report available at https://www.bjs.gov/content/pub/html/fjsst/2007/fjs07st.pdf; 2010 through 2015 reports available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf and http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Tax-Fraud_FY14.pdf.

[39] National Corrections Reporting Program, 1996, available at https://www.bjs.gov/content/pub/pdf/cfjs9604.pdf.

[40] 1997 report available at https://www.bjs.gov/content/pub/pdf/cfjs9704.pdf; 1998 report available at https://www.bjs.gov/content/pub/pdf/cfjs9805.pdf; 1999 report available at https://www.bjs.gov/content/pub/pdf/cfjs9905.pdf; 2000 report available at https://www.bjs.gov/content/pub/pdf/cfjs0005.pdf; 2001 report available at https://www.bjs.gov/content/pub/pdf/cfjs0105.pdf; 2002 report available at https://www.bjs.gov/content/pub/pdf/cfjs0205.pdf; 2003 report available at https://www.bjs.gov/content/pub/pdf/cfjs0305.pdf; 2004 report available at https://www.bjs.gov/content/pub/pdf/cfjs0405.pdf; 2005 report available at https://www.bjs.gov/content/pub/html/fjsst/2005/tables/fjs05st501.cfm; 2006 report available at https://www.bjs.gov/content/pub/html/fjsst/2006/tables/fjs06st501.pdf; 2007 report available at https://www.bjs.gov/content/pub/html/fjsst/2007/fjs07st.pdf; 2010 through 2015 reports available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf and http://

*Booker* was decided—it was 64.2 percent; and it reached its peak in 2009, at 68.2 percent.[41] By 2015, it had inched back down to 63.3 percent.[42]

On its face, the fact that the average length of sentences did not decrease after *Booker*, could be surprising. Even more surprising is that the percentage of tax offenders who received a custodial sentence appears to have increased for the first four years after *Booker*. However, much of this inertia in the first four years after *Booker* can be explained by the time it took for the courts to fully appreciate the effect of *Booker* and how judges view the guidelines even after the Supreme Court converted them from mandatory to advisory.

### ¶ 2 Continuing Importance of the Guidelines

In the years following *Booker*, a series of cases provided additional guidance to courts as to how they should view the guidelines.[43] Eventually, case authority settled on the district court being required to accurately calculate the guidelines, to use them as a "starting point," but to then impose whatever sentence is consistent with the seven factors listed in 18 U.S.C. § 3553(a). Why did judges continue on the same path even after *Booker*, at least for tax sentences?

Although the guidelines are only one of the many factors—the "starting point"— that courts are required to consider at sentencing, for some judges, the guidelines remain very influential. Absent fact-specific circumstances surrounding the nature of the crime or the history and characteristics of the defendant, many judges consider a guideline sentence the default result. Why? For a handful of reasons.

First, the guidelines were designed to account for the other six Sec. 3553(a) factors, and for that reason many judges trust them. Judges also by and large respect the process by which they were created and updated, as fellow judges played a central role in both the drafting and revisions of the guidelines.

Second, imposing a sentence within the guidelines is easier, more comfortable, and less risky in the eyes of many judges. A large if not overwhelming percentage of sitting federal judges in 2017 have no experience with sentencing from 30 years ago, before the guidelines were adopted. For those judges who first touched a federal criminal case after 1987, either as a judge or practitioner, most of their experience would have been when the guidelines were mandatory in the 18 years between 1987 and 2005. Even without the guidelines being mandatory, they are required to accurately calculate the

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www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Tax-Fraud_FY14.pdf.

[41] *Id.*

[42] *Id.*

[43] See, e*.g., Rita v. United States*, 551 US 338 (2007).

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VER: [SC_00755-Master:13 May 17 02:10][MX-SECNDARY: 12 May 17 07:53][TT-: 23 Sep 11 07:01 loc=usa unit=00750-ch0009vol069] 0



guidelines and use them as a starting point. It is hard to get the guidelines out of your mind if you are a sentencing judge, and there is comfort in hewing to the well-worn path of the guidelines. Within-guidelines sentences are rarely if ever reversed on appeal, and few busy judges enjoy doing anything twice.[44]

Third, using the guidelines in many situations avoids unwarranted sentencing disparities, which is a real concern that drove Congress to require guidelines in the first place (without regard to whether seeking longer sentences is appropriate). Particularly considering the guidelines' stated purpose of focusing on deterrence as a driving force in sentencing tax offenders, the fact that judges continue to use the guidelines as an anchor in most cases is not surprising. Further, the Department of Justice and even the Probation Office—an arm of the court—base their sentencing recommendations on the guidelines despite that the guidelines are only one of the seven factors in Section 3553(a). This is one of the main reasons that the Department of Justice ("DOJ") still treats the guidelines as effectively mandatory for internal purposes, by continuing to require that prosecutors obtain supervisory approval to seek a non-guideline sentence. In addition, for many reasons, the DOJ cares about consistency in tax matters more than almost any other category of cases.

## ¶ 907 HIGH-PROFILE CASES WITH LIGHTER SENTENCES RETURN

Two recent cases involving undisclosed foreign bank accounts show that judges are exercising their discretion again.

"Beanie Baby" magnate Ty Warner hid more than $100 million in Swiss bank accounts and failed to report $25 million of interest earned on his hidden funds. He was prosecuted, and pled guilty. He admitted the conduct and that the tax loss was $6 million. After paying the required penalty of 50 percent of the high account balance, a total of $53.6 million, and the delinquent taxes, Warner was sentenced. His guideline range was 46 to 57 months, after pleading guilty, just above the range that would have applied to Skitch Henderson's conduct. Recognizing Warner's history of philanthropy and good works, the court imposed a *straight probationary sentence with no incarceration*. The government appealed, arguing the sentencing court imposed an unreasonable sentence. The Seventh Circuit disagreed, and in so doing accepted Warner's argument that general deterrence—deterring other would-be tax evaders—was served by the large penalty.[45] This approach gives short shrift to the policy statements in the guidelines that emphasize general deterrence, and shows that the district court and the Circuit elevated the offender's history and characteristics over the guidelines and general deterrence.

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[44] *See generally Rita*, 551 US 338 (appropriate for appellate courts to presume that a within-guideline sentence was reasonable).

[45] *United States v. Warner*, 792 F3d 847, 861 (7th Cir 2015).

The *Warner* case was not unique. In February 2017, a district court in Virginia sentenced Dan Horsky, a former business school professor who had hidden $220 million in offshore accounts, underreported gain by $40 million, and evaded $18 million of taxes.[46] Even after accepting responsibility, Horsky's guideline range was 57 to 71 months.[47] Despite these eye-popping figures and a government recommendation of 20 months with a heavy emphasis on general deterrence in its sentencing papers, the district court sentenced Horsky to 7 months incarceration.[48]

It seems that Skitch Henderson's six-month sentence—meted out for general deterrence—would be at home in today's "advisory" guidelines world as it was in the 1970s.

## ¶ 908 PROPOSED GUIDELINES: THE FUTURE

### ¶ 1 Overview

Ty Warner and Dan Horsky may become the new normal in tax sentences. There is hope on the horizon for tax offenders seeking non-prison and shorter sentences, in the form of the most-recent proposed guideline amendments.

As noted above, it appears that the percentage of tax offenders who receive a custodial sentence and the average sentence imposed have both peaked and are slowly declining, in spite of the fact that the average recommended guideline has continued to inch up.[49] Between 2011 and 2015, the average minimum guideline recommended sentence in tax cases increased from 24 to 26 months (roughly correlated to Offense Levels 17 and 18), but at the same time the average sentence that judges actually imposed decreased, from 18 to 17 months (roughly correlated to Offense Levels 15 and 14). In fact, the percentage of within-guideline sentences imposed has plunged in those five years, from 37.1% to just 25%. Most or all of this reduction is attributable to judges exercising their discretion to impose below-guidelines sentences, over the government's objection: each year judges were more likely to impose a sentence below the minimum guideline recommendation *even if* the government wasn't recommending a below-guideline sentence.

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[46] Department of Justice February 10, 2017 press release, "Former University Business Professor sentenced to Prison for Hiding over $220 Million in Offshore Banks," available at, https://www.justice.gov/opa/pr/former-university-business-professor-sentenced-prison-hiding-over-220-million-offshore-banks.

[47] Government's Sentencing Position in *United States v. Dan Horsky*, EDVA Case NO. 1:16-CR-224, Docket No. 26, at 1.

[48] DOJ February 10, 2017 press release.

[49] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY15.pdf.

### ¶ 2 Recent Recidivism Study Supports Lower Tax Sentences

In March 2016, the Sentencing Commission published a study of recidivism (re-arrest, reconviction, and re-incarceration) rates. This study shows the wide recidivism chasm between offenders in the various Criminal History categories, as well as between young and old offenders, and violent versus non-violent offenses. The average tax offender scores well in every category.

According to the March 2016 study, judges sentencing tax offenders should expect never to see them again, which can't be said about many other categories of offenders. The average tax offender is 50 years old. Over 81 percent of tax offenders have little or no criminal history. Although not specifically identified in the 2015 Tax Fraud synopsis, in our experience tax offenders also tend to be better educated that average federal defendants as well.

The vast majority of tax offenders have little or no criminal history, and the re-arrest rates for persons with zero criminal history points was just 30.2 percent, compared to 81.5 percent for those who had more than ten points. Interestingly, there was a large re-arrest rate jump between those with zero criminal history points—which includes never-arrested persons as well as those convicted of minor offenses or an offense more than 10 years old—and those with just one point, from 30.2 percent to 46.9 percent. This highlights the recidivism—and, consequently, risk—differences between true first-time offenders and merely low-level or infrequent offenders.

Type of offense, age, and education also cut in favor of tax offenders. Fraud offenders, including tax, had the lowest recidivism rate among all identified categories, at 34.2 percent. Compare that to firearms offenses, at nearly 70 percent. Older offenders present less recidivism risk, with 70 percent of teenage offenders reoffending compared to just 14 percent of those over 60 years old. Nineteen percent of college graduates reoffend compared to 60 percent of high school dropouts.

The study made a strong statement for alternatives to incarceration, which the guidelines have, unfortunately and counterproductively, disfavored for tax offenders since 1987. Offenders with sentences of straight probation and between zero and six months shared a low likelihood of reoffending, at roughly 35 percent. Offenders receiving sentences above six months, however, reoffended at roughly 50 percent for all durations above 6 months.

Given that tax offenders aren't likely to reoffend, two of the §3553(a) factors—specific deterrence of the offender and protecting the public from future crimes of the offender—strongly suggest that the appropriate result is little or no incarceration for most tax criminals.

### ¶ 3 Proposed Amendments

In late 2016, nearly 30 years after the House urged that the guidelines be used to reduce overcrowding and encourage non-prison sentence, the Sentencing Commission finally adopted a goal to "encourage the use of alternatives to incarceration."[50] That shift in focus may reshape the guidelines to the benefit of tax offenders, among others, by combining Zones B and C of the sentencing table and reducing Offense Levels for "First Offenders."[51]

The effect of combining Zones B and C of the sentencing table would be to encourage judges to impose non-prison sentences on more offenders, which dovetails with the Commission's 2016 goal. As the table currently exists, a guideline range in Zone B permits judges to substitute alternative confinement, such as home detention or a halfway house, for imprisonment. On the other hand, Zone C requires that the court impose a term of imprisonment of at least 50 percent of the guideline sentencing range. Under this proposed revision, judges will have greater flexibility to impose exclusively home-confinement or halfway house sentences for offenders in slightly higher guideline ranges.

A second proposed amendment would benefit tax offenders regardless of their sentencing zone. The Sentencing Commission intends to reduce first-time tax offenders' Offense Level by one or two points, regardless of where they fall on the sentencing grid. These reductions could have a significant impact on sentences imposed, which are already trending downward. If the sentence reductions move in lock-step with the proposed guideline reduction, 2015's average sentence of 17 months would drop to as low as 12 months. Thirty years after the tax guidelines were adopted with the stated goal of increasing average sentences from 12 months, *Booker* and guideline amendments may bring us back to where we started with Skitch Henderson and his fellow pre-guideline offenders. As recognized by the House of Representatives in 1984 and experts commenting on the guidelines in 1987, and confirmed by the Sentencing Commission's 2016 report, non-prison and short sentences can be appropriate for most tax offenders. Judges can be trusted to sort out the rare offender who deserves a stiffer sentence from the run-of-the-mill tax offender whose felony conviction alone deters him and many others from future crimes.

Although the proposed amendments did not pass in 2017, they remain on the Commission's list of tentative priorities for 2017-2018.[52]

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[50] http://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2017-priorities.

[51] http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf; http://www.ussc.gov/about/news/press-releases/december-9-2016 (describing the purposes of the proposed amendments).

[52] United States Sentencing Commission Notice of Proposed 2017-2018 Priorities, 82 FR 28381 (June 23, 2017).

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## ¶ 909 CONCLUSION

The guidelines were adopted in large part to reduce sentencing disparities. However, this goal does not mandate lengthy sentences for tax offenders, merely uniform ones. So long as equal offenders are treated equally, the guidelines will have achieved their primary goal. Thirty years ago, the tax guidelines were hijacked by the hard-on-tax-crime crowd, and in 1993, they succeeded in increasing average tax sentences and obtaining custodial sentences for more tax offenders. However, as reflected in the 2016 recidivism study, coming down hard on older, well-educated tax offenders may be both unnecessary and a waste of scare prison resources. The Sentencing Commission is using its data to propose changes to the guidelines that will better reflect an offender's continuing potential risk of reoffending. Judges are already moving in this direction in cases such as *Warner* and *Horsky*, and the proposed guideline amendments should promote uniformity while treating tax offenders appropriately in comparison to other offenders who pose a higher risk to society.