

## GENERAL REMARKS ON THE JUDICIAL SENTENCING SYSTEM IN THE UNITED STATES. REFLECTIONS ON THE FEDERAL SENTENCING GUIDELINES

***ABSTRACT** - Sentencing rules and sentencing procedure in the American criminal law have been chosen as main topic of the article. The first part of the paper deals with characteristics of American criminal procedure based on adversarial and accusatorial principles as well as with the role of jury as a major foundation of the American legal system. The second part analyses provisions regarding sentencing and judgment procedures included in the US Code and Federal Sentencing Guidelines. In addition, it briefly explains the influence of the US Supreme Court on the development of the sentencing rules.*

Nevertheless their apparent simplicity, the sentencing rules have an exceptionally complicated nature. In the criminal tradition, statement that the criminal penalty should be the basic reaction to the committed crime, has in fact become a postulate. The penalty is a legal but also a social consequence of the criminal conduct. The principle aims of the penalty include: fairness (punishment as a repay, element of re-prise), deterrence (preventive function), education (compensatory function), isolation and elimination (for example unconditional imprisonment). The essence of the penalty is the personal hardship of the perpetrator, specific, just payment reflecting the condemnation and moral retribution for the evil of the committed crime. On the other hand, penalty should be also an instrument of the perpetrator's improvement (sensu largo). The level of this personal hardship most of all comes from the rules

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and factors concerning the imposition and execution of the particular punishments. Those sentencing rules and factors should allow adequately and flexibly applying criminal penalties and at the same time – supporting the achievement of the penalty's aims. Unfortunately, the criminal law science has not so far compiled any concept of a different (than criminal punishment) reaction to the offense. That is why the sentencing rules and factors have become more important.

Reflections around very formalized, yet dynamic sentencing system in the United States, around institutions of Federal Sentencing Guidelines or Presentence Report should provide a comparative diversification and intensification of the constantly up to date discussion and search for the more effective forms of the legal and criminal reactions to the committed crime with special emphasis on a deeply humanistic perspective of the position of the individual in the social group.<sup>1</sup>

## CHARACTERISTIC FEATURES OF THE AMERICAN CRIMINAL PROCEDURE

Criminal procedure in the United States is based on the adversarial and accusatorial principles in their most comprehensive form. They are co-responsible for the structure of the procedure which begins with the claim of the entitled subject. In case of the American criminal procedure, it is the prosecutor (on the federal level – United States Attorney<sup>2</sup>) who, usually during 48 hours since the suspects' arrest, issues a complaint. A complaint is a written statement of the essential facts constituting the offense charged<sup>3</sup>. It serves as the official charging document until an indictment is issued.

- 1 See: Bojarski M., Filar M., Filipkowski W., Górniok O., Hofmański P., Kalitowski M., Kamieński A., Paprzycki L.K., Plywaczewski E., Radecki W., Sienkiewicz Z., Siwik Z., Stefański R.A., Tyszkiewicz L., Wąsek A., Wilk L., Kodeks Karny. Komentarz., pod red. O. Górniok, wyd. 2, Warszawa 2006, Marek A., Komentarz do kodeksu karnego. Część ogólna, Warszawa 1989, Gardocki L., Prawo karne., wyd. 10, Warszawa 2004, Bojarski M., Giezek J., Sienkiewicz Z., Prawo karne materialne. Część ogólna i szczególna., Warszawa 2006r., s. 261 i n., Szczygieł G., Kary długoterminowe a cele wykonywania kary pozbawienia wolności., [in:] Gardocka T. (ed.), Kary długoterminowe : polityka karna, wykonywanie, warunkowe zwolnienia., Warszawa 2006, Beccaria C., O przestępstwach i karach., Warszawa 1959, p. 88, Strzembosz A., O nowe ujęcie celów kary w ustawodawstwie karnym., PiP 1989, nr 11, Tobis A., Racjonalizacja kary w przygotowywanej reformie polskiego prawa karnego., PiP 1991, nr 12, Wróblewski B., Penologia. Socjologia kar., Wilno 1926, p. 228, Cieślak M., O węzłowych pojęciach związanych z sensem kary., NP 1969, p. 203, A. Gaberle, Nierozłączna triada. Przystępczość. Przystępca. Społeczeństwo., Gdańsk 2003, T. Bojarski, Kilka uwag ogólnych o środkach reakcji na czyny zabronione stanowiące przestępstwa i wykroczenia., [in:] Nauki penalne wobec problemów współczesnej przystępczości., Księga jubileuszowa z okazji 70. rocznicy urodzin Prof. Andrzeja Gaberle., Wolters Kluwer Polska 2007. and the cited literature.
- 2 There are 93 United States Attorneys stationed throughout the United States, Puerto Rico the Virgin Islands, Guam, and the Northern Mariana Islands. The United States Attorneys serve as the nation's principal litigators under the direction of the Attorney General. See: The United States Department of Justice; US Attorney Office: [www.usdoj.gov/usao](http://www.usdoj.gov/usao)
- 3 P. 3. of the Federal Rules of Criminal Procedure. On the federal level criminal procedure in the US is regulated in the Title 18 of the US Code - Crimes and Criminal Procedure. In addition, Federal Rules of Criminal Procedures

The defendant is taken without unnecessary delay before a magistrate judge, or before a state or local judicial officer<sup>4</sup>. At this hearing, called “initial arraignment” or “initial appearance”, the arrested person receives formal notice of the charges against her. The magistrate judge decides whether the arrestee should be set free on her own recognizance, released on bail, or detained pending further proceedings and the date for a preliminary hearing is set.<sup>5</sup> At the preliminary hearing<sup>6</sup>, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.<sup>7</sup>

It is the duty of the parties to introduce the evidence concerning the case to the court and jury. The role of the judge and the jury is to evaluate this material. American procedural and evidence rules are very strict and thus limit the arbitrary control of the judge over the admissible evidence. American judge is excluded from any functions related to the search for and gathering of the evidence. The parties hold the right to call witnesses and present evidence justifying their statements and legitimacy of their thesis. The parties’ lawyers address the witnesses in accordance with the rules of cross examination (after direct questions are asked by one party, the right to examination goes to the opposing party). The judge is passive and neutral. His task is to observe the proceedings and to give the final decision upon the penal responsibility of the accused person. The parties are active and responsible for the “preparation and conduct” of the trial which is why the participation of the legal representatives is so important in the American criminal procedure.<sup>8</sup>

## THE JURY

Another characteristic feature of the American criminal procedure is the role of the jury. The institution of the jury is a major foundation of the American legal system and has its origin in the provisions of the United States Constitution<sup>9</sup>. It has been

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(F.R.Crim.P.) apply - at this moment the newest edition of December 1, 2007. State Statutes, accordant with the Constitution, regulate the state procedures differently. This article, however discuss only the federal rules.

4 Fed. R. Crim. P. 5.

5 See: J. Dressler, A.C. Michaels: Understanding Criminal Procedure, Vol. I, Lexis Nexis 2006, p. 8.

6 The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody. Fed. R. Crim P. 5.1. (c).

7 Fed. R. Crim P. 5.1. (e)

8 A. Ludwikowska, System prawa Stanów Zjednoczonych., Toruń 1996, p. 250-252.

9 In *Duncan v. Louisiana* in 1968 roku the Supreme court extended this right also to the state criminal proceedings. See: *Duncan v. Louisiana*, 391 U.S. 145 (1968).

strengthened and specified by the number of the US Supreme Court's decisions.<sup>10</sup> According to Article III and Amendment VI to the Constitution, the accused in criminal prosecutions has to right to speedy and public trial, by an impartial jury.

There are two contemporary models of the jury: the grand jury (jurors hear evidence in criminal cases and decide whether to issue an indictment) and the petit jury (jurors decide upon the guilt of the defendant in criminal procedure). As a rule, jury decides criminal sentence only in death penalty cases (only in few states this right has been given to the judge).<sup>11</sup> In other cases the judge's role is to decide on the adequate penalty. There is a clear division between the function of the jury deciding on the facts and function of the judge deciding on the law (including the fundamental duty of the judge to make sure the jury works in accordance with the binding instructions and rules of evidence). Judge can not share his opinion concerning the evidence with the jury. Rules of Evidence<sup>12</sup> include a number of control functions of the judge over the jury. The jurors are obligated by the judge to give a verdict based on the applicable law. If they violate this rule while deciding upon the guilt, the accused may appeal and as a consequence initiate a new criminal procedure. The accused may not base her appeal on the conviction because this decision is binding but she can appeal arguing that some particular legal provisions have been violated i.e. dealing with the jury instructions or refusal to admit an important evidence in the case. However, when jurors depart from the law to acquit, even when the guilt was proved "beyond reasonable doubt", the Double Jeopardy Clause of the Fifth Amendment protects the defendant from being retried for that crime. Such a competence of the jury is known as "jury nullification" and is a subject of many controversies and never-ending debates.<sup>13</sup>

It should be emphasized however, that the participation of the jury in the criminal procedure is regulated differently in the state legislations. The grand jury, deciding in all the criminal cases, exists only in 14 states. In practice, a vast majority of

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10 The Supreme Court has for example refused to recognize a right to jury trial when the charge that the defendant faces carries a penalty of six months or less. It also decided that the jury trial was optional rather than mandatory in federal felony cases and gave defendants the option of dispensing with the jury and proceeding to trial before a judge alone. N.J. King: *The American Criminal Jury*, 62 *Law&Contemp. Probs.* 41 (Spring 1999), p. 45-47.

11 H: Leiterman: *The Citizens Jury*, "Social Education", November/December 1999, p. 462-464.

12 Federal Rules of Evidence were adopted by the US Congress in 1975 (at the moment the amended version of December 1, 2006 is in force). Most states have accepted them as model solution and implemented in their legislation.

13 N.J. King, *op. cit.*, p. 49-50. For more on the jury nullification: Steven S.P. Grossman: *An Honest Approach to Plea Bargaining*, 29 *Am. J. Trial. Advoc.* 2005-2006, p. 101; S.W. Howe: *Value of Plea Bargaining*, 58 *Okla. L. Rev.* 2005, p. 559., J.A. Cook III: *All Aboard! The Supreme Court, Guilty Pleas and the Railroad of Criminal Defendants*, 75 *U. Colo. L. Rev.* 2004, p. 963.

cases are settled by plea bargaining, when the prosecutor negotiates with the defense and the case is closed without the jury trial.<sup>14</sup>

## **SENTENCING AND JUDGMENT PROCEDURE**

Decision regarding the type and severity of the punishment is, in most of the cases, left in the hands of the judge. General rules of sentencing and judgment are included in the provisions of the Criminal Procedure of the US Code<sup>15</sup> and in the Federal Rules of Criminal Procedure<sup>16</sup>.

The basic rule of the American sentencing system is that the court must impose sentence without unnecessary delay. Before the sentence is imposed, the probation officer must conduct a presentence investigation and submit a report to the court. The presentence report includes all the necessary guidelines and instructions provided by the Sentencing Commission, the calculation of the offence level and criminal history category. In addition, the report contains information regarding general characteristics of the defendant (i.e. prior criminal record, financial condition, any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment). The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. Before imposing the sentence the court must provide the defendant's attorney an opportunity to speak on the defendant's behalf and address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudi-

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14 According to the data of the Bureau of Justice Statistics in 95% of state criminal cases in 2002 the trial did not occur. See: M.R. Durose, P.A. Langan: State Court Sentencing of Convicted Felons, 2002. Statistical Tables. May 2005. NCJ 208910, p. 7. [www.ojp.usdoj.gov/bjs/pub/pdf/sc0204st.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/sc0204st.pdf). For more on the plea bargaining: J.D. Jackson: Making Juries Accountable, 50 Am. J. Comp. L., 2002, p. 477; P. Butler: In Defense of Jury Nullification, 31 Litigation, 2004-2005, p. 46; S.D. Jordan: The Criminal Trial Jury: Erosion of Jury Power, 5 How. Scroll: Soc. Just. L. Rev., 2002, p. 1.

15 18 U.S.C., p. II, ch. 227, subch. A, § 3553.

16 32 F.R.Crim.P.

cation, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order.<sup>17</sup>

## SENTENCING AND JUDGMENT RULES

### Rules included in the US Code – Criminal Procedure

There are 123 chapters of Part I of Title 18 of the US Code (*Crimes*) where different federal crimes<sup>18</sup> are categorized and specific ranges of penalty for their commitment are assigned. In Part II of Title 18 of the US Code (*Criminal Procedure*), especially in § 3553, additional rules of sentencing are included.

According to the provisions of § 3553 the court shall impose a sentence sufficient, but not greater than necessary. There are seven basic factors which have to be considered when imposing a sentence. The first one is the nature and circumstances of the offense and the history and characteristics of the defendant. The second part includes elements concerning sufficiency of the penalty according to the circumstances of the individual case so the penalty reflects the seriousness of the offense (repressive element), promotes respect for the law (compensation element) which influences legal awareness of the society, protects the public from further crimes of the defendant (preventive aspect) as well as provides just punishment for the offense (educational aspect).<sup>19</sup> There are six classic justifications for criminal punishment: prevention, restraint, rehabilitation, deterrence, education and retribution.<sup>20</sup>

The third part indicates that the court should consider the kinds of sentences available. The fourth and fifth parts deal with the guidelines issued by the Sentencing Commission including exceptions provided by the law. Sixth and seventh rules state that in determining the particular sentence to be imposed the court should consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct and the need to provide restitution to any victims of the offense.<sup>21</sup>

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17 32 (b) – (k) F.R.Crim.P.

18 According to the FBI data, federal jurisdiction deals with violations of over 200 categories of federal law. See information of the official FBI website: <http://www.fbi.gov/hq.htm>. This number changes depending on the US Congress entitled to amend the US Code.

19 18 U.S.C. § 3553 (a) (1)-(2).

20 In *Ewing vs California* the Supreme Court quoting adequate literature emphasized those justifications. See: *Ewing vs California*, 538 U.S. 11 (2003)

21 18 U.S.C. § 3553 (a) (3)-(7).

It is important to note that the court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.<sup>22</sup>

## **Rules included in the Federal Sentencing Guidelines**

The guidelines (*Federal Sentencing Guidelines*) issued by the Sentencing Commission mentioned above constitute a characteristic feature of the American sentencing system.

The US Sentencing Commission (hereafter Commission) is an independent agency in the judicial branch of the US government. It was established by the Sentencing Reform Act of 1984.<sup>23</sup> There are three principal purposes of the Commission which can be described as three functions: creative, advisory and informative. Those purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.<sup>24</sup>

Commission consists of seven voting members and one nonvoting member. The President, after number of consultations, appoints the voting members of the Commission, by and with the advice and consent of the Senate for the term of 6 years. The Attorney General, or the Attorney General's designee, is an *ex officio*, nonvoting member of the Commission.<sup>25</sup>

The main duty of the Commission is to promulgate and distribute to all courts of the United States and to the United States Probation System<sup>26</sup> guidelines for use of a sentencing court in determining the sentence to be imposed in a criminal case. Other duties listed issuing general policy statements regarding application of the guide-

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22 18 U.S.C. § 3553 (c).

23 Sentencing Reform Act of 1984, Pub. L. No. 98-473. Other information from the Sentencing Commission website: [www.ussc.gov](http://www.ussc.gov)

24 The establishment and purposes of the Commission are included in 28 U.S.C. § 991 (b), § 994. See also: Overview of the United States Sentencing Commission on the Commission's website: [www.ussc.gov](http://www.ussc.gov)

25 28 U.S.C. § 991 (a) and § 992 (a)

26 The U.S. Probation and Pretrial Services System carries out probation and pretrial services functions in the U.S. district courts. For details see: <http://www.uscourts.gov/fedprob/introduction.htm>

lines including the appropriate use of sanctions, conditions of probation and supervised release, temporary release and fines.<sup>27</sup>

The Commission fulfilled its duties by creation of the Federal Sentencing Guidelines (hereafter Guidelines) which were drafted and accepted during first three years' of the Commission's work and came into force on November 1, 1987. The guidelines have been frequently amended and modified.<sup>28</sup>

When working on the Guidelines the Commission used three objectives that Congress, in enacting the new sentencing law, sought to achieve: honesty, uniformity and proportionality in sentencing. The first objective was to eliminate the chaos and deception functioning in the previously adopted system which required a judge to impose an indeterminate sentence that was automatically reduced in most cases by 'good time' credits. In addition, the parole commission was permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court. The uniformity objective was to narrow the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Finally, the proportionality was to be achieved by a system that imposed appropriately different sentences for criminal conduct of different severity.<sup>29</sup>

Reform of the sentencing system was of a revolutionary nature. So far the federal judges used and unlimited discretion in sentencing (within the particular penalty range established by the law). They were solely responsible for the decision concerning the factors which would influence the final type and severity of the imposed punishment.<sup>30</sup>

The federal parole system established in 1910 was based on the strong faith in the effectiveness of the prisoners' rehabilitation. Creation of the Sentencing Commission and, as a consequence, creation of the Federal Sentencing Guidelines which eliminated arbitrary sentencing by limiting judges' discretion in choosing the punishment, was a decision controversial enough to end up in the United States Supreme Court. In 1989 in *Mistretta v. United States* the Supreme Court had to decide

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27 28 U.S.C. § 994 (a) (1),(2),(3)

28 Each new edition of the Guidelines comes along with special Guidelines Manual which includes the text of the Guidelines with broad comments and instructions. At the moment as of June 2008 the Federal Sentencing Guidelines of November 1, 2007 are in force. See: United States Sentencing Commission, Guidelines Manual (Nov. 2007).

29 United States Sentencing Commission, Guidelines Manual, §1A1.1 (Nov. 2007).

30 More on the subject: C. Green: Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines, 93 GEO. L.J. 2005, p. 396.

if the reform establishing the Sentencing Commission violated the US Constitution. In its verdict the Court rejected arguments concerning the violation of the separation of powers principle and confirmed that the Commission is an independent agency of the judicial branch established in accordance with the Constitution.<sup>31</sup>

The Federal Sentencing Guidelines were effective and obligatory in the sentencing system in the United States for almost 20 years.

## **PROCEDURE OF THE FEDERAL SENTENCING GUIDELINES**

Mechanism of the Federal Sentencing Guidelines is based on the offenses' division into particular levels depending on their severity. Each federal offense is assigned to one of 43 offense levels. In each case, a particular provision of the US Code or other law which was violated is provided and constitutes the legal basis for criminal responsibility for the commitment of the offense. In addition, characteristic features or specific circumstances of the offense may be described and allow increasing or decreasing the offense level. Homicide may be an example here. Base offense level for the first degree murder is the highest one – 43rd. Second degree murder is assigned to level 38. Involuntary manslaughter is set at level 12 if the offense involved criminally negligent conduct but the provision states that a greater level should be applied if the offense involved reckless conduct (level 18) or if the offense involved the reckless operation of a means of transportation (level 22).<sup>32</sup>

All offenses are divided into 26 main parts (Offenses Against the Person, Basic Economic Offenses, Offenses Involving Public Officials, Offenses Involving Drugs and Narco Terrorism etc.), then sections and paragraphs dealing with individual criminal conducts. Each offense, set at the appropriate level, is completed with a detailed commentary containing additional clarifications and examples.<sup>33</sup>

While deciding about the sentence the judge should find the right offense level for the committed crime. There are also additional regulations (Adjustments) to be considered and decrease or increase the conclusive level of the offense. Those Adjustments are divided into 5 parts and deal with:

1. Victim-Related Adjustments,
2. Role in the Offense,

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31 *Mistretta v. United States*, 488 U.S. 361 (1989).

32 United States Sentencing Commission, *Guidelines Manual*, §2A1.4. (Nov. 2007).

33 Ch. 2 – Offence Conduct, United States Sentencing Commission, *Guidelines Manual*, (Nov. 2007), p. 44-321.

3. Obstruction and Related Adjustments,
4. Multiple Counts,
5. Acceptance of Responsibility.

The main parts are divided into paragraphs dealing with particular circumstances.<sup>34</sup> For example, if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, the offense level should be increased by 4.<sup>35</sup>

Another step is to assign the defendant with one of 6 categories of criminal history and criminal livelihood. These categories include specific number of points depending on the defendant's history (prior sentences of imprisonment, etc.).<sup>36</sup>

Based on those divisions and categories the Commission prepared a special Sentencing Table where the horizontal axis shows Criminal History Category (I to VI depending on the number of criminal history points), and the vertical axis lists offense levels (1-43). At the point of the two axes' intersection, American judge finds the appropriate range for the sentence to be imposed. The range is given in months of imprisonment. At some points the upper level of punishment range reaches "life" (i.e. 360 – life) and the entire 43rd level is marked with "life" sentence only.<sup>37</sup>

The Sentencing Table's grid is additionally divided into 4 „zones” (A – D). If the defendant is to be given the penalty listed in zone A (0 to 6 months of imprisonment) a guideline of sentence of straight probation is available. Zones B and C allow for probation or supervised release conditioned upon some confinement. For ranges in zone D, a within-guideline sentence requires imprisonment.<sup>38</sup> It should be noted that only first 13 levels stay in zones A-C and in the field of the Criminal History Category VI zones A-C lie only within levels 1-6.

The Sentencing Guidelines also establish relations between the guidelines ranges and penalty ranges provided in the statutes. Sentence may be imposed at any point within the guideline range, so long as the sentence is not outside the statutory limits. If the entire range is above the statutory maximum, the maximum becomes the guideline sentence. The statutory minimum becomes the guideline sentence if it is

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34 Ch. 3 – Adjustments, United States Sentencing Commission, Guidelines Manual, (Nov. 2007), p. 321-354.

35 United States Sentencing Commission, Guidelines Manual, §3B1.1. (Nov. 2007).

36 Ch. 4 – Criminal History and Criminal Livelihood United States Sentencing Commission, Guidelines Manual, (Nov. 2007), p. 354 - 380.

37 Ch. 5. – Determining the Sentence - P. A. - Sentencing Table, United States Sentencing Commission, Guidelines Manual, (Nov. 2007), p. 380.

38 United States Sentencing Commission, Guidelines Manual, §5 B1.1 (Nov. 2007).

greater than any sentence in the guideline range.<sup>39</sup> In those provisions the rules for multiple counts and total sentences are included. In addition, the Sentencing Commission prepared detailed rules concerning restitution and fines.<sup>40</sup>

Originally there were two main exceptions from the obligation to impose sentences within the Federal Sentencing Guidelines. According to the provisions of the US Code, the first departure was possible if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.<sup>41</sup> Secondly, the Sentencing Guidelines include two parts dedicated to the departures. Part K states that on the motion of the government, the court has the right to impose a sentence below a level established by the statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.<sup>42</sup> In part H the judge will find certain offender characteristics which may or may not influence the sentence and allow for departure.<sup>43</sup> As a consequence the Federal Sentencing Guidelines seriously limited the sentencing discretion of American judge.

## **INFLUENCE OF THE UNITED STATES SUPREME COURT ON THE SENTENCING SYSTEM**

The Supreme Court's decision in *Koon v. United States*<sup>44</sup> in 1996 changed the situation by granting the judges wider scope of discretion in determining the departure circumstances. As a result, more sentences from outside the Federal Guidelines' ranges were imposed (in 2001 it was approx. 36%). The statistics have also shown clear disproportions in the severity of punishments imposed in different jurisdictions.<sup>45</sup>

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39 United States Sentencing Commission, Guidelines Manual, §5G1.1 (Nov. 2007).

40 Ch. 5. – Determining the Sentence - P. E. – Restitution, Fines, United States Sentencing Commission, Guidelines Manual, (Nov. 2007), p. 405-413.

41 18 U.S.C. §3553 (b)(1)

42 United States Sentencing Commission, Guidelines Manual, §5K1.1 (Nov. 2007).

43 For example education, emotional state or socio-economical status can not be considered as factors determining such decision. Detailed Departures' regulations are included in part K. See: Chapter 5. – Determining the Sentence - P.K. – Departures, United States Sentencing Commission, Guidelines Manual, (Nov. 2007), p. 433-452.

44 *Koon v. United States* 518 U.S. 81 (1996).

45 K.D. Behre, A.J. Ifrah: You be the Judge: The Success of Fifteen Years of Sentencing under the United States Sentencing Guidelines [w:] Perspectives of the Federal Sentencing Guidelines and Mandatory Sentencing, 40 Am. Crim. L. Rev. 2003, p. 7.

Another turn was brought by the US Congress in 2003 when the controversial Feeney Amendment was passed and again limited the judicial discretion and made the Federal Guidelines more mandatory by codifying a *de novo* appellate review standard for all the departures. The sentencing power was left in the hands of the appellate judges. The obligatory system of Federal Sentencing Guidelines and most of all, limited possibility of departures from the penalty ranges provided by the Guidelines triggered a series of discussions and controversies concerning the scope of judicial discretion in sentencing. Most judges were convinced that the situation was definitely unfavorable and negatively influenced the federal judicial system.<sup>46</sup>

The final solution came along with the 2005 Supreme Court's decision in *United States v. Booker*<sup>47</sup>. It was another turning point in the history of American judiciary. The Supreme Court declared that the mandatory character of the Federal Sentencing Guidelines violates the provisions of the VI th Amendment to the US Constitution granting the right to trial by impartial jury. It argued that the system requires the judge to increase the penalty based on the facts which were unknown to the jury and were not confessed to by the defendant. The Court decided that the provisions of the 18 U.S.C. § 3553 were unconstitutional and rendered the Federal Sentencing Guidelines effectively advisory. American judges have been obligated to "consult" the Guidelines and consider them while imposing the sentence. As a result, after almost twenty years of mandatory federal sentencing system, "the judicial discretion has been restored and prosecutorial power has been curtailed"<sup>48</sup>. In practice however, after the verdict in *United States v. Booker*, American federal courts have not changed the sentencing procedure and still use Federal Sentencing Guidelines as a basis for the decision on the type and severity of the punishment.<sup>49</sup>

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46 G.R. Bissonnette, *op.cit.*, s. 1509-1511.

47 It was a joint decision in *United States v. Freddie J. Booker and United States v. Ducan Fanfan* 543 U.S. 220 (2005).

48 S.D. Jordan: *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 *Pepp. L. Rev.* 2006, p. 615.

49 The 2006 data in: L.B.Campbell, H.J. Bemporad: *An Introduction to Federal Sentencing*, Office for the Federal Public Defender Western District of Texas 2006, p. 2.