United States Sentencing Commission

2024-2025 Amendment Cycle

Public Comment on Certain Proposed Amendments
90 FR 128

UNITED STATES SENTENCING COMMISSION

2024-2025 PUBLIC COMMENT ON PROPOSED AMENDMENTS FOR CAREER OFFENDER, FIREARMS OFFENSES, CIRCUIT CONFLICTS, AND SIMPLIFICATION

90 FR 128

Proposed Amendments to the Sentencing Guidelines (Preliminary)

December 19, 2024

This document collects the proposed amendments to the sentencing guidelines, policy statements, and commentary, in the "reader-friendly" form in which they were made available at the public meeting on December 19, 2024. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the proposed amendments as submitted will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register. In addition, an updated "reader-friendly" version of the proposed amendments as submitted will be posted on the Commission's website at www.ussc.gov.

The proposed amendments and issues for comment will be subject to a public comment period running through **February 3, 2025**, and a reply comment period running through **February 18, 2025**. Comments during the reply phase are limited to issues raised in the original comment period. Public comment received after the close of the comment period may not be considered. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.ussc.gov.

PROPOSED AMENDMENTS

1. CAREER OFFENDER

2. FIREARMS OFFENSES

3. CIRCUIT CONFLICTS

4. SIMPLIFICATION OF THREE-STEP PROCESS

SUPPLEMENTARY INFORMATION

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See* Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this document are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendments, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

PROPOSED AMENDMENT: CAREER OFFENDER

Synopsis of Proposed Amendment: In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "revising the 'categorical approach' for purposes of the career offender guideline." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It would eliminate the categorical approach when determining whether an offense qualifies as a crime of violence by providing a definition for "crime of violence" that is based on a defendant's conduct and a definition of "controlled substance offense" that is limited to specific federal drug statutes. These changes are intended to correct some of the "odd" and "arbitrary" results that the categorical approach has produced relating to the "crime of violence" definition (*see*, *e.g.*, *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)), and to provide a definition of "controlled substance offense" that is based on enumerated federal drug trafficking offenses.

The Categorical Approach as Developed by Supreme Court Jurisprudence

Several statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the "categorical approach" and "modified categorical approach," as set forth by Supreme Court jurisprudence. The categorical and modified categorical approaches require courts to look only to the elements of the offense, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts may look to certain additional sources of information, now commonly referred to as the "*Shepard* documents," to determine the elements of the offense of conviction. *See* Taylor v. United States, 495 U.S. 575 (1990) (holding that, under the "categorical approach," courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); Shepard v. United States, 544 U.S. 13 (2005) (holding that courts may use a "modified categorical approach" in cases where the statute of conviction is "overbroad," that is, the statute contains multiple offenses with different offense elements).

Application of the Categorical Approach in the Guidelines

Supreme Court jurisprudence on this subject pertains to statutory provisions (*e.g.*, 18 U.S.C. § 924(e)), but courts have applied the categorical and modified categorical approaches to guideline provisions. For example, courts have used these approaches to determine if a conviction is a "crime of violence" or a "controlled substance offense" for purposes of applying the career offender guideline at §4B1.1.

Commission data indicates that of the 64,124 individuals sentenced in fiscal year 2023, 1,351 individuals (2.1%) were sentenced under the career offender guideline. While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation.

General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Courts have criticized the categorical approach as a "legal fiction," in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to "odd" and "arbitrary" results (*e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017); United States v. McCollum, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)).

Feedback from Stakeholders

The Commission has also received input at roundtable discussions with several stakeholders with diverse perspective and expertise within the criminal justice system. Many stakeholders suggested that the Commission should eliminate the categorical approach to capture violent offenses that are currently excluded while also narrowing the scope of the "controlled substance offense" definition, particularly its reach over predicate offenses. Many stakeholders also recommend that the definition of "controlled substance offense" should only cover federal drug offenses and exclude prior state drug offenses for purposes of the career offender guideline.

Many stakeholders have remarked that the Commission should limit the number of qualifying prior offenses overall for purposes the career offender guideline. Some stakeholders suggested that the Commission should condition which convictions qualify as predicate offenses by establishing a minimum sentence length threshold.

Proposed Changes to §4B1.2

The proposed amendment would amend §4B1.2 in several ways.

First, the proposed amendment would move the definition of "controlled substance offense" from subsection (b) to subsection (a). It would also revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The proposed amendment would also move to subsection (a) the provision currently located in Commentary to §4B1.2 stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense."

Second, the proposed amendment would place all provisions related to "crime of violence" in subsection (b). It would define the term "crime of violence" based on the defendant's own offense conduct which, consistent with subsection (a)(1)(A) of §1B1.3 (Relevant Conduct), is the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. It provides a list of types of qualifying conduct that includes a "force clause" at §4B1.2(b)(1)(A) (which closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person") and provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such as forcible sex offenses, robbery, arson, and extortion. The proposed amendment would also include a provision at subsection (b)(2) that would allow certain inchoate offenses to still qualify as "crimes of violence." In addition, the proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" by using only a specific list of sources of information from the record.

Third, the proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." **Option 1** would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a) [or (b)]. **Option 2** would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Option 2 brackets the possibility of including a provision that provides that a conviction shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [three years] [two years][six months] in prison. **Option 3** would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted under §4A1.1(a) [or (b)]. All three options include two suboptions. Suboption A in each option would set the minimum sentence length requirement for purposes of both "crime of violence" and "controlled substance offense." Suboption B in each option would set the minimum sentence length requirement for purposes of "crime of violence" only.

Changes to Other Guidelines

The current definitions of "crime of violence" and "controlled substance" at §4B1.2 are incorporated by reference in several other guidelines in the *Guidelines Manual*. The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The proposed amendment would make such changes to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing

Criminal History), §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(~~b~~a) CONTROLLED SUBSTANCE OFFENSE.—

(1) DEFINITION.—The term "controlled substance offense" means an offense under 21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b), **[**or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)**]**.~~federal or state law, punishable by imprisonment for a term exceeding one year, that—~~

~~(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or~~

~~(2) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).~~

(2) ADDITIONAL CONSIDERATION.—**{**A violation of 18 U.S.C. § 924(c) or § 929(a) is ~~a "crime of violence" or~~ a "controlled substance offense" if the offense of conviction established that the underlying offense was ~~a "crime of violence" or~~ a "controlled substance offense."~~.~~ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)**}***

(~~a~~b) CRIME OF VIOLENCE.—

(1) DEFINITION.—The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding

* The text in braces currently appears in Application Note 1 of the Commentary to §4B1.2. The proposed amendment would place the text here with the changes shown in revision marks.

one year, ~~that~~—in which the defendant engaged in any of the following conduct:

(~~1~~A) ~~has as an element the~~The use, attempted use, or threatened use of physical force (*i.e.*, force capable of causing physical pain or injury to another person) against the person of another~~; or~~.

~~(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(e).~~

(B) A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) The unlawful taking or obtaining of personal property from a person, or in the presence of a person, against the person's will by means of actual or threatened force (*i.e.*, force that is sufficient to overcome a victim's resistance), or violence, or fear of injury against: (i) the person, the property of such person, or property in the custody or possession of such person; (ii) a relative or family member of the person, or the property of such relative or family member; or (iii) anyone in the company of the person at the time of the taking or obtaining, or their property.

(D) The obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(E) The willful or malicious setting of fire to or burning of property; or

(F) The use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials as defined in 18 U.S.C. § 841(c).

(~~d~~2) COVERED INCHOATE OFFENSES~~ INCLUDED~~. ~~The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit~~

~~any such offense~~An offense is a "crime of violence" if the defendant engaged in any of the conduct described in subsection (b)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense.

(3) DETERMINATION OF WHETHER AN OFFENSE IS A "CRIME OF VIOLENCE".—In determining whether an offense is a "crime of violence," the focus of inquiry is on the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. *See* subsection (a)(1)(A) of §1B1.3 (Relevant Conduct).

(4) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence," the government may only use the following sources of information from the record:

(A) The charging document.

(B) The jury instructions and accompanying verdict form.

(C) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

[(D) The judge's formal rulings of law or findings of fact.

(E) The judgment of conviction.

(F) Any explicit factual finding by the trial judge to which the defendant assented.**]**

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

Option 1 (Limiting Prior Convictions to Sentences Receiving Points under §4A1.1(a))

[*Suboption 1A (Limitation applicable to both "crime of violence" and "controlled substance offense"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.**]**

[*Suboption 1B (Limitation applicable only to "crime of violence"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means ~~(1)~~ the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that is counted separately under §4A1.1(a) **[**or (b)**]**.**]**

Option 2 (Limiting Prior Convictions Through a Sentence-Imposed Approach):

[*Suboption 2A (Limitation applicable to both "crime of violence" and "controlled substance offense"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of

a controlled substance offense)~~,~~; and (2) ~~the sentences for~~ each of at least two of the aforementioned felony convictions (A) is~~are~~ counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of this provision, "***sentence imposed***" has the meaning given the term "sentence of imprisonment" in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**three years**][**two years**][**six months**]** in prison.**]]**

[Suboption 2B (Limitation applicable only to "crime of violence"):

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means ~~(1)~~ the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. For purposes of this provision, "***sentence imposed***" has the meaning given the term "sentence of imprisonment" in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction of a crime of violence shall not qualify as a prior felony conviction under this provision if the defendant can establish that the

conviction resulted in a sentence for which the defendant served less than **[**three years**]** **[**two years**][**six months**]** in prison.**]]**

[Option 3 (Limiting Prior Convictions Through a Time-Served Approach):

[*Suboption 3A (Limitation applicable to both "crime of violence" and "controlled substance offense"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~,~~; and (2) ~~the sentences for~~each of at least two of the aforementioned felony convictions (A) is~~are~~ counted separately under ~~the provisions of §4A1.1(a), (b), or (c)~~§4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.**]**

[*Suboption 3B (Limitation applicable only to "crime of violence"):*

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~, and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)~~. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a "controlled substance offense" that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a "crime of violence" that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison.**]**

~~(c) ADDITIONAL DEFINITIONS.—~~

~~(1) FORCIBLE SEX OFFENSE. "***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.~~

~~The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(2) EXTORTION. "***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.~~

~~(3) ROBBERY. "***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.~~

(~~4~~d) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult ~~federal or state~~ conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

Commentary

Application ~~Notes~~Note:

1. ~~**Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".** For purposes of this guideline—~~

~~Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."~~

~~Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."~~

~~Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."~~

~~Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."~~

~~A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)~~

~~2. **Offense of Conviction as Focus of Inquiry.** Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.~~

~~3. **Applicability of §4A1.2.** The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.~~

~~4. **Upward Departure for Burglary Involving Violence.** There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.~~

1. **Conduct Constituting Robbery and Extortion Offenses.**—The Commission anticipates that subsection (b)(1)(A) will be sufficient to include as crimes of violence conduct that would constitute most robbery and extortion offenses that involve violence. Subsections (b)(1)(C) and (b)(1)(D) are included to provide clarity and ease of application.

Background: Section 4B1.2 defines the terms "crime of violence," "controlled substance offense," and "two prior felony convictions." Prior to **[**amendment year**]**, to determine if an offense met the definition of "crime of violence" or "controlled substance offense" in §4B1.2, courts used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

In **[**amendment year**]**, the Commission amended §4B1.2 to eliminate the use of the categorical approach and modified categorical approach established by Supreme Court jurisprudence for purposes of determining whether an offense is a "crime of violence" or a "controlled substance offense" in §4B1.2. *See* USSG App. C, Amendment **[___]** (effective **[**Date**]**). Section 4B1.2 provides a list of the federal drug statutes that qualify as a "controlled substance offense." The approach set out in the guideline for determining whether an offense of conviction is a "crime of violence" allows a court to consider the conduct of the defendant underlying the offense of conviction. The approach set forth by this guideline requires the court to consider the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The government must make a prima facie showing that an offense of conviction is a "crime of violence" only by using the limited list of sources of information, commonly referred to as the "*Shepard* documents," that Supreme Court jurisprudence has determined is permissible to determine whether a conviction fits within the definition of a particular category of crimes.

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

(a) Base Offense Level (Apply the Greatest):

(1) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **20**, if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);

(4) **16**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or

(5) **12**, otherwise.

* * *

Commentary

* * *

Application Notes:

* * *

2. **Definitions for Purposes of Subsections (a)(1) and (a)(2).—**

~~For purposes of this guideline:~~

"~~***Controlled substance offense***~~" ~~has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

"~~***Crime of violence***~~" ~~has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

(A) **Crime of Violence.—**

(i) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(C) **Felony Conviction.—**"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with

knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

* * *

(b) Specific Offense Characteristics

* * *

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **2** levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by **5** levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant

offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

* * *

Commentary

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Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

~~"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

* * *

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

* * *

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **"Crime of Violence" and "Controlled Substance Offense".—**

(A) **Crime of Violence.—**

(i) **Definition.**—"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of

another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

~~3~~4. **Definition of "Prohibited Person".**—For purposes of subsections (a)(4)(B), (a)(6), and (b)(5), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

~~10~~11. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsections (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~11~~12. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C.

§ 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note ~~7~~8).

* * *

~~13~~14. **Application of Subsection (b)(5).—**

(A) **Definitions.—**For purposes of this subsection:

~~"***Crime of violence***" and "***controlled substance offense***" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

* * *

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

* * *

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.

* * *

Commentary

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Application Notes:

1. **Definitions.**—For purposes of this guideline:

~~"***Crime of violence***" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

* * *

4. **"Crime of Violence" under Subsection (b)(1).—**

(A) **Definition.**—For purposes of subsection (b)(1), "***crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(iii) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

§4A1.1. Criminal History Category

* * *

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under subsection (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

* * *

Commentary

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Application Notes:

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4. **§4A1.1(d).**—In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in ~~§4B1.2(a). *See*~~ §4A1.2(p).

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(p) CRIME OF VIOLENCE DEFINED

~~For the purposes of §4A1.1(d), the definition of "crime of violence" is that set forth in §4B1.2(a).~~

(1) DEFINITION.—For purposes §4A1.1(d), "***crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (A) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(2) ADDITIONAL CONSIDERATIONS.—

(A) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(B) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (i) an offense described in 18 U.S.C. § 2241(c) or (ii) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) "Extortion" is obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(D) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(E) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(F) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

§4B1.4. Armed Career Criminal

* * *

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence~~, as defined in §4B1.2(a),~~ or a controlled substance offense~~, as defined in §4B1.2(b)~~, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

* * *

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence~~, as defined in §4B1.2(a),~~ or a controlled substance offense~~, as defined in §4B1.2(b)~~, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

Commentary

Application Notes:

* * *

3. **"Crime of Violence" and "Controlled Substance Offense".—**

(A) **Crime of Violence.—**

(i) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a

firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(III) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant's criminal history; *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application ~~Note~~Notes:

~~1. "***Crime of violence***" and "***controlled substance offense***" are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

1. **Crime of Violence.—**

(A) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Extortion" is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

(iv) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase

"actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(v) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

2. **Controlled Substance Offense.—**

(A) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) **Additional Considerations.—**

(i) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(iii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(iv) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(v) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(vi) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

* * *

Commentary

Application Notes:

* * *

~~2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~

~~3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.~~

2. **Crime of Violence.—**

(A) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) **Additional Considerations.—**

(i) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Extortion" is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

(iv) "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property

in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(v) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Controlled Substance Offense.—**

(A) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) **Additional Considerations.—**

(i) The term "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

(iii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

(iv) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

(v) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

(vi) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

* * *

Issues for Comment:

1. As explained above, courts use the "categorical approach" and the "modified categorical approach," as set forth in Supreme Court jurisprudence, to determine whether a conviction is a "crime of violence" or a "controlled substance offense" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions.

   The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approach provided above, that permits the court to consider the defendant's conduct underlying the offense of conviction for purposes of the "crime of violence" definition. What are the advantages and disadvantages of the "categorical approach" as opposed to the approach set forth in the proposed amendment above?

2. The proposed amendment provides that courts may consider the full scope of the defendant's conduct under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct) (*i.e.*, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense") for purposes of the "crime of violence" definition. Should the focus of the inquiry be limited to the conduct that formed the basis of the conviction? If not, should the Commission limit the consideration of the defendant's conduct in some other way? If so, how should the Commission set forth such limitation? Should the Commission limit the consideration of the defendant's conduct only to such acts and omissions that occurred "during the commission of the offense of conviction" and exclude conduct "in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" or make any other changes?

3. The proposed amendment would revise the definition of "controlled substance offense" in §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). Are there federal drug offenses that are covered by the proposed amendment but should

not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?

The Commission also seeks comment on whether, instead of excluding state drug offenses, it should limit the definition of "controlled substance offense" in some other way. For example, should the Commission keep the current definition of "controlled substance offense" and limit qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served? If so, how should the Commission set that limit and why?

4. The definition of "crime of violence" set forth in the proposed amendment above includes a "force clause" proposed at §4B1.2(b)(1)(A). The provision closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person." The Commission seeks comment on whether this definition is appropriate.

   The definition of "crime of violence" also includes provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such forcible sex offenses, robbery, arson, and extortion. The Commission seeks comment on whether the force clause set forth in proposed §4B1.2(b)(1)(A) would be sufficient to cover the other types of conduct specifically listed in the "crime of violence" definition. Specifically, the Commission seeks comment on whether the force clause would cover conduct constituting robbery and extortion offenses.

5. The definition of "crime of violence" includes a provision relating to forcible sexual acts at proposed §4B1.2(b)(1)(B). The Commission seeks comment generally on whether the scope of this provision for purposes of the "crime of violence" definition is appropriate.

6. The "crime of violence" definition includes a provision that would cover conduct constituting an arson offense at proposed §4B1.2(b)(1)(E). The Commission seeks comment generally on whether the proposed provision is appropriate.

7. The Commission seeks comment on whether the definition of "crime of violence" should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?

8. The proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" only by using a specific list of sources of information from the record. The sources of information that do not appear within brackets in the proposed amendment are specifically identified in *Shepard v. United States*, 544 U.S. 13 (2005), for use in the modified categorical approach. The sources

of information listed within brackets are comparable judicial documents identified in subsequent case law for the same purpose.

The Commission seeks comment on whether it should limit the sources of information that the government needs to make prima facie showing that an offense of conviction is a "crime of violence." Should the Commission list specific sources or types of sources that courts may consider in addition to the sources listed in the proposed amendment? If so, what documents or types of information should be included in this list? Are there any documents or types of information that should be excluded?

9. The proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." The Commission seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a "crime of violence" or "controlled substance offense" is consistent with the Commission's authority under 28 U.S.C. § 994(h). The Commission also seeks comment on each of these options. Should the Commission differentiate between "crimes of violence" and "controlled substance offenses" in setting a minimum sentence length requirement?

10. As indicated above, several guidelines use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. *See* the Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The Commission seeks comment on whether this is the appropriate approach or, in the alternative, whether any or all of these guidelines should continue to define the terms "crime of violence" and "controlled substance offense" by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the definitions contained in §4B1.2. Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

PROPOSED AMENDMENT: FIREARMS OFFENSES

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B) addressing offenses involving firearms. The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A of the proposed amendment addresses the application of §2K2.1 to machinegun conversion devices (MCDs), which are designed to convert weapons to fully automatic firearms. Issues for comment are also provided.

Part B of the proposed amendment establishes a *mens rea* requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. An issue for comment is also provided.

(A) Machinegun Conversion Devices (MCDs)

Synopsis of Proposed Amendment: Section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) employs, for different purposes, two distinct definitions of the term "firearm" drawn from separate statutory sources: 21 U.S.C. § 921(a)(3) ("Gun Control Act (GCA) definition of firearm") and 26 U.S.C. § 5845(a) ("National Firearms Act (NFA) definition of firearm"). One difference between the definitions is the inclusion of machinegun conversion devices (MCDs). Commonly referred to as "Glock switches" or "auto sears," MCDs are devices designed to convert weapons into fully automatic firearms. The NFA definition of firearm includes "machineguns," 26 U.S.C. § 5845(a), and the definition of "machinegun" includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun," 26 U.S.C. § 5845(b). Therefore, MCDs fall within the NFA definition of firearm. However, the GCA definition of firearm does not encompass MCDs. *See* 21 U.S.C. § 921(a)(3).

Section 2K2.1 uses the NFA definition of firearm for certain enhanced base offense levels. *See*, *e.g.,* USSG §2K2.1(a)(1), (3), (4), and (5). Therefore, those enhanced base offense levels apply to offenses involving MCDs. However, the remainder of §2K2.1, including the specific offense characteristics and the cross reference, uses the GCA definition of firearm. USSG §2K2.1, comment. (n.1). Therefore, MCDs do not trigger §2K2.1's specific offense characteristics or the cross reference. For example, an individual convicted under 18 U.S.C. § 922(o) for possessing five MCDs would receive an enhanced base offense level because the offense involved a firearm described in 26 U.S.C. § 5845(a). *See* USSG §2K2.1(a)(5). However, this individual would not receive an enhancement under §2K2.1(b)(1) for the number of firearms involved in the offense because the MCDs are not firearms under the GCA definition. *See* USSG §2K2.1(b)(1).

Commenters have expressed concern that §2K2.1 insufficiently addresses offenses involving MCDs. Commenters have described a significant recent proliferation of MCDs and pointed out the increased danger to bystanders and law enforcement officials when a weapon is equipped with an MCD because those weapons can fire more quickly and are more difficult to control.

Part A of the proposed amendment would amend §2K2.1 to address these concerns.

The proposed amendment provides two options to amend §2K2.1.

Option 1 would amend the definition of "firearm" applicable to §2K2.1 to include any firearm described in 18 U.S.C. § 921(a)(3) (*i.e.*, the GCA definition of firearm) or 26 U.S.C. § 5845(a) (*i.e.*, the NFA definition of firearm). It would move the definition from the Commentary to the guideline itself in newly created subsection (d).

Option 2 would expand the application of the following subsections, which now apply only to GCA firearms, so that those subsections would also apply to NFA firearms:

- Subsection (b)(1), which provides an enhancement based on the number of firearms involved in the offense;

- Subsection (b)(4), which provides an enhancement for offenses involving firearms that were stolen, had a modified serial number, or were not marked with a serial number;

- Subsection (b)(5), which provides an enhancement for certain offenses involving the transport, transfer, sale, or other disposition of a firearm to another person;

- Subsection (b)(6), which provides an enhancement for offenses involving transportation of a firearm outside the United States or the possession of a firearm in connection with another felony;

- Subsection (b)(7), which provides an enhancement for recordkeeping offenses that reflect an effort to conceal a substantive offense involving firearms or ammunition; and

- Subsection (c), which cross references other guidelines for cases in which the defendant used or possessed any firearm cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense.

Option 2, if applied to all of the listed subsections, would produce an equivalent result to Option 1, but Option 2 highlights the policy question as to whether expansion of the definition of "firearm" should apply to all relevant provisions.

Issues for comment are also provided.

Proposed Amendment:

Option 1 ("Firearm" definition includes GCA firearms and NFA firearms):

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(d) Definition

(1) For purposes of this guideline, "***firearm***" includes any firearm described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a).

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

~~"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).~~

Option 2 ("Firearm" definition depends on specific subsection):

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)), increase as follows:

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(A)	3–7	add **2**
(B)	8–24	add **4**
(C)	25–99	add **6**
(D)	100–199	add **8**
(E)	200 or more	add **10**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not

unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in ~~subdivision~~paragraph (A), increase by **2** levels.

(4) If ~~(A)~~ any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) (A) was stolen, increase by **2** levels; or (B)~~(i) any firearm~~ had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, increase by **4** levels; or ~~(ii) the defendant knew that any firearm involved in the offense~~ (C) was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or~~ and the defendant knew, was willfully blind to, or consciously avoided knowledge of such fact, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **2** levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) as a result of inducing the conduct described in clause (i), increase by **5** levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(6) If the defendant—

(A) possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition in connection with another felony offense; or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition, increase to the offense level for the substantive offense.

(8) If the defendant—

(A) receives an enhancement under subsection (b)(5); and

(B) committed the offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses;

increase by **2** levels.

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition;

decrease by **2** levels.

(c) Cross Reference

(1) If the defendant used or possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3), unless otherwise specified.

* * *

8. **Application of Subsection (b)(4).—**

(A) **Interaction with Subsection (a)(7).—**If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control

Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)~~(i)~~ or ~~(ii)~~(C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)~~(i)~~. However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)~~(i)~~ or ~~(ii)~~(C).

(B) **Defendant's State of Mind.**—Subsection (b)(4)(A) or (B)~~(i)~~ applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)~~(B)(ii)~~(C) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

9. **Application of Subsection (b)(7).**—Under subsection (b)(7), if a ~~record keeping~~recordkeeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

* * *

Issues for Comment

1. Part A of the proposed amendment seeks to respond to concerns that §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) insufficiently addresses the dangers presented by machinegun conversion devices (MCDs). The Commission seeks comment on whether the proposed amendment appropriately addresses those concerns. Should the Commission address those concerns in another way? If so, how?

2. Under Options 1 and 2 of Part A of the proposed amendment, an MCD would be treated as a firearm for purposes of §2K2.1. The Commission seeks comment on whether it is appropriate for MCDs to be given the same weight as other firearms. Should MCDs be treated differently from other firearms? If so, how?

3. Section 2K2.1(b)(1) and (b)(5)(C) provide enhancements based, in whole or in part, on the number of "firearms" involved in the offense. Under Options 1 and 2, an MCD would be considered a firearm. MCDs are designed to be affixed to another firearm. The Commission seeks comment on how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C). Should the

calculation depend on whether the MCD was affixed to another firearm? If an MCD is affixed to a semi-automatic firearm, should the resulting weapon be counted as one firearm or two firearms?

4. Section 2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c) currently apply to firearms defined in 18 U.S.C. 921(a)(3) (the GCA definition of firearm). Under Options 1 and 2, the term "firearm," as used in those provisions, would also include any firearm described in 26 U.S.C. § 5845(a) (the NFA definition of firearm), such as an MCD. The Commission seeks comment on whether this change should apply to all of the listed provisions. Should one or more of these provisions be excluded from the change? For example, should the Commission make an exception to §2K2.1(b)(4)(C), as redesignated, which provides an enhancement for certain cases involving firearms that were not marked with a serial number, for MCDs, which are often privately made and not marked with a serial number?

5. With few exceptions (*e.g.*, MCDs), a weapon that meets the NFA definition of firearm also meets the GCA definition of firearm. Apart from MCDs, the Commission seeks comment on whether there are any exceptions (*i.e.*, weapons that meet the NFA definition of firearm but not the GCA definition) that should not be treated as firearms for purposes of §2K2.1. If so, what types of weapons should be excluded? In Option 2 of Part A of the proposed amendment, should the Commission expand the application of subsection (b)(1), (b)(4), (b)(5), (b)(6), (b)(7), or (c) to include machineguns (as defined in 26 U.S.C. § 5845(b)), rather than all NFA firearms?

6. In addition to amending the definition of "firearm" for purposes of §2K2.1, Option 1 of Part A of the amendment would move the definition from the Commentary to the guideline itself. However, the option would not move any other §2K2.1 definitions from the Commentary to the guideline. The Commission seeks comment on whether leaving some definitions in the Commentary will lead to inconsistent application of those definitions. Should the Commission move other definitions from the Commentary to §2K2.1 to the guideline itself? If so, which ones?

(B) *Mens Rea* Requirement

Synopsis of Proposed Amendment: Section 2K2.1 provides for offense level increases in cases involving stolen firearms, firearms with modified serial numbers, and firearms not marked with a serial number (commonly referred to as ghost guns). *See* USSG §2K2.1(b)(4). Subsection (b)(4)(A) provides a 2-level enhancement if a firearm is stolen. USSG §2K2.1(b)(4)(A). Subsections (B)(i) and (ii) provide a 4-level enhancement based upon the existence and state of any serial number on firearms considered for purposes of §2K2.1. USSG §2K2.1(b)(4)(B)(i) and (ii). The 4-level enhancement may apply, under subsection (b)(4)(B)(i), if a "firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye," and, under subsection (b)(4)(B)(ii), if a "firearm involved in the offense was not otherwise marked with a serial number." *Id.* The court may not apply both §2K2.1(b)(4)(A) and (b)(4)(B) cumulatively, as the provisions are alternative. *See* USSG §1B1.1, comment. (n.4(A)) ("Within each specific offense characteristic subsection, . . . the offense level adjustments are alternative; only the one that best describes the conduct is to be used.").

The enhancements for stolen firearms and modified serial numbers impose no requirement of the defendant's knowledge or other mental state. USSG §2K2.1(b)(4)(A) and (B)(i). The Commentary to §2K2.1 states that these enhancements apply "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." USSG §2K2.1, comment. (n.8(B)). However, subsection (b)(4)(B)(ii) for firearms not marked with a serial number applies only "if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact." *Id.*

The enhancement regarding firearms not marked with a serial number is the result of a 2023 amendment. USSG App. C, amend. 819 (effective Nov. 1, 2023). The amendment extended the 4-level enhancement at §2K2.1(b)(4)(B) to firearms not marked with a serial number. *Id.* The Commission determined, however, "that the enhancement should apply only to those defendants who knew or consciously avoided knowing that the firearm was not marked with a serial number." *Id.*

Accordingly, in its current form, §2K2.1(b)(4) imposes a mental state requirement when the enhancement applies based on a firearm not marked with a serial number but includes no such requirement when it applies based on a stolen firearm or firearm with a modified serial number.

Part B of the proposed amendment would apply the current mental state requirement from §2K2.1(b)(4)(B)(ii) to all of subsection (b)(4).

Under the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm was stolen." Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B)(i) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered

illegible or unrecognizable to the unaided eye." The proposed amendment would also make conforming changes to Application Note 8 of the Commentary to §2K2.1.

An issue for comment is also provided.

Proposed Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(b) Specific Offense Characteristics

* * *

(4) If the defendant knew, was willfully blind to the fact, or consciously avoided knowing that (A) any firearm was stolen, increase by **2** levels; or (B)~~(i)~~ any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye; or (~~ii~~C) ~~the defendant knew that~~ any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, increase by **4** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

* * *

8. **Application of Subsection (b)(4).—**

~~(A) **Interaction with Subsection (a)(7).—**~~If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the ~~offense involved~~ defendant knew, was willfully blind to the fact, or consciously avoided knowing that a firearm ~~with~~ had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or ~~if the defendant knew~~ that any firearm involved in the offense was not otherwise marked with a serial

number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, apply subsection (b)(4)(B)~~(i)~~ or (~~ii~~C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)~~(i)~~. However, if the ~~offense involved~~ defendant knew, was willfully blind to the fact, or consciously avoided knowing that a ~~stolen~~ firearm or ~~stolen~~ ammunition was stolen, or ~~if the defendant knew~~ that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) ~~or was willfully blind to or consciously avoided knowledge of such fact~~, apply subsection (b)(4)(A) or ~~(B)~~(~~ii~~C).

~~(B) **Defendant's State of Mind.**—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.~~

* * *

Issue for Comment

1. Under Part B of the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that" a firearm was stolen. Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The Commission seeks comment on whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. Are there changes the Commission should make to the proposed amendment to address potential evidentiary issues? If so, what changes should the Commission make?

PROPOSED AMENDMENT: CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses two circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176, 66177 (Aug. 14, 2024) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A addresses a circuit conflict concerning whether the "physically restrained" enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to §1B1.1 (Application Instructions). Three options are presented. Issues for comment are also included.

Part B addresses a circuit conflict concerning whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single-sentence rule"). *See* USSG §4A1.2(a)(2).

(A) Circuit Conflict Concerning the "Physically Restrained" Enhancement at §2B3.1(b)(4)(B)

Synopsis of Proposed Amendment: Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." For purposes of §2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1(L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up."

A circuit conflict has arisen concerning whether the enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those outlined in the Commentary to §1B1.1 (*i.e.*, "being tied, bound, or locked up").

The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement. *See*, *e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, "at close range," and was commanded to "look straight ahead into the gun and not to move"); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where "two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery"); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit has "rejected the notion of a 'physical component' limitation as inapt" and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); United States v. Deleon, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier").

By contrast, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits largely agree that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. *See*, *e.g.*, United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) ("displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint' enhancement"); United States v. Bell, 947 F.3d 49, 57, 60–61 (3d Cir. 2020) (adopting "the requirement that the restraint involve some physical aspect"; placing fake gun on victim's neck and forcing him to floor did not suffice); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017) (vacating enhancement because "standing near a door, holding a firearm, and instructing a victim to get on the ground" did not "differentiate th[e] case in any meaningful way from a typical armed robbery"); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019) ("more than pointing a gun at someone and ordering that person not to move is necessary"); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) ("briefly pointing a gun at a victim and commanding her once to get down" did not

constitute "physical restraint, given that nearly all armed bank robberies will presumably involve such acts"); *see also* United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) ("the phrase 'being tied, bound, or locked up' indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way"; physically restrained adjustment did not apply where victim was ordered to walk down the stairs at gunpoint).

Part A of the proposed amendment presents three options for responding to this circuit conflict by amending the enhancement at §2B3.1(b)(4)(B).

Option 1 would generally adopt the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures. It would amend the language of §2B3.1(b)(4)(B) to specify that the increase applies to cases in which "any person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape." Option 1 also includes conforming changes to the Commentary to §2B3.1.

Option 2 would generally adopt the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that physical measures must be used for the enhancement to apply. It would amend the language of §2B3.1(b)(4)(B) to clarify that the increase applies only in cases in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." Option 2 also includes conforming changes to the Commentary to §2B3.1.

Option 3 would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at §2B3.1(b)(4)(B). The new enhancement would provide for a 2-level enhancement for offenses in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." It would also add a 1-level enhancement for offenses in which "any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape." Option 3 includes conforming changes to the Commentary to §2B3.1.

Issues for comment are also provided.

Proposed Amendment:

Option 1 (First, Fourth, Sixth, Tenth, and Eleventh Approach – *Physical or Non-Physical Means*)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Option 2 (Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits Approach – *Physical Contact or Confinement Required*)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Option 3 (Combination of Both Approaches)

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

* * *

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; ~~or~~ (B) if any ~~person was physically restrained~~ person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by **2** levels; or (C) if any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape, increase by **1** level.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," and "***abducted***," ~~and "***physically restrained***" are defined~~have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).

* * *

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or ~~was physically restrained by being tied, bound, or locked up~~ a victim's freedom of movement was restricted.

* * *

Issues for Comment

1. Part A of the proposed amendment sets forth three options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?

2. The term "physically restrained," as used in §2B3.1 (Robbery), is defined in Application Note 1(L) of the Commentary to §1B1.1 (Application Instructions). Other guidelines also use the term "physically restrained" and define such term by reference to the Commentary to §1B1.1. *See* §§2B3.2(b)(5)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 2E2.1(b)(3)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 3A1.3 ("If a victim was physically restrained in the course of the offense, increase by 2 levels.").

   If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend any or all of these other guidelines to mirror the proposed approach for §2B3.1? Instead of amending §2B3.1 or the other guidelines, should the Commission amend Application Note 1(L) of the Commentary to §1B1.1 to mirror the proposed approach for §2B3.1?

(B) Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)

Synopsis of Proposed Amendment: Section 4A1.2(a)(2) outlines whether multiple prior sentences should be "counted separately or treated as a single sentence" for purposes of assigning criminal history points ("single-sentence rule"). Prior sentences should be "counted separately if the sentences were imposed for offenses that were separated by an *intervening arrest* (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." USSG §4A1.2(a)(2) (emphasis added). If "there is no *intervening arrest*, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day." *Id.* (emphasis added).

There is a circuit split over the meaning of "intervening arrest." The Third, Sixth, Ninth, and Eleventh Circuits have held that a formal, custodial arrest is required, and that a citation or summons following a traffic stop does not qualify. *See* United States v. Ley, 876 F.3d 103, 109 (3d Cir. 2017) ("[A] traffic stop, followed by the issuance of a summons, is not an arrest. The Court therefore holds that, for purposes of section 4A1.2(a)(2) of the Sentencing Guidelines, an arrest is a formal, custodial arrest."); United States v. Rogers, 86 F.4th 259, 264–65 (6th Cir. 2023) ("for purposes of § 4A1.2(a)(2), an arrest requires placing someone in police custody as part of a criminal investigation"; "subtle interactions with law enforcement—such as traffic stops" are not "the focus of the Guidelines' approach" to prior sentences); United States v. Leal-Felix, 665 F.3d 1037, 1041 (9th Cir. 2011) (en banc) (for purposes of the guidelines, "an arrest is a 'formal arrest'" not a "mere citation" and "may be indicated by informing the suspect that he is under arrest, transporting the suspect to the police station, and/or booking the suspect into jail"); United States v. Wright, 862 F.3d 1265, 1282 (11th Cir. 2017) ("traffic citation for driving with a suspended license is not an arrest under § 4A1.2(a)(2)"). By contrast, the Seventh Circuit has adopted a broad view of the term, holding that a traffic stop amounts to an intervening arrest. *See* United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003) ("A traffic stop is an 'arrest' in federal parlance.").

Part B of the proposed amendment responds to this circuit conflict. It would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest . . . requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." It would also specify that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest."

Proposed Amendment:

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by subparagraph (A) or (B) as a single sentence. *See also* §4A1.1(d).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

"Intervening arrest," for purposes of this provision, requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

* * *

PROPOSED AMENDMENT: SIMPLIFICATION OF THREE-STEP PROCESS

Synopsis of Proposed Amendment: In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "possibly amending the *Guidelines Manual* to address the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

In December 2023, the Commission published a proposed amendment that would have provided for a two-step process in §1B1.1 (Application Instructions) with accompanying changes throughout the *Guidelines Manual* to convert the Commission's existing departures and policy statements to "additional considerations." More specifically, that proposed amendment would have revised §1B1.1 to account for a two-step sentencing process, established a new Chapter Six further specifically addressing the court's consideration of the factors set forth in 18 U.S.C. § 3553(a), eliminated Chapter Five, Part H and most of Part K, and reclassified most "departures" currently provided throughout the *Guidelines Manual* as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a). *See* Proposed Amendments to the Sentencing Guidelines (Dec. 2023) at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines.

The Three-Step Process in the Guidelines Manual

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides the Commission with broad authority to develop guidelines that will further the basic purposes of criminal sentencing: deterrence, incapacitation, retribution, and rehabilitation. The Act contains detailed instructions as to how this determination should be made, including that the Commission establish categories of offenses and categories of defendants for use in prescribing guideline ranges that specify an appropriate sentence and to consider whether, and to what extent, specific offense-based and defendant-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c) and (d). In relation to the establishment of categories of defendants, the Act placed several limitations upon the Commission's ability to consider certain personal and individual characteristics in establishing the guidelines and policy statements. *See* 28 U.S.C. §§ 994(d), (e).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. § 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range should continue to be "the starting point and the initial benchmark" in sentencing proceedings. *See* Gall v. United States, 552 U.S. 38, 49 (2007); *see also* Peugh v. United States, 569 U.S. 530 (2013) (noting that "the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). After determining the kinds of sentence and guideline range, the court must also fully consider the factors in 18 U.S.C. § 3553(a), including, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," to determine a sentence that is sufficient but not greater than necessary. *See* Rita v. United States, 551 U.S. 338, 347–48 (2007).

Section 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the *Guidelines Manual*. Post-*Booker*, the Commission incorporated a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. § 3553(a) in imposing a sentence that is sufficient, but not greater than necessary (whether within or outside the applicable guideline range).

The first step in the three-step process, as set forth in §1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

The second step in the three-step process, as set forth in §1B1.1(b), requires the court to consider "Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence." Authorized grounds for departures based on various circumstances of the offense, specific personal characteristics of the defendant, and certain procedural history of the case are described throughout the *Guidelines Manual*: several Chapter Two offense guidelines and Chapter Eight organizational guidelines contain departure provisions within their corresponding Commentary; grounds for departure based on criminal history are generally provided in Chapter Four; and Chapter Five sets forth various policy statements with additional grounds for departure. Chapter Five, Part H, addresses the relevance of certain specific personal characteristics in sentencing by allocating them into three general categories. The first category includes specific personal characteristics that Congress has prohibited from consideration or that the Commission has determined should be prohibited. *See*, *e.g.*, USSG §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)). The second category includes specific personal characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See*, *e.g.*, §§5H1.2 (Employment Record); 5H1.6 (Family Ties and Responsibilities (Policy Statement)). The third category includes specific personal characteristics that Congress directed the Commission to consider in the guidelines only to the extent that they have relevance to sentencing. *See, e.g.*, USSG §§5H1.1 (Age (Policy Statement)); 5H1.3 (Mental and Emotional Conditions (Policy Statement)).

The third step in the three-step process, as set forth in §1B1.1(c), requires the court to "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Specifically, section 3553(a) provides:

> 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; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements 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);
(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.
(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.

18 U.S.C. § 3553(a).

Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. For further information pertaining to the application of departure provisions other than §5K1.1 or §5K3.1 (either alone or in conjunction with §5K1.1 or §5K3.1, see https://www.ussc.gov/education/backgrounders/2024-simplification-data. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.

Proposed Amendment

The proposed amendment contains two parts. Part A contains issues for comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in §1B1.1 and the use of departures and policy statements relating to specific personal characteristics. Part B contains a proposed amendment that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

Part B of the proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions. *See* United States v. Booker, 543 U.S. 220 (2005); Irizarry v. United States, 553 U.S. 708 (2008) (holding that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give "reasonable notice" that the court is contemplating a "departure" from the recommended guideline range on a ground not identified for departure in the presentence report or in a party's prehearing submission, does not apply to a "variance" from a recommended guideline range).

Part B of the proposed amendment would revise Chapter One in multiple ways. First, it would delete the "Original Introduction to the Guidelines Manual" currently contained in Chapter One, Part A. This introduction would be published as a historical background in **[**Appendix B (Selected Sentencing Statutes)**][**a new Appendix D**]** of the *Guidelines Manual*. Second, Part B of the proposed amendment would revise the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. Part B of the proposed amendment sets forth the calculation of guideline range and determination of sentencing requirements and options under the *Guidelines Manual* as the first step of the sentencing process in §1B1.1(a). The court's consideration of the section 3553(a) factors is set forth as the second and final step of the sentencing process in §1B1.1(b). As revised, §1B1.1(b) expressly lists the factors courts must consider pursuant to 18 U.S.C. § 3553(a). Additionally, the definition of "departures" is removed from the application notes to §1B1.1, and the Background Commentary is revised accordingly.

In addition, Part B of the proposed amendment seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a). More specifically, Part B of the proposed amendment revises current §1A3.1 (Authority), which sets forth the Commission's authority in developing the guidelines. First, the provision is redesignated as §1A1.1 and, for clarity, is retitled as "Commission's Authority." Second, in addition to referring to 28 U.S.C. § 994(a) as the basis of the Commission's authority to promulgate guidelines, policy statements, and commentary, the provision would also explain how the Commission has complied with the requirements placed by Congress, noting what is not considered by the Commission in formulating the guidelines used to calculate the guideline range.

A new background commentary explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, do not apply to sentencing courts. It makes clear that "Congress set forth the factors that a court must consider in imposing a sentence that is 'sufficient but not greater than necessary' to comply with the purposes of sentencing in 18 U.S.C. § 3553(a)" and that "[t]hese statutory factors permit a sentencing court to consider the 'widest possible breadth of information' about a defendant ensuring the court is in 'possession of the fullest information possible concerning the defendant's life and characteristics.'" The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a two-step process in which the sentencing court must first correctly calculate the applicable guideline range as the "starting point and initial benchmark" and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

Consistent with the revised approach, Part B of the proposed amendment would delete most "departures" currently provided throughout the *Guidelines Manual*. Changes would be made throughout the *Guidelines Manual* by deleting the departure provisions currently contained in commentary to various guidelines. Part B of the proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter's purpose in the introductory commentary noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, all provisions in Chapter Five, Part K (Departures), with the exception of those pertaining to substantial assistance to the authorities, would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

Finally, Chapter Five is also amended by revising the Commentary to §5B1.1 (Imposition of a Term of Probation) and §5D1.1 (Imposition of a Term of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation or supervised release. The commentary is further revised to retain factors the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

The issues for comment set forth below are informed by the proposed amendment contained in Part B.

(A) Issues for Comment

1. Part B of the proposed amendment would remove the second step in the three-step process, as set forth in subsection (b) of §1B1.1 (Application Instructions), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.

   The Commission invites general comment on whether reconceptualizing the three-step process in this manner streamlines the application of the *Guidelines Manual* and

better reflects the interaction between 18 U.S.C. § 3553(a) and the guidelines. Does the approach set forth in Part B of the proposed amendment better achieve these goals than the proposed amendment published in December 2023 (available at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines), which would have retained current departure provisions in more generalized language and reclassified them as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a)? Are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

2. The Commission seeks comment on whether revising the three-step process, either in general or as implemented in Part B of the proposed amendment, is consistent with the Commission's authority under 28 U.S.C. §§ 994 and 995 and all other provisions of federal law. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission, such as the restrictions on the Commission's authority to promulgate further reasons for downward departures set forth in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108–21, 117 Stat. 649 (2003).

3. The *Guidelines Manual* currently contains more than two hundred departure provisions in Chapter Five, Part K (Departures), and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H, contains twelve policy statements addressing the relevance of certain specific personal characteristics in sentencing. Such provisions were either included by the original Commission or through subsequent guideline amendments to provide guidance to courts in identifying "aggravating or mitigating circumstance(s) 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." *See* 18 U.S.C. § 3553(b).

   The proposed amendment contained in Part B would delete most "departures" currently provided throughout the *Guidelines Manual*. Only the provisions pertaining to substantial assistance to authorities (currently provided for in Chapter Five, Part K, Subpart 1) and Early Disposition Programs (currently provided for in §5K3.1 (Early Disposition Programs (Policy Statement)) would be retained in the Manual, while other deleted "departures" would be accounted for through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a). If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to expressly account for any "departure provisions" in the *Guidelines Manual* beside substantial assistance and Early Disposition Programs? If so, which provisions should be retained and how? Alternatively, should the Commission remove the departures contained in Chapter Five, Part K, and the provisions in Chapter Five, Part H, addressing the relevance of certain specific personal characteristics in sentencing, while retaining other departure provisions throughout the *Guidelines Manual*?

   The Commission also seeks comment on whether it should consolidate and preserve for historical purposes any deleted departure provisions. If so, how should the Commission

do so? For example, should the Commission somehow preserve the content of deleted departures in a new Appendix to the *Guidelines Manual* or in some other format?

4. At some places in the *Guidelines Manual*, commentary including a departure provision also provides background information that the Commission determined was relevant to the court's consideration. For example, in setting forth a series of departure considerations, Application Note 27 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) also provides background information regarding the nature and impact of certain controlled substances, such as synthetic cathinones and cannabinoids, that may be informative to a court's determination as to whether a departure is warranted. The Commission seeks comment on whether it should retain such type of background information even if the departure language is removed. If so, which provisions in the *Guidelines Manual* currently contain background information that should be retained?

Proposed Amendment:

[For ease and clarity of presentation, the proposed amendment shows the complete *Guidelines Manual* with revision marks redlining the specific provisions impacted. The proposed amendment is set forth in the following pages.]

CHAPTER ONE

INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A — INTRODUCTION AND AUTHORITY

Introductory Commentary

~~Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ("Commission") when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.~~

~~Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.~~

~~1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL~~

~~The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:~~

~~1. Authority~~

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. ~~Its principal purpose is~~Congress directed the Commission to establish sentencing policies and practices for the federal criminal justice system ~~that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes~~ and develop guidelines that further the purposes of sentencing. The guidelines set forth throughout this Manual represent the first step in the sentencing process and are one of multiple factors judges must consider in arriving at sentence that is sufficient but not greater than necessary under 18 U.S.C. § 3553(a).

This Part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary. Information describing the historical development and evolution of the federal sentencing guidelines is set forth in [Appendix D of the Guidelines Manual].

~~The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.~~

~~2. The Statutory Mission~~

~~The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.~~

~~The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).~~

~~Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.~~

~~The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).~~

~~The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines~~

~~through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.~~

~~3. The Basic Approach (Policy Statement)~~

~~To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice 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 imposed by the court.~~

~~Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.~~

~~Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity — sentencing every offender to five years — destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.~~

~~A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.~~

~~The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs~~

~~depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.~~

~~The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.~~

~~In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.~~

~~In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.~~

~~A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.~~

~~Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.~~

~~In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.~~

~~This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.~~

~~The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.~~

~~The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.~~

~~Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines~~

~~as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.~~

~~4. The Guidelines' Resolution of Major Issues (Policy Statement)~~

~~The guideline drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.~~

~~(a) Real Offense vs. Charge Offense Sentencing.~~

~~One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.~~

~~The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.~~

~~In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines~~

~~that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.~~

~~The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.~~

~~(b) Departures.~~

~~The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "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." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.~~

~~*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)~~

~~The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission,~~

~~over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.~~

~~Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.~~

~~It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.~~

~~A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.~~

~~(e) Plea Agreements.~~

~~Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines would bring.~~

~~The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(c) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and~~

~~will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.~~

~~The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.~~

~~(d) Probation and Split Sentences.~~

~~The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."~~

~~The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.~~

~~More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**~~

~~*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a "nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment." (*See* USSG App. C, amendment 801.)~~

In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for "zero-point" offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to "zero-point" offenders by revising the application note in §5C1.1 that addressed "nonviolent first offenders" to focus on "zero-point" offenders. (*See* USSG App. C, amendment 821.)

**Note: Although the Commission had not addressed "single acts of aberrant behavior" at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)

(c) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment — sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.*, separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively related criminal violations?

~~In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.~~

~~In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.~~

~~The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.*, 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.~~

~~**(g) Sentencing Ranges.**~~

~~In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.~~

~~While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing~~

~~practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.~~

~~The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.~~

~~(h) The Sentencing Table.~~

~~The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.~~

~~Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.~~

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission "the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose" of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States v. Booker*, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). *See* 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita v. United States*, 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita*, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

> [T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 347–48 (emphasis in original). The Court concluded that "[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[,]" *id.* at 348, and that the Commission's process for promulgating guidelines results in "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court "first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita*:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. at 350; *see also Booker*, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); *Gall*, 552 U.S. at 46 ("[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.").

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. § 994(x), the Commission publishes guideline amendment proposals in the *Federal Register* and conducts hearings to solicit input on those

~~proposals from experts and other members of the public. Pursuant to 28 U.S.C. § 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines.~~

~~Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), "Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id.* at 103; 28 U.S.C. § 994(h).~~

~~As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.~~

~~3~~1. AUTHORITY

§~~1A3.1~~1A1.1. Commission's Authority

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) deterrence; (3) protection of the public from further crimes; and (4) rehabilitation. *See* 18 U.S.C. § 3553(a). The Act also provides for the development of guidelines by the Commission that further those purposes.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

The Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race,

sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant, in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

Commentary

Background: The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides that courts must consider a variety of factors when imposing a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing as set forth in the Act—to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, deterrence, protection of the public from further crimes, and rehabilitation. 18 U.S.C. § 3553(a). The Act provides for the development of guidelines that will (1) further these statutory purposes of sentencing; (2) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (3) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 994(f).

As background, Congress provided specific directives to the Commission when setting a guideline range for "each category of offense involving each category of defendant." 28 U.S.C. § 994(b)(1).

First, the Act directs the Commission to consider, for purposes of establishing categories of offenses, whether the following seven matters, "among others," have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence: (1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole. *See* 28 U.S.C. § 994(c).

Second, the Act directs the Commission to consider, for purposes of establishing categories of defendants, whether the following eleven matters, "among others," have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. *See* 28 U.S.C. § 994(d). The Act also directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).

In formulating the guidelines used to calculate the guideline range, the Commission remains cognizant of these detailed instructions directing the Commission to consider whether, and to what extent,

specific offense-based and offender-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c), (d). Similarly, the Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court. To the contrary, Congress set forth the factors that a court must consider in imposing a sentence that is "sufficient but not greater than necessary" to comply with the purposes of sentencing in 18 U.S.C. § 3553(a). These statutory factors permit a sentencing court to consider the "widest possible breadth of information" about a defendant ensuring the court is in "possession of the fullest information possible concerning the defendant's life and characteristics." *See Pepper v. United States*, 562 U.S. 476, 488 (2011); *see also Concepcion v. United States*, 597 U.S. 481, 493 (2022). Accordingly, the application instructions set forth in the following part are structured to reflect this two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the "starting point and initial benchmark" and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 67, 68, and 271); November 1, 1990 (amendment 307); November 1, 1992 (amendment 466); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 2000 (amendments 602 and 603); October 27, 2003 (amendment 651); November 1, 2008 (amendments 717 and 725); November 1, 2014 (amendment 789); November 1, 2018 (amendment 813); November 1, 2023 (amendment 821).

PART B — GENERAL APPLICATION PRINCIPLES

§1B1.1. Application Instructions

(a) STEP ONE: CALCULATION OF GUIDELINE RANGE AND DETERMINATION OF SENTENCING REQUIREMENTS AND OPTIONS UNDER THE GUIDELINES MANUAL.— The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment ~~as appropriate~~ for the defendant's acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Parts B and C of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(9) Apply, as appropriate, Part K of Chapter Five.

~~(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).~~

~~(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).~~

(b) STEP TWO: CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

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

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

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

(5) the need to provide restitution to any victims of the offense.

Commentary

Application Notes:

1. **Frequently Used Terms Defined.**—The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(A) "***Abducted***" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

(B) "***Bodily injury***" means any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.

(C) "***Brandished***" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

(D) "***Court protection order***" means "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).

(E) "***Dangerous weapon***" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

~~(F) "***Departure***" means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure.~~

~~"***Downward departure***" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "***Depart downward***" means grant a downward departure.~~

~~"***Upward departure***" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "***Depart upward***" means grant an upward departure.~~

(~~G~~F) "***Destructive device***" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).

(~~H~~G) "***Firearm***" means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.

(~~I~~H) "***Offense***" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "***instant***" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, an offense before a state court involving the same underlying conduct).

(~~J~~I) "***Otherwise used***" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.

(~~K~~J) "***Permanent or life-threatening bodily injury***" means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.

(~~L~~K) "***Physically restrained***" means the forcible restraint of the victim such as by being tied, bound, or locked up.

(~~M~~L) "***Serious bodily injury***" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

2. **Definition of Additional Terms.**—Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case-by-case basis.

The term "***includes***" is not exhaustive; the term "***e.g.***" is merely illustrative.

3. **List of Statutory Provisions.**—The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.

4. **Cumulative Application of Multiple Adjustments.—**

(A) **Cumulative Application of Multiple Adjustments within One Guideline.**—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subparagraphs (A) – (E)) are not added together.

(B) **Cumulative Application of Multiple Adjustments from Multiple Guidelines.**—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.

5. **Two or More Guideline Provisions Equally Applicable.**—Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.

6. **Use of Abbreviated Guideline Titles.**—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery;

Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). ~~Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "***variance***". *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").~~ This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), by setting forth both essential steps of the court's inquiry in making this determination.

Originally, the guidelines were mandatory, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker*, district courts are first required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that "the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution to any victims of the offense. *See Rita*, 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 1); November 1, 1989 (amendments 69–72 and 303); November 1, 1990 (amendment 361); November 1, 1991 (amendment 388); November 1, 1993 (amendment 497); November 1, 1997 (amendments 545 and 546); November 1, 2000 (amendments 591 and 601); November 1, 2001 (amendment 617); October 27, 2003 (amendment 651); November 1, 2003 (amendment 661); November 1, 2006 (amendment 684); November 1, 2010 (amendment 741); November 1, 2014 (amendment 789); November 1, 2018 (amendment 805); November 1, 2023 (amendment 824); November 1, 2024 (amendment 831).

§1B1.2. Applicable Guidelines

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more

serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense.

Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. *See* §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. *See* §1B1.9 (Class B or C Misdemeanors and Infractions).

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).

(c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Commentary

Application Notes:

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1 (Other Offenses), is to be used.

   In the case of a particular statute that proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and the Statutory Index will specify only one offense guideline for that offense of conviction. In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. *See* §2X5.1 (Other Offenses).

As set forth in the first paragraph of this note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a). The sentence that shall be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. *See* Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

The exception to the general rule has a practical basis. In a case in which the elements of an offense more serious than the offense of conviction are established by a plea agreement, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then ~~depart from it~~ impose a sentence that is greater than the otherwise applicable guideline range to the degree the court found necessary based upon the more serious conduct established by the plea agreement. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, §2B1.1 (Theft, Property Destruction, and Fraud) contains monetary distinctions which are more significant and more detailed than the monetary distinctions in §2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining ~~the~~ an appropriate ~~degree of departure~~sentence in a case in which the defendant pled guilty to theft but admitted committing robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.

2. Section 1B1.2(b) directs the court, once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two) under §1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in §1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the "relevant conduct" criteria of §1B1.3 are to be used, unless conviction under a specific statute is expressly required.

3. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d)

provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

4. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (*e.g.*, a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 2); November 1, 1989 (amendments 73–75 and 303); November 1, 1991 (amendment 434); November 1, 1992 (amendment 438); November 1, 2000 (amendment 591); November 1, 2001 (amendments 613 and 617).

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS).—Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (~~DETERMINING THE SENTENCE~~DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES).—Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

(c) ACQUITTED CONDUCT.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

Commentary

Application Notes:

1. **Sentencing Accountability and Criminal Liability.**—The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. **Accountability Under More Than One Provision.**—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

3. **Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—**

   (A) **In General.**—A "***jointly undertaken criminal activity***" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (*i.e.*, "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

(B) **Scope.**—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). ~~The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.~~

(C) **In Furtherance.**—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

(D) **Reasonably Foreseeable.**—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. **Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—**

(A) **Acts and omissions aided or abetted by the defendant.—**

(i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as de-

scribed above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. *See* Application Note 2.

(B) **Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—**

(i) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) **Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.—**

(i) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (*i.e.*, the forgery of the $800 check).

(ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

(iii) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import

under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (*see* the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (*i.e.*, the one delivery).

(vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

(vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B)

for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (*i.e.*, the 500 grams).

(viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. *See* Application Note 3(B).

5. **Application of Subsection (a)(2).—**

(A) **Relationship to Grouping of Multiple Counts.—**"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

(B) **"Same Course of Conduct or Common Scheme or Plan".—**"Common scheme or plan" and "same course of conduct" are two closely related concepts.

(i) **Common scheme or plan.** For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of *modus operandi* (the same or similar computer manipulations were used to execute the scheme).

(ii) **Same course of conduct**. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

(C) **Conduct Associated with a Prior Sentence.**—For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and *modus operandi*. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; *see* §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

6. **Application of Subsection (a)(3).—**

(A) **Definition of "Harm".—**"***Harm***" includes bodily injury, monetary loss, property damage and any resulting harm.

(B) **Risk or Danger of Harm.—**If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.*, §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.*, §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.*, §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. ~~In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure).~~ The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

7. **Factors Requiring Conviction under a Specific Statute.—**A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").

Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. *See* Application Note 3(C) of §2S1.1.

8. **Partially Completed Offense.—**In the case of a partially completed offense (*e.g.*, an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).

9. **Solicitation, Misprision, or Accessory After the Fact.—**In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

10. **Acquitted Conduct.**—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered sep-

arately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 3); November 1, 1989 (amendments 76–78 and 303); November 1, 1990 (amendment 309); November 1, 1991 (amendment 389); November 1, 1992 (amendment 439); November 1, 1994 (amendment 503); November 1, 2001 (amendments 617 and 634); November 1, 2004 (amendment 674); November 1, 2010 (amendment 746); November 1, 2015 (amendments 790 and 797); November 1, 2023 (amendment 824); November 1, 2024 (amendment 826).

§1B1.4. Information to be Used in Imposing Sentence ~~(Selecting a Point Within the Guideline Range or Departing from the Guidelines)~~

In determining the sentence to impose ~~within the guideline range, or whether a departure from the guidelines is warranted~~, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence ~~within that range~~. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account ~~in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines~~. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines ~~would~~ may provide a reason for sentencing at the top of, or above, the guideline range ~~and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics)~~.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 4); November 1, 1989 (amendment 303); November 1, 2000 (amendment 604); November 1, 2004 (amendment 674); November 1, 2023 (amendment 824).

§1B1.5. Interpretation of References to Other Offense Guidelines

(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions).

(b) (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.

(2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.

(c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.

(d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

Commentary

Application Notes:

1. References to other offense guidelines are most frequently designated "Cross References," but may also appear in the portion of the guideline entitled "Base Offense Level" (*e.g.*, §2D1.2(a)(1) and (2)), or "Specific Offense Characteristics" (*e.g.*, §2A4.1(b)(7)). These references may be to a specific guideline, or may be more general (*e.g.*, to the guideline for the "underlying offense"). Such references incorporate the specific offense characteristics, cross references, and special instructions as well as the base offense level. For example, if the guideline reads "2 plus the offense level from §2A2.2 (Aggravated Assault)," the user would determine the offense level from §2A2.2, including any applicable adjustments for planning, weapon use, degree of injury and motive, and then increase by 2 levels.

   A reference may also be to a specific subsection of another guideline; *e.g.*, the reference in §2D1.10(a)(1) to "3 plus the offense level from the Drug Quantity Table in §2D1.1". In such case, only the specific subsection of that other guideline is used.

2. A reference to another guideline may direct that such reference is to be used only if it results in a greater offense level. In such cases, the greater offense level means the offense level taking into account only the Chapter Two offense level, unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, *see* the Commentary to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest

Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).

3. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States. Where there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.

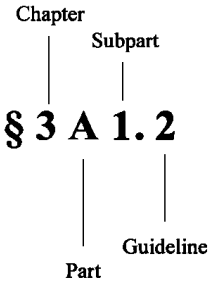
Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 79 and 80); November 1, 1991 (amendment 429); November 1, 1992 (amendment 440); November 1, 1995 (amendment 534); November 1, 1997 (amendment 547); November 1, 2001 (amendment 616); November 1, 2004 (amendment 666).

§1B1.6. Structure of the Guidelines

The guidelines are presented in numbered chapters divided into alphabetical parts. The parts are divided into subparts and individual guidelines. Each guideline is identified by three numbers and a letter corresponding to the chapter, part, subpart and individual guideline.

The first number is the chapter, the letter represents the part of the chapter, the second number is the subpart, and the final number is the guideline. Section 2B1.1, for example, is the first guideline in the first subpart in Part B of Chapter Two. Or, §3A1.2 is the second guideline in the first subpart in Part A of Chapter Three. Policy statements are similarly identified.

To illustrate:



Historical Note	Effective November 1, 1987.

§1B1.7. Significance of Commentary

The Commentary that accompanies the guideline sections may serve a number of purposes. ~~First, it~~ It may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. ~~Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally,~~ In addition, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. ~~As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.~~

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

"[C]ommentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 498).

§1B1.8. Use of Certain Information

(a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(b) The provisions of subsection (a) shall not be applied to restrict the use of information:

(1) known to the government prior to entering into the cooperation agreement;

(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);

(3) in a prosecution for perjury or giving a false statement;

(4) in the event there is a breach of the cooperation agreement by the defendant; or

(5) in determining whether, or to what extent, ~~a downward departure from the guidelines is warranted~~ to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

Commentary

Application Notes:

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. ~~Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward.~~ In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, ~~and~~ or to what extent, ~~a downward departure is warranted~~ to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)~~; *e.g.*,~~. For example, a court may refuse to ~~depart downward~~ impose a sentence that is below the otherwise applicable guideline range on the basis of such information.

2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The probation office generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.

3. On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(f) (Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.

4. As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.

5. This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (*e.g.*, where the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).

6. Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (*i.e.*, an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline).

Historical Note	Effective June 15, 1988 (amendment 5). Amended effective November 1, 1990 (amendment 308); November 1, 1991 (amendment 390); November 1, 1992 (amendment 441); November 1, 2004 (amendment 674); November 1, 2009 (amendment 736); November 1, 2010 (amendment 746); November 1, 2013 (amendment 778).

§1B1.9. Class B or C Misdemeanors and Infractions

The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.

Commentary

Application Notes:

1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days or for which no imprisonment is authorized. *See* 18 U.S.C. § 3559.

2. The guidelines for sentencing on multiple counts do not apply to counts that are Class B or C misdemeanors or infractions. Sentences for such offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the Class B or C misdemeanor or infraction and any other offenses of which the defendant is convicted.

Background: For the sake of judicial economy, the Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines.

Historical Note	Effective June 15, 1988 (amendment 6). Amended effective November 1, 1989 (amendment 81); November 1, 2010 (amendment 746).

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) AUTHORITY.—

(1) IN GENERAL.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) EXCLUSIONS.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is

less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) COVERED AMENDMENTS.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), 782 (subject to subsection (e)(1)), and 821 (parts A and B, subpart 1 only and subject to subsection (e)(2)).

(e) SPECIAL INSTRUCTIONS.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

(2) The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later.

Commentary

Application Notes:

1. **Application of Subsection (a).—**

(A) **Eligibility.**—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (*i.e.*, the

guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a)(1)–(7), which is determined before consideration of ~~any departure provision in the Guidelines Manual or any variance~~ Part K of Chapter Five and §1B1.1(b)). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).

(B) **Factors for Consideration.—**

(i) **In General.—**Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) **Public Safety Consideration.—**The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) **Post-Sentencing Conduct.—**The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. **Application of Subsection (b)(1).—**In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. **Application of Subsection (b)(2).—**Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting ~~a downward departure or variance~~a sentence that is below the otherwise applicable guideline range), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a ~~downward departure~~ reduction of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing the court, upon government motion, ~~a downward departure~~ to impose a sentence that is below the otherwise applicable guideline range based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. *See* subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. **Application of Subsection (c).**—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

   (A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

   To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. *See* §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. **Application to Amendment 750 (Parts A and C Only).**—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables (currently called Drug Conversion Tables) in the Commentary to §2D1.1 (*see* §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

6. **Application to Amendment 782.**—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. **Application to Amendment 821 (Parts A and B, Subpart 1 Only).**—As specified in subsection (d), the parts of Amendment 821 that are covered by this policy statement are Parts A and B, Subpart 1 only, subject to the special instruction at subsection (e)(2). Part A amended §4A1.1 (Criminal History Category) to limit the overall criminal history impact of "status points" (*i.e.*, the additional criminal history points given to defendants for the fact of having committed the instant offense while under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status). Part B, Subpart 1 created a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) to provide a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A and whose instant offense did not involve specified aggravating factors.

The special instruction at subsection (e)(2) delays the effective date of orders reducing a defendant's term of imprisonment to a date no earlier than February 1, 2024. A reduction based on the

retroactive application of Part A or Part B, Subpart 1 of Amendment 821 that does not comply with the requirement that the order take effect no earlier than February 1, 2024, is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Subsection (e)(2), however, does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before February 1, 2024, provided that any order reducing the defendant's term of imprisonment has an effective date of February 1, 2024, or later.

8. **Supervised Release.—**

(A) **Exclusion Relating to Revocation.**—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) **Modification Relating to Early Termination.**—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

9. **Use of Policy Statement in Effect on Date of Reduction.**—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range

made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

**So* in original. Probably should be "to fall above the amended guidelines".

Historical Note	Effective November 1, 1989 (amendment 306). Amended effective November 1, 1990 (amendment 360); November 1, 1991 (amendment 423); November 1, 1992 (amendment 469); November 1, 1993 (amendment 502); November 1, 1994 (amendment 504); November 1, 1995 (amendment 536); November 1, 1997 (amendment 548); November 1, 2000 (amendment 607); November 5, 2003 (amendment 662); November 1, 2007 (amendment 710); March 3, 2008 (amendments 712 and 713); May 1, 2008 (amendment 716); November 1, 2011 (amendment 759); November 1, 2012 (amendment 770); November 1, 2014 (amendments 780, 788, and 789); November 1, 2018 (amendment 808); November 1, 2023 (amendments 824 and 825).

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

Commentary

Application Notes:

1. Subsection (b)(2) provides that if an earlier edition of the Guidelines Manual is used, it is to be used in its entirety, except that subsequent clarifying amendments are to be considered.

   Example: A defendant is convicted of an antitrust offense committed in November 1989. He is to be sentenced in December 1992. Effective November 1, 1991, the Commission raised the base offense level for antitrust offenses. Effective November 1, 1992, the Commission lowered the guideline range in the Sentencing Table for cases with an offense level of 8 and criminal history category of I from 2–8 months to 0–6 months. Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4–10 months (final offense level of 9, criminal history category of I). Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2–8 months (final offense level of 8, criminal history category of I). If the court determines that application of the 1992 edition of the Guidelines Manual would violate the *ex post facto* clause of the United States Constitution, it shall apply the 1989 edition of the Guidelines Manual in its entirety. It shall not apply, for example, the offense level of 8 and criminal history category of I from the 1989 edition of the Guidelines Manual in conjunction with the amended guideline range of 0–6 months for this offense level and criminal history category from the 1992 edition of the Guidelines Manual.

2. Under subsection (b)(1), the last date of the offense of conviction is the controlling date for *ex post facto* purposes. For example, if the offense of conviction (*i.e.*, the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for *ex post facto* purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guidelines Manual took effect).

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. *See Peugh v. United States*, 569 U.S. 530, 533 (2013) (holding that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense").

Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the *ex post facto* clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant

pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (*e.g.*, related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the *ex post facto* clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. *See United States v. Ykema*, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed); *United States v. Allen*, 886 F.2d 143 (8th Cir. 1989) (similar); *see also United States v. Cusack*, 901 F.2d 29 (4th Cir. 1990) (similar).

Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The *ex post facto* clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress's directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (*see* §§3D1.1–3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. *See generally United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a "cohesive and integrated whole" rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range — the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.

Historical Note	Effective November 1, 1992 (amendment 442). Amended effective November 1, 1993 (amendment 474); November 1, 2010 (amendment 746); November 1, 2013 (amendment 779); November 1, 2015 (amendment 796); November 1, 2023 (amendment 824).

§1B1.12. Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031–5042). However, the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor sufficient to warrant ~~an upward departure from~~ imposing a sentence greater than that guideline range in determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 5037(c); *United States v. R.L.C.*, 503 U.S. 291 (1992). Therefore, a necessary

step in ascertaining the maximum sentence that may be imposed upon a juvenile delinquent is the determination of the guideline range that would be applicable to a similarly situated adult defendant.

Historical Note	Effective November 1, 1993 (amendment 475).

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

(a) IN GENERAL.—Upon motion of the Director of the Bureau of Prisons or the defendant pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) MEDICAL CIRCUMSTANCES OF THE DEFENDANT.—

(A) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end-of-life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(B) The defendant is—

(i) suffering from a serious physical or medical condition,

(ii) suffering from a serious functional or cognitive impairment, or

(iii) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal health risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be adequately mitigated in a timely manner.

(2) AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older

and incapable of self-care because of a mental or physical disability or a medical condition.

(B) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

(D) The defendant establishes that circumstances similar to those listed in paragraphs (3)(A) through (3)(C) exist involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for such family member or individual. For purposes of this provision, "***immediate family member***" refers to any of the individuals listed in paragraphs (3)(A) through (3)(C) as well as a grandchild, grandparent, or sibling of the defendant.

(4) VICTIM OF ABUSE.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

(A) sexual abuse involving a "sexual act," as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or

(B) physical abuse resulting in "serious bodily injury," as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.

For purposes of this provision, the misconduct must be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger.

(5) OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).

(6) UNUSUALLY LONG SENTENCE.—If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

(c) LIMITATION ON CHANGES IN LAW.—Except as provided in subsection (b)(6), a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement. However, if a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement, a change in the law (including an amendment to the Guidelines Manual that has not been made retroactive) may be considered for purposes of determining the extent of any such reduction.

(d) REHABILITATION OF THE DEFENDANT.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement. However, rehabilitation of the defendant while serving the sentence may be considered in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted.

(e) FORESEEABILITY OF EXTRAORDINARY AND COMPELLING REASONS.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

Commentary

Application Notes:

1. **Interaction with Temporary Release from Custody Under 18 U.S.C. § 3622 ("Furlough")**.—A reduction of a defendant's term of imprisonment under this policy statement is not appropriate when releasing the defendant under 18 U.S.C. § 3622 for a limited time adequately addresses the defendant's circumstances.

2. **Notification of Victims**.—Before granting a motion pursuant to 18 U.S.C. § 3582(c)(1)(A), the Commission encourages the court to make its best effort to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

Background: The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is required by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

Historical Note	Effective November 1, 2006 (amendment 683). Amended effective November 1, 2007 (amendment 698); November 1, 2010 (amendment 746); November 1, 2016 (amendment 799); November 1, 2018 (amendment 813); November 1, 2023 (amendment 814).

CHAPTER TWO

OFFENSE CONDUCT

Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)~~; and Chapter Five, Part K (Departures)~~.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2011 (amendment 758); November 1, 2024 (amendment 831).

PART A — OFFENSES AGAINST THE PERSON

1. HOMICIDE

§2A1.1. First Degree Murder

(a) Base Offense Level: **43**

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2282A, 2291, 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Applicability of Guideline.**—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (*e.g.*, a kidnapping in which death occurs, *see* §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (*e.g.*, murder in aid of racketeering, *see* §2E1.3(a)(2)).

2. ~~**Imposition of Life Sentence.—**~~

~~(A)~~ **Offenses Involving Premeditated Killing.**—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed.~~ A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance,~~

~~as provided in 18 U.S.C. § 3553(e).~~ If a mandatory statutory term of life imprisonment applies, a lesser term of imprisonment is permissible only in cases in which the government files a motion pertaining to the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

~~(B) **Felony Murder.**—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.~~

3. **Applicability of Guideline When Death Sentence Not Imposed.**—If the defendant is sentenced pursuant to 18 U.S.C. § 3591 *et seq*. or 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 82); November 1, 1990 (amendment 310); November 1, 1993 (amendment 476); November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendments 699 and 700); November 1, 2010 (amendment 746).

§2A1.2. Second Degree Murder

(a) Base Offense Level: **38**

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2199, 2282A, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), *see* Appendix A (Statutory Index).

~~**Application Note:**~~

~~1. **Upward Departure Provision.**—If the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendments 699 and 700).

§2A1.3. Voluntary Manslaughter

(a) Base Offense Level: **29**

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendment 699).

§2A1.4. Involuntary Manslaughter

(a) Base Offense Level:

(1) **12**, if the offense involved criminally negligent conduct; or

(2) (Apply the greater):

(A) **18**, if the offense involved reckless conduct; or

(B) **22**, if the offense involved the reckless operation of a means of transportation.

(b) Special Instruction

(1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. **Definitions.**—For purposes of this guideline:

"***Criminally negligent***" means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

"***Means of transportation***" includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. "Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7).

"***Reckless***" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"Reckless" includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637); November 1, 2003 (amendment 652); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendment 699).

§2A1.5. Conspiracy or Solicitation to Commit Murder

(a) Base Offense Level: **33**

(b) Specific Offense Characteristic

(1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.

(c) Cross References

(1) If the offense resulted in the death of a victim, apply §2A1.1 (First Degree Murder).

(2) If the offense resulted in an attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 371, 373, 1117, 1751(d).

Historical Note	Effective November 1, 1990 (amendment 311). Amended effective November 1, 2004 (amendment 663).

* * * * *

2. ASSAULT

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

(a) Base Offense Level:

(1) **33**, if the object of the offense would have constituted first degree murder; or

(2) **27**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) the victim sustained serious bodily injury, increase by **2** levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1992(a)(7), 2199, 2291. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application ~~Notes~~Note:

1. **Definitions.**—For purposes of this guideline:

"***First degree murder***" means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

"***Permanent or life-threatening bodily injury***" and "***serious bodily injury***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

~~2. **Upward Departure Provision.** If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.~~

Background: This section applies to the offenses of assault with intent to commit murder and attempted murder. An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 83 and 84); November 1, 1990 (amendment 311); November 1, 1991 (amendment 391); November 1, 1995 (amendment 534); November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendment 699).

§2A2.2. Aggravated Assault

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) If (A) a firearm was discharged, increase by **5** levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **3**
(B)	Serious Bodily Injury	add **5**
(C)	Permanent or Life-Threatening Bodily Injury	add **7**
(D)	If the degree of injury is between that specified in subdivisions (A) and (B),	add **4** levels; or
(E)	If the degree of injury is between that specified in subdivisions (B) and (C),	add **6** levels.

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed **10** levels.

(4) If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner, increase by **3** levels.

However, the cumulative adjustments from application of subdivisions (2), (3), and (4) shall not exceed **12** levels.

(5) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

(6) If the offense involved the violation of a court protection order, increase by **2** levels.

(7) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), (8), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1992(a)(7), 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Aggravated assault***" means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.

"***Brandished***," "***bodily injury***," "***firearm***," "***otherwise used***," "***permanent or life-threatening bodily injury***," and "***serious bodily injury***," have the meaning given those terms in §1B1.1 (Application Instructions), Application Note 1.

"***Dangerous weapon***" has the meaning given that term in §1B1.1, Application Note 1, and includes any instrument that is not ordinarily used as a weapon (*e.g.*, a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"***Strangling***" and "***suffocating***" have the meaning given those terms in 18 U.S.C. § 113.

"***Spouse***," "***intimate partner***," and "***dating partner***" have the meaning given those terms in 18 U.S.C. § 2266.

2. **Application of Subsection (b)(1).**—For purposes of subsection (b)(1), "***more than minimal planning***" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

3. **Application of Subsection (b)(2).**—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

4. **Application of Official Victim Adjustment.**—If subsection (b)(7) applies, §3A1.2 (Official Victim) also shall apply.

Background: This guideline covers felonious assaults that are more serious than other assaults because of the presence of an aggravating factor, *i.e.*, serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.

Subsection (b)(7) implements the directive to the Commission in subsection 11008(e) of the 21st Century Department of Justice Appropriations Act (the "Act"), Public Law 107–273. The enhancement in subsection (b)(7) is cumulative to the adjustment in §3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall

consider "the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by" 18 U.S.C. §§ 111 and 115.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 85 and 86); November 1, 1990 (amendment 311); November 1, 1995 (amendment 534); November 1, 1997 (amendment 549); November 1, 2001 (amendment 614); November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendment 699); November 1, 2014 (amendment 781).

§2A2.3. Assault

(a) Base Offense Level:

(1) **7**, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or

(2) **4**, otherwise.

(b) Specific Offense Characteristic

(1) If (A) the victim sustained bodily injury, increase by **2** levels; or (B) the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner, or an individual under the age of sixteen years, increase by **4** levels.

(c) Cross Reference

(1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 113(a)(4), (5), (7), 115(a), 115(b)(1), 351(e), 1751(e), 2199, 2291. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Bodily injury***", "***dangerous weapon***", and "***firearm***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"***Spouse***," "***intimate partner***," and "***dating partner***" have the meaning given those terms in 18 U.S.C. § 2266.

"***Substantial bodily injury***" means "bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." *See* 18 U.S.C. § 113(b)(1).

2. **Application of Subsection (b)(1).**—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B).

Background: This section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault).

Historical Note	Effective November 1, 1987. Amended effective October 15, 1988 (amendment 64); November 1, 1989 (amendments 87 and 88); November 1, 1995 (amendment 510); November 1, 2004 (amendment 663); November 1, 2007 (amendment 699); November 1, 2014 (amendment 781).

§2A2.4. Obstructing or Impeding Officers

(a) Base Offense Level: **10**

(b) Specific Offense Characteristics

(1) If (A) the offense involved physical contact; or (B) a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by **3** levels.

(2) If the victim sustained bodily injury, increase by **2** levels.

(c) Cross Reference

(1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

Statutory Provisions: 18 U.S.C. §§ 40A, 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline, "***bodily injury***", "***dangerous weapon***", and "***firearm***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Application of Certain Chapter Three Adjustments.**—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under

18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).

~~3. **Upward Departure Provision.** The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).~~

Historical Note	Effective October 15, 1988 (amendment 64). Amended effective November 1, 1989 (amendments 89 and 90); November 1, 1992 (amendment 443); November 1, 1997 (amendment 550); November 1, 2004 (amendment 663); November 1, 2005 (amendment 679); November 1, 2007 (amendment 699); November 1, 2023 (amendment 815).

* * * * *

3. CRIMINAL SEXUAL ABUSE AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 701).

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level:

(1) **38**, if the defendant was convicted under 18 U.S.C. § 2241(c); or

(2) **30**, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

(2) If subsection (a)(2) applies and (A) the victim had not attained the age of twelve years, increase by **4** levels; or (B) the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily

injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(5) If the victim was abducted, increase by **4** levels.

(6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an interactive computer service, increase by **2** levels.

(c) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(2) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official, the offense shall be deemed to have an official victim for purposes of subsection (c)(2) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Abducted***", "***permanent or life-threatening bodily injury***", and "***serious bodily injury***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "***serious bodily injury***" means

conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"***Custody or control***" and "***prison official***" have the meaning given those terms in Application Note 4 of the Commentary to §3A1.2 (Official Victim).

"***Child pornography***" has the meaning given that term in 18 U.S.C. § 2256(8).

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Distribution***" means any act, including possession with intent to distribute, production, transportation, and advertisement, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant.

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Participant***" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography.

"***Victim***" includes an undercover law enforcement officer.

2. **Application of Subsection (b)(1).—**

(A) **Definitions.—**For purposes of subsection (b)(1), "***conduct described in 18 U.S.C. § 2241(a) or (b)***" is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) **Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).—**If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).

3. **Application of Subsection (b)(3).—**

(A) **Care, Custody, or Supervisory Control.**—Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, babysitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. **Application of Subsection (b)(6).—**

(A) **Misrepresentation of Participant's Identity.**—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Use of a Computer or Interactive Computer Service.**—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. **Application of Subsection (c)(2).—**

(A) **In General.**—The cross reference in subsection (c)(2) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(B) **Definition.**—For purposes of subsection (c)(2), "***sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

~~6. **Upward Departure Provision.**—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 91 and 92); November 1, 1991 (amendment 392); November 1, 1992 (amendment 444); November 1, 1993 (amendment 477); November 1, 1995 (amendment 511); November 1, 1997 (amendment 545); November 1, 2000 (amendments 592 and 601); November 1, 2001 (amendment 615); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2008 (amendment 725).

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the minor was in the custody, care, or supervisory control of the defendant, increase by **4** levels.

(2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by **4** levels.

(3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

"***Participant***" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

2. **Custody, Care, or Supervisory Control Enhancement.—**

(A) **In General.—**Subsection (b)(1) is intended to have broad application and is to be applied whenever the minor is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.—**If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(2).—**

(A) **Misrepresentation of Identity.—**The enhancement in subsection (b)(2)(B)(i) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(2)(B)(i) is intended to apply only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(B)(i) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Undue Influence.—**In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.

However, subsection (b)(2)(B)(ii) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B)(ii) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. **Application of Subsection (b)(3).**—Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.

5. **Cross Reference.**—Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (*see* 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (*see* 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (*see* 18 U.S.C. § 2242(1)).

~~6. **Upward Departure Consideration.**—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.~~

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the minor, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor's behavior was compromised. A four-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the minor and the defendant, as specified in 18 U.S.C. § 2243(a). A four-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the minor had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the minor.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 93); November 1, 1991 (amendment 392); November 1, 1992 (amendment 444); November 1, 1995 (amendment 511); November 1, 2000 (amendment 592); November 1, 2001 (amendment 615); November 1, 2004 (amendment 664); November 1, 2009 (amendment 732); November 1, 2010 (amendment 746).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. §§ 2243(b), 2243(c). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Participant***" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"***Ward***" means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. **Application of Subsection (b)(1).**—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a

minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. **Application of Subsection (b)(2).**—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

4. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 94); November 1, 1995 (amendment 511); November 1, 2000 (amendment 592); November 1, 2001 (amendment 615); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2010 (amendment 746); November 1, 2023 (amendment 816).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **20**, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);

(2) **16**, if the offense involved conduct described in 18 U.S.C. § 2242; or

(3) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **22**, increase to level **22**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 2244. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Participant***" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

2. **Application of Subsection (a)(1).**—For purposes of subsection (a)(1), "***conduct described in 18 U.S.C. § 2241(a) or (b)***" is engaging in, or causing sexual contact with, or by another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person

will be subjected to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. **Application of Subsection (a)(2).**—For purposes of subsection (a)(2), "***conduct described in 18 U.S.C. § 2242***" is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

4. **Application of Subsection (b)(3).—**

   (A) **Custody, Care, or Supervisory Control.**—Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

   (B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. **Misrepresentation of a Participant's Identity.**—The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

   The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

6. **Application of Subsection (b)(5).**—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1–3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 95); November 1, 1991 (amendment 392); November 1, 1992 (amendment 444); November 1, 1995 (amendment 511); November 1, 2000 (amendment 592); November 1, 2001 (amendment 615); November 1, 2004 (amendment 664); November 1, 2007 (amendments 701 and 711).

§2A3.5. Failure to Register as a Sex Offender

(a) Base Offense Level (Apply the greatest):

(1) **16**, if the defendant was required to register as a Tier III offender;

(2) **14**, if the defendant was required to register as a Tier II offender; or

(3) **12**, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

(1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

(A) a sex offense against someone other than a minor, increase by **6** levels;

(B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or

(C) a sex offense against a minor, increase by **8** levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a), (b).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Sex offense***" has the meaning given that term in 34 U.S.C. § 20911(5).

"***Tier I offender***", "***Tier II offender***", and "***Tier III offender***" have the meaning given the terms "tier I sex offender", "tier II sex offender", and "tier III sex offender", respectively, in 34 U.S.C. § 20911.

2. **Application of Subsection (b)(1).**—For purposes of subsection (b)(1), a defendant shall be deemed to be in a "failure to register status" during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

3. **Application of Subsection (b)(2).—**

(A) **In General.**—In order for subsection (b)(2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) **Interaction with Subsection (b)(1).**—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

Historical Note	Effective November 1, 2007 (amendments 701 and 711). Amended effective November 1, 2010 (amendment 746); November 1, 2018 (amendments 812 and 813).

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under—

(a) 18 U.S.C. § 2250(d), the guideline sentence is the minimum term of imprisonment required by statute; or

(b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(d), 2260A.

Application Notes:

1. **In General.**—Section 2250(d) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a) or (b). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.

2. **Inapplicability of Chapters Three and Four.**—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for

Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. **Inapplicability of Chapter Two Enhancement.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(d) or § 2260A.

~~4. **Upward Departure.**—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.~~

Historical Note	Effective November 1, 2007 (amendment 701). Amended effective November 1, 2018 (amendment 812).

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4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT

§2A4.1. Kidnapping, Abduction, Unlawful Restraint

(a) Base Offense Level: **32**

(b) Specific Offense Characteristics

(1) If a ransom demand or a demand upon government was made, increase by **6** levels.

(2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(3) If a dangerous weapon was used, increase by **2** levels.

(4) (A) If the victim was not released before thirty days had elapsed, increase by **2** levels.

(B) If the victim was not released before seven days had elapsed, increase by **1** level.

(5) If the victim was sexually exploited, increase by **6** levels.

(6) If the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by **3** levels.

(7) If the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom; or if another offense was committed during the kidnapping, abduction, or unlawful restraint, increase to—

(A) the offense level from the Chapter Two offense guideline applicable to that other offense if such offense guideline includes an adjustment for kidnapping, abduction, or unlawful restraint, or otherwise takes such conduct into account; or

(B) **4** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**, in any other case,

if the resulting offense level is greater than that determined above.

(c) Cross Reference

(1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b), 2340A. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

Definitions of "***serious bodily injury***" and "***permanent or life-threatening bodily injury***" are found in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "***serious bodily injury***" means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).

2. "***A dangerous weapon was used***" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).

3. "***Sexually exploited***" includes offenses set forth in 18 U.S.C. §§ 2241–2244, 2251, and 2421–2423.

4. In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)).

   Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.

Background: Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.

The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.

An enhancement is provided when the offense is committed for ransom (subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).

Section 401 of Public Law 101–647 amended 18 U.S.C. § 1201 to require that courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided.

Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 96); November 1, 1991 (amendment 363); November 1, 1992 (amendment 445); November 1, 1993 (amendment 478); November 1, 1997 (amendment 545); November 1, 2002 (amendment 637); May 30, 2003 (amendment 650); October 27, 2003 (amendment 651).

§2A4.2. Demanding or Receiving Ransom Money

(a) Base Offense Level: **23**

(b) Cross Reference

(1) If the defendant was a participant in the kidnapping offense, apply §2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

Commentary

Statutory Provisions: 18 U.S.C. §§ 876(a), 877, 1202. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. A "***participant***" is a person who is criminally responsible for the commission of the offense, but need not have been convicted.

Background: This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in §2A4.1. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. §§ 876–877.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 479); November 1, 2023 (amendment 824).

* * * * *

5. AIR PIRACY AND OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637).

§2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

(a) Base Offense Level: **38**

(b) Specific Offense Characteristic

(1) If death resulted, increase by **5** levels.

Commentary

Statutory Provisions: 49 U.S.C. § 46502(a), (b) (formerly 49 U.S.C. § 1472 (i), (n)). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Background: This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. § 46502(a), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. § 46502(b). Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is assumed in the base offense level.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1995 (amendment 534).

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft

(a) Base Offense Level (Apply the greatest):

(1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;

(2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;

(3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1–2A2.4; or

(4) **9**.

(b) Specific Offense Characteristic

(1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) Cross References

(1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

(2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 39B, 1992(a)(1), (a)(4), (a)(5), (a)(6); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. **Definitions.**—For purposes of this guideline:

"***Biological agent***", "***chemical weapon***", "***nuclear byproduct material***", "***nuclear material***", "***toxin***", and "***weapon of mass destruction***" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"***Brandished***", "***dangerous weapon***", "***firearm***", and "***otherwise used***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"***Mass transportation***" has the meaning given that term in 18 U.S.C. § 1992(d)(7).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 97 and 303); November 1, 1993 (amendment 480); November 1, 1995 (amendment 534); November 1, 2002 (amendment 637); November 1, 2007 (amendment 699); November 1, 2023 (amendment 815).

§2A5.3. Committing Certain Crimes Aboard Aircraft

(a) Base Offense Level: The offense level applicable to the underlying offense.

Commentary

Statutory Provision: 49 U.S.C. § 46506 (formerly 49 U.S.C. § 1472(k)(1)).

Application ~~Notes~~Note:

1. "***Underlying offense***" refers to the offense listed in 49 U.S.C. § 46506 of which the defendant is convicted.

~~2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.~~

Historical Note	Effective October 15, 1988 (amendment 65). Amended effective November 1, 1989 (amendment 98); November 1, 1995 (amendment 534).

* * * * *

6. THREATENING OR HARASSING COMMUNICATIONS, HOAXES, STALKING, AND DOMESTIC VIOLENCE

Historical Note	Effective November 1, 1987. Amended effective November 1, 1997 (amendment 549); November 1, 2006 (amendment 686).

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

(a) Base Offense Level:

(1) **12**; or

(2) **6**, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E) that did not involve a threat to injure a person or property.

(b) Specific Offense Characteristics

(1) If the offense involved any conduct evidencing an intent to carry out such threat, increase by **6** levels.

(2) If (A) the offense involved more than two threats; or (B) the defendant is convicted under 18 U.S.C. § 1521 and the offense involved more than two false liens or encumbrances, increase by **2** levels.

(3) If the offense involved the violation of a court protection order, increase by **2** levels.

(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

(5) If the defendant (A) is convicted under 18 U.S.C. § 115, (B) made a public threatening communication, and (C) knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115, increase by **2** levels.

(6) If (A) subsection (a)(2) and subdivisions (1), (2), (3), (4), and (5) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by **4** levels.

(c) Cross Reference

(1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876(c), 877, 878(a), 879, 1038, 1521, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)–(E); 49 U.S.C. § 46507. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Scope of Conduct to Be Considered.**—In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

2. **Applicability of Chapter Three Adjustments.**—If the defendant is convicted under 18 U.S.C. § 1521, apply §3A1.2 (Official Victim).

3. **Grouping.**—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

~~4. **Departure Provisions.**—~~

~~(A) **In General.**—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. *See* Chapter Five, Part K (Departures).~~

~~(B) **Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm.**—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.~~

Background: These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

Subsection (b)(5) implements, in a broader form, the directive to the Commission in section 209 of the Court Security Improvement Act of 2007, Public Law 110–177.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 480); November 1, 1997 (amendment 549); November 1, 2002 (amendment 637); November 1, 2006 (amendment 686); November 1, 2007 (amendment 699); November 1, 2008 (amendment 718); November 1, 2009 (amendment 729); November 1, 2023 (amendment 824).

§2A6.2. Stalking or Domestic Violence

(a) Base Offense Level: **18**

(b) Specific Offense Characteristic

(1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; (D) possession, or threatened use, of a dangerous weapon; or (E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of subdivisions (A), (B), (C), (D), or (E), increase by **4** levels.

(c) Cross Reference

(1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2261–2262.

Application Notes:

1. For purposes of this guideline:

"***Bodily injury***" and "***dangerous weapon***" are defined in the Commentary to §1B1.1 (Application Instructions).

"***Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim***" means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening, harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.

"***Stalking***" means conduct described in 18 U.S.C. § 2261A.

"***Strangling***" and "***suffocating***" have the meaning given those terms in 18 U.S.C. § 113.

2. Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.

3. In determining whether subsection (b)(1)(E) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(E) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.

   Prior convictions taken into account under subsection (b)(1)(E) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together with the interstate domestic violence count. This grouping procedure avoids unwarranted "double counting" with the enhancement in subsection (b)(1)(E) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

   Multiple counts that are cross referenced to another offense guideline pursuant to subsection (c) are to be grouped together if §3D1.2 (Groups of Closely Related Counts) would require grouping of those counts under that offense guideline. Similarly, multiple counts cross referenced pursuant to subsection (c) are not to be grouped together if §3D1.2 would preclude grouping of the counts under that offense guideline. For example, if the defendant is convicted of multiple counts of threatening an ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A6.1 (Threatening or Harassing Communications), the counts would group together because Application Note 3 of §2A6.1 specifically requires grouping. In contrast, if the defendant is convicted of multiple counts of assaulting the ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A2.2 (Aggravated Assault), the counts probably would not group together inasmuch as §3D1.2(d) specifically precludes grouping of counts covered by §2A2.2 and no other provision of §3D1.2 would likely apply to require grouping.

   Multiple counts involving different victims are not to be grouped under §3D1.2 (Groups of Closely Related Counts).

~~5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.~~

Historical Note	Effective November 1, 1997 (amendment 549). Amended effective November 1, 2001 (amendment 616); November 1, 2009 (amendment 737); November 1, 2014 (amendment 781).

PART B — BASIC ECONOMIC OFFENSES

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, PROPERTY DESTRUCTION, AND OFFENSES INVOLVING FRAUD OR DECEIT

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Chapter Two, Part K (Offenses Involving Public Safety)). These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 303); November 1, 2001 (amendment 617).

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$6,500 or less	no increase
(B)	More than $6,500	add **2**
(C)	More than $15,000	add **4**
(D)	More than $40,000	add **6**
(E)	More than $95,000	add **8**
(F)	More than $150,000	add **10**
(G)	More than $250,000	add **12**
(H)	More than $550,000	add **14**
(I)	More than $1,500,000	add **16**

(J)	More than $3,500,000	add **18**
(K)	More than $9,500,000	add **20**
(L)	More than $25,000,000	add **22**
(M)	More than $65,000,000	add **24**
(N)	More than $150,000,000	add **26**
(O)	More than $250,000,000	add **28**
(P)	More than $550,000,000	add **30**.

***Notes to Table:**

(A) **Loss.—**Loss is the greater of actual loss or intended loss.

(B) **Gain.—**The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) "***Actual loss***" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) "***Intended loss***" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) "***Pecuniary harm***" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) "***Reasonably foreseeable pecuniary harm***" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;

(B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(7) If (A) the defendant was convicted of a federal health care offense involving a government health care program; and (B) the loss under subsection (b)(1) to the government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

(8) (Apply the greater) If—

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by **4** levels. If the resulting offense level is less than **12**, increase to level **12**.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(17) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in subparagraph (D).

(D) If the resulting offense level determined under subparagraph (A) or (B) is less than level **24**, increase to level **24**.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subparagraph (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(20) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither paragraph (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful

Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 220, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 20 U.S.C. § 1097(a), (b), (d), (e); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Cultural heritage resource***" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

"***Equity security***" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"***Federal health care offense***" has the meaning given that term in 18 U.S.C. § 24.

"***Financial institution***" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (*e.g.*, pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons.

"***Firearm***" and "***destructive device***" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"***Foreign instrumentality***" and "***foreign agent***" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"***Government health care program***" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

"***Means of identification***" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"***National cemetery***" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"***Paleontological resource***" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

"***Personal information***" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.

"***Pre-retail medical product***" has the meaning given that term in 18 U.S.C. § 670(e).

"***Publicly traded company***" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

"***Supply chain***" has the meaning given that term in 18 U.S.C. § 670(e).

"***Theft from the person of another***" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

"***Trade secret***" has the meaning given that term in 18 U.S.C. § 1839(3).

"***Veterans' memorial***" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

"***Victim***" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. **Application of Subsection (a)(1).—**

(A) **"Referenced to this Guideline".—**For purposes of subsection (a)(1), an offense is "***referenced to this guideline***" if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) **Definition of "Statutory Maximum Term of Imprisonment".**—For purposes of this guideline, "***statutory maximum term of imprisonment***" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) **Base Offense Level Determination for Cases Involving Multiple Counts.**—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

(A) **Rules of Construction in Certain Cases.**—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) **Product Substitution Cases.**—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) **Procurement Fraud Cases.**—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) **Offenses Under 18 U.S.C. § 1030.**—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) **Estimation of Loss.**—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(C) **Exclusions from Loss.**—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(D) **Credits Against Loss.**—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(E) **Special Rules.**—Notwithstanding subparagraph (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) **Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.**—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN)

pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this clause, "***counterfeit access device***" and "***unauthorized access device***" have the meaning given those terms in Application Note 10(A).

(ii) **Government Benefits.**—In a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.

(iii) **Davis–Bacon Act Violations.**—In a case involving a Davis–Bacon Act violation (*i.e.*, a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.

(iv) **Ponzi and Other Fraudulent Investment Schemes.**—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.*, the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

(v) **Certain Other Unlawful Misrepresentation Schemes.**—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

(vi) **Value of Controlled Substances.**—In a case involving controlled substances, loss is the estimated street value of the controlled substances.

(vii) **Value of Cultural Heritage Resources or Paleontological Resources.**—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.

(viii) **Federal Health Care Offenses Involving Government Health Care Programs.**—In a case in which the defendant is convicted of a federal health care offense involving a government health care program, the aggregate dollar amount of fraudulent bills submitted to the government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.

(ix) **Fraudulent Inflation or Deflation in Value of Securities or Commodities.**—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court

may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—

(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

(II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

4. **Application of Subsection (b)(2).—**

(A) **Definition.—**For purposes of subsection (b)(2), "***mass-marketing***" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(B) **Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—**For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) **Undelivered United States Mail.—**

(i) **In General.—**In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "***victim***" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) **Special Rule.—**A case described in subparagraph (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

(iii) **Definition.**—"***Undelivered United States mail***" means mail that has not actually been received by the addressee or the addressee's agent (*e.g.*, mail taken from the addressee's mail box).

(D) **Vulnerable Victims.**—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

(E) **Cases Involving Means of Identification.**—For purposes of subsection (b)(2), in a case involving means of identification "***victim***" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

(F) **Substantial Financial Hardship.**—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

(i) becoming insolvent;

(ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);

(iii) suffering substantial loss of a retirement, education, or other savings or investment fund;

(iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;

(v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and

(vi) suffering substantial harm to his or her ability to obtain credit.

5. **Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).**—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

(A) The regularity and sophistication of the defendant's activities.

(B) The value and size of the inventory of stolen property maintained by the defendant.

(C) The extent to which the defendant's activities encouraged or facilitated other crimes.

(D) The defendant's past activities involving stolen property.

6. **Application of Subsection (b)(6).**—For purposes of subsection (b)(6), "***improper means***" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.

7. **Application of Subsection (b)(8)(B).**—If subsection (b)(8)(B) applies, do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

8. **Application of Subsection (b)(9).—**

(A) **In General.**—The adjustments in subsection (b)(9) are alternative rather than cumulative. ~~If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.~~

(B) **Misrepresentations Regarding Charitable and Other Institutions.**—Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (*e.g.*, for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:

(i) A defendant who solicited contributions for a non-existent famine relief organization.

(ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.

(iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.

(C) **Fraud in Contravention of Prior Judicial Order.**—Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (*e.g.*, a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) **College Scholarship Fraud.**—For purposes of subsection (b)(9)(D):

"***Financial assistance***" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"***Institution of higher education***" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) **Non-Applicability of Chapter Three Adjustments.—**

(i) **Subsection (b)(9)(A).**—If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) **Subsection (b)(9)(B) and (C).**—If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

9. **Application of Subsection (b)(10).—**

(A) **Definition of United States.**—For purposes of subsection (b)(10)(B), "***United States***" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) **Sophisticated Means Enhancement under Subsection (b)(10)(C).**—For purposes of subsection (b)(10)(C), "***sophisticated means***" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) **Non-Applicability of Chapter Three Adjustment.**—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

10. **Application of Subsection (b)(11).—**

(A) **Definitions.**—For purposes of subsection (b)(11):

"***Authentication feature***" has the meaning given that term in 18 U.S.C. § 1028(d)(1).

"***Counterfeit access device***" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

"***Device-making equipment***" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"***Produce***" includes manufacture, design, alter, authenticate, duplicate, or assemble. "***Production***" includes manufacture, design, alteration, authentication, duplication, or assembly.

"***Telecommunications service***" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"***Unauthorized access device***" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) **Authentication Features and Identification Documents.**—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to

violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) **Application of Subsection (b)(11)(C)(i).—**

(i) **In General.—**Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) **Examples.—**Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (*e.g.*, from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (*e.g.*, from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) **Non-Applicability of Subsection (b)(11)(C)(i).—**Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:

(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(D) **Application of Subsection (b)(11)(C)(ii).—**Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

11. **Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—**If subsection (b)(13) applies, do not apply §3B1.3.

12. **Application of Subsection (b)(15).—**Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (*e.g.*, an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "***vehicle***" means motor vehicle, vessel, or aircraft. A "***cargo shipment***" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

13. **Gross Receipts Enhancement under Subsection (b)(17)(A).—**

(A) **In General.**—For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

(B) **Definition.**—"***Gross receipts from the offense***" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. *See* 18 U.S.C. § 982(a)(4).

14. **Application of Subsection (b)(17)(B).—**

(A) **Application of Subsection (b)(17)(B)(i).**—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

(i) The financial institution became insolvent.

(ii) The financial institution substantially reduced benefits to pensioners or insureds.

(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.

(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.

(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".

(B) **Application of Subsection (b)(17)(B)(ii).—**

(i) **Definition.**—For purposes of this subsection, "***organization***" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).

(ii) **In General.**—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:

(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.

(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).

(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.

(IV) The organization substantially reduced its workforce.

(V) The organization substantially reduced its employee pension benefits.

(VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".

15. **Application of Subsection (b)(19).—**

(A) **Definitions.—**For purposes of subsection (b)(19):

"***Critical infrastructure***" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"***Government entity***" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

(B) **Subsection (b)(19)(A)(iii).—**If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).

16. **Application of Subsection (b)(20).—**

(A) **Definitions.—**For purposes of subsection (b)(20):

"***Commodities law***" means (i) the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.

"***Commodity pool operator***" has the meaning given that term in section 1a(11) of the Commodity Exchange Act (7 U.S.C. § 1a(11)).

"***Commodity trading advisor***" has the meaning given that term in section 1a(12) of the Commodity Exchange Act (7 U.S.C. § 1a(12)).

"***Futures commission merchant***" has the meaning given that term in section 1a(28) of the Commodity Exchange Act (7 U.S.C. § 1a(28)).

"***Introducing broker***" has the meaning given that term in section 1a(31) of the Commodity Exchange Act (7 U.S.C. § 1a(31)).

"***Investment adviser***" has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

"***Person associated with a broker or dealer***" has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

"***Person associated with an investment adviser***" has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

"***Registered broker or dealer***" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

"***Securities law***" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

(B) **In General.**—A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) **Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).**—If subsection (b)(20) applies, do not apply §3B1.3.

17. **Cross Reference in Subsection (c)(3).**—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

18. **Continuing Financial Crimes Enterprise.**—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".

19. **Partially Completed Offenses.**—In the case of a partially completed offense (*e.g.*, an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 of the Commentary to §2X1.1.

20. **Multiple-Count Indictments.**—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a

common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).

~~21. **Departure Considerations.**~~

~~(A) **Upward Departure Considerations.** There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:~~

~~(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.~~

~~(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.~~

~~(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).~~

~~(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.~~

~~(v) In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.~~

~~(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:~~

~~(I) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.~~

~~(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.~~

~~(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.~~

~~(B) **Upward Departure for Debilitating Impact on a Critical Infrastructure.**—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.~~

~~(C) **Downward Departure Consideration.**—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.~~

~~For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.~~

~~(D) **Downward Departure for Major Disaster or Emergency Victims.**—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.~~

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does

not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111–148.

Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112–186.

Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.

Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(12) implements the directive in section 5 of Public Law 110–179.

Subsection (b)(14) implements the directive in section 3 of Public Law 112–269.

Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(18) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(19) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 7); November 1, 1989 (amendments 99–101 and 303); November 1, 1990 (amendments 312, 317, and 361); November 1, 1991 (amendments 364, and 393); November 1, 1993 (amendments 481 and 482); November 1, 1995 (amendment 512); November 1, 1997 (amendment 551); November 1, 1998 (amendment 576); November 1, 2000 (amendment 596); November 1, 2001 (amendment 617); November 1, 2002 (amendments 637, 638, and 646); January 25, 2003 (amendment 647); November 1, 2003 (amendments 653, 654, 655, and 661); November 1, 2004 (amendments 665, 666, and 674); November 1, 2005 (amendment 679); November 1, 2006 (amendments 685 and 696); November 1, 2007 (amendments 699, 700, and 702); February 6, 2008 (amendment 714); November 1, 2008 (amendments 719 and 725); November 1, 2009 (amendments 726, 733, and 737); November 1, 2010 (amendments 745 and 747); November 1, 2011 (amendment 749); November 1, 2012 (amendment 761); November 1, 2013 (amendments 771, 772, and 777); November 1, 2015 (amendments 791 and 792), November 1, 2018 (amendments 806 and 813); November 1, 2023 (amendment 815); November 1, 2024 (amendments 827 and 831).

§2B1.2. [Deleted]

Historical Note	Section 2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), effective November 1, 1987, amended effective January 15, 1988 (amendment 8), June 15, 1988 (amendment 9), November 1, 1989 (amendments 102–104), and November 1, 1990 (amendments 312 and 361), was deleted by consolidation with §2B1.1 effective November 1, 1993 (amendment 481).

§2B1.3. [Deleted]

Historical Note	Section 2B1.3 (Property Damage or Destruction), effective November 1, 1987, amended effective June 15, 1988 (amendment 10), November 1, 1990 (amendments 312 and 313), November 1, 1997 (amendment 551), November 1, 1998 (amendment 576), was deleted by consolidation with §2B1.1 effective November 1, 2001 (amendment 617).

§2B1.4. Insider Trading

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the gain resulting from the offense exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Application of Subsection (b)(2).**—For purposes of subsection (b)(2), an "***organized scheme to engage in insider trading***" means a scheme to engage in insider trading that involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

   The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

   (A) the number of transactions;

   (B) the dollar value of the transactions;

   (C) the number of securities involved;

   (D) the duration of the offense;

   (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);

   (F) the efforts undertaken to obtain material, nonpublic information;

   (G) the number of instances in which material, nonpublic information was obtained; and

   (H) the efforts undertaken to conceal the offense.

2. **Application of §3B1.3.**—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee".

   Furthermore, §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates

in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. *See* §3B1.3, comment. (n.4).

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading". Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

Certain other offenses, *e.g.*, 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.

Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111–203.

Historical Note	Effective November 1, 2001 (amendment 617). Amended effective November 1, 2010 (amendment 746); November 1, 2012 (amendment 761); November 1, 2015 (amendment 791).

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the value of the cultural heritage resource or paleontological resource (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource or paleontological resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery or veterans' memorial; (F) a museum; or (G) the World Heritage List, increase by **2** levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony;

(D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.

(4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by **2** levels.

(5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources or paleontological resources, increase by **2** levels.

(6) If a dangerous weapon was brandished or its use was threatened, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(c) Cross Reference

(1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. §§ 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. §§ 541–546, 554, 641, 661–662, 666, 668, 1163, 1168, 1170, 1361, 1369, 2232, 2314–2315.

Application Notes:

1. **Definitions.—**For purposes of this guideline:

(A) "***Cultural heritage resource***" means any of the following:

(i) A historic property, as defined in 54 U.S.C. § 300308 (*see also* section 16(l) of 36 C.F.R. pt. 800).

(ii) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (*see also* section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 229; 18 C.F.R. pt. 1312).

(iii) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (*see also* 43 C.F.R. § 10.2(d)).

(iv) A commemorative work. "***Commemorative work***" (I) has the meaning given that term in 40 U.S.C. § 8902(a)(1); and (II) includes any national monument or national memorial.

(v) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).

(vi) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

(B) "***Paleontological resource***" has the meaning given such term in 16 U.S.C. § 470aaa.

2. **Value of the Resource Under Subsection (b)(1).**—This application note applies to the determination of the value of the resource under subsection (b)(1).

   (A) **General Rule.**—For purposes of subsection (b)(1), the value of the resource shall include, as applicable to the particular resource involved, the following:

      (i) The archaeological value. (Archaeological value shall be included in the case of any resource that is an archaeological resource.)

      (ii) The commercial value.

      (iii) The cost of restoration and repair.

   (B) **Estimation of Value.**—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the resource based on available information.

   (C) **Definitions.**—For purposes of this application note:

      (i) "***Archaeological value***" of a resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (*See, e.g.*, 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)

      (ii) "***Commercial value***" of a resource means the fair market value of the resource at the time of the offense. (*See, e.g.*, 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)

      (iii) "***Cost of restoration and repair***" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the resource; and any other actual and projected costs to complete restoration and repair of the resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (*See, e.g.*, 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

   (D) **Determination of Value in Cases Involving a Variety of Resources.**—In a case involving a variety of resources, the value of the resources is the sum of all calculations made for those resources under this application note.

3. **Enhancement in Subsection (b)(2).**—For purposes of subsection (b)(2):

   (A) "***Museum***" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.

   (B) "***National cemetery***" and "***veterans' memorial***" have the meaning given those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

(C) "***National Historic Landmark***" means a property designated as such pursuant to 54 U.S.C. § 302102.

(D) "***National marine sanctuary***" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.

(E) "***National monument or national memorial***" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to 54 U.S.C. § 320301.

(F) "***National park system***" has the meaning given that term in 54 U.S.C. § 100501.

(G) "***World Heritage List***" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. **Enhancement in Subsection (b)(3).**—For purposes of subsection (b)(3):

(A) "***Cultural patrimony***" has the meaning given that term in 25 U.S.C. § 3001(3)(D) (*see also* 43 C.F.R. 10.2(d)(4)).

(B) "***Cultural property***" has the meaning given that term in 19 U.S.C. § 2601(6).

(C) "***Designated archaeological or ethnological material***" means archaeological or ethnological material described in 19 U.S.C. § 2601(7) *(see also* 19 U.S.C. §§ 2601(2) and 2604).

(D) "***Funerary object***" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.

(E) "***Human remains***" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(F) "***Pre-Columbian monumental or architectural sculpture or mural***" has the meaning given that term in 19 U.S.C. § 2095(3).

(G) "***Sacred object***" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (*see also* 43 C.F.R. § 10.2(d)(3)).

5. **Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).—**

(A) **"For Pecuniary Gain".**—For purposes of subsection (b)(4), "***for pecuniary gain***" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) **Commercial Purpose.**—The acquisition of resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose" for purposes of subsection (b)(4).

6. **Pattern of Misconduct Enhancement Under Subsection (b)(5).—**

   (A) **Definition.**—For purposes of subsection (b)(5), "***pattern of misconduct involving cultural heritage resources or paleontological resources***" means two or more separate instances of offense conduct involving a resource that did not occur during the course of the offense (*i.e.*, that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

   (B) **Computation of Criminal History Points.**—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. **Dangerous Weapons Enhancement Under Subsection (b)(6).**—For purposes of subsection (b)(6), "***brandished***" and "***dangerous weapon***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

8. **Multiple Counts.**—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).

~~9. **Upward Departure Provision.**—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources or paleontological resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.*, the Statue of Liberty or the Liberty Bell).~~

Historical Note	Effective November 1, 2002 (amendment 638). Amended effective November 1, 2006 (amendment 685); November 1, 2007 (amendment 700); November 1, 2010 (amendments 745 and 746); November 1, 2014 (amendment 781); November 1, 2015 (amendment 791); November 1, 2018 (amendment 813).

§2B1.6. Aggravated Identity Theft

(a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

Commentary

Statutory Provision: 18 U.S.C. § 1028A. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Imposition of Sentence.—**

   (A) **In General.—**Section 1028A of title 18, United States Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subparagraph (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

   (B) **Multiple Convictions Under Section 1028A.—**Section 1028A(b)(4) of title 18, United States Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. *See* the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

2. **Inapplicability of Chapter Two Enhancement.—**If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "***Means of identification***" has the meaning given that term in 18 U.S.C. § 1028(d)(7).

3. **Inapplicability of Chapters Three and Four.—**Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2.

Historical Note	Effective November 1, 2005 (amendment 677). Amended effective November 1, 2024 (amendment 831).

* * * * *

2. BURGLARY AND TRESPASS

§2B2.1. Burglary of a Residence or a Structure Other than a Residence

(a) Base Offense Level:

(1) **17**, if a residence; or

(2) **12**, if a structure other than a residence.

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by **2** levels.

(2) If the loss exceeded $5,000, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **1**
(C)	More than $20,000	add **2**
(D)	More than $95,000	add **3**
(E)	More than $500,000	add **4**
(F)	More than $1,500,000	add **5**
(G)	More than $3,000,000	add **6**
(H)	More than $5,000,000	add **7**
(I)	More than $9,500,000	add **8**.

(3) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.

(4) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Firearm***," "***destructive device***," and "***dangerous weapon***" are defined in the Commentary to §1B1.1 (Application Instructions).

2. "***Loss***" means the value of the property taken, damaged, or destroyed.

3. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.

4. **More than Minimal Planning.**—"***More than minimal planning***" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. "More than minimal planning" shall be considered to be present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.

Background: The base offense level for residential burglary is higher than for other forms of burglary because of the increased risk of physical and psychological injury. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. ~~Weapon use would be a ground for upward departure.~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 11); June 15, 1988 (amendment 12); November 1, 1989 (amendments 105 and 106); November 1, 1990 (amendments 315 and 361); November 1, 1993 (amendment 481); November 1, 2001 (amendment 617); November 1, 2014 (amendment 781); November 1, 2015 (amendment 791).

§2B2.2. [Deleted]

Historical Note	Section 2B2.2 (Burglary of Other Structures), effective November 1, 1987, amended effective June 15, 1988 (amendment 13), November 1, 1989 (amendment 107), and November 1, 1990 (amendments 315 and 361), was deleted by consolidation with §2B2.1 effective November 1, 1993 (amendment 481).

§2B2.3. Trespass

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

(1) (Apply the greater) If—

(A) the trespass occurred (i) at a secure government facility; (ii) at a nuclear energy facility; (iii) on a vessel or aircraft of the United States; (iv) in a secure area of an airport or a seaport; (v) at a residence; (vi) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vii) at any restricted building or grounds; or (viii) on a computer system used (I) to maintain or operate a critical infrastructure; or (II) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels; or

(B) the trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds, increase by **4** levels.

(2) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (ii) exceeded $6,500, increase by

the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(c) Cross Reference

(1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036, 2199; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Airport***" has the meaning given that term in section 47102 of title 49, United States Code.

"***Critical infrastructure***" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"***Felony offense***" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.

"***Firearm***" and "***dangerous weapon***" are defined in the Commentary to §1B1.1 (Application Instructions).

"***Government entity***" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"***Protected computer***" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

"***Restricted building or grounds***" has the meaning given that term in 18 U.S.C. § 1752.

"***Seaport***" has the meaning given that term in 18 U.S.C. § 26.

2. **Application of Subsection (b)(3).**—Valuation of loss is discussed in §2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1.

Background: Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secure government installations (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 108 and 109); November 1, 1997 (amendment 551); November 1, 2001 (amendment 617); November 1, 2002 (amendment 637); November 1, 2003 (amendment 654); November 1, 2007 (amendments 699 and 703); November 1, 2013 (amendment 777); November 1, 2015 (amendment 791); November 1, 2024 (amendment 827).

* * * * *

3. ROBBERY, EXTORTION, AND BLACKMAIL

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

(1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the cumulative adjustments from application of paragraphs (2) and (3) shall not exceed **11** levels.

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was

physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

(5) If the offense involved carjacking, increase by **2** levels.

(6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.

(7) If the loss exceeded $20,000, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	$20,000 or less	no increase
(B)	More than $20,000	add **1**
(C)	More than $95,000	add **2**
(D)	More than $500,000	add **3**
(E)	More than $1,500,000	add **4**
(F)	More than $3,000,000	add **5**
(G)	More than $5,000,000	add **6**
(H)	More than $9,500,000	add **7**.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a), 2119. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," "***abducted***," and "***physically restrained***" are defined in the Commentary to §1B1.1 (Application Instructions).

"***Carjacking***" means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.

2. **Dangerous Weapon.—**Consistent with Application Note 1(E)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

3. **Definition of "Loss".**—"***Loss***" means the value of the property taken, damaged, or destroyed.

4. **Cumulative Application of Subsections (b)(2) and (b)(3).**—The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.

~~5. **Upward Departure Provision.**—If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).~~

~~6~~5. **"A Threat of Death".**—"A threat of death," as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendments 14 and 15); November 1, 1989 (amendments 110 and 111); November 1, 1990 (amendments 314, 315, and 361); November 1, 1991 (amendment 365); November 1, 1993 (amendment 483); November 1, 1997 (amendments 545 and 552); November 1, 2000 (amendment 601); November 1, 2001 (amendment 617); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791); November 1, 2018 (amendment 805); November 1, 2024 (amendment 831).

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by **2** levels.

(2) If the greater of the amount demanded or the loss to the victim exceeded $20,000, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

(3) (A)(i) If a firearm was discharged, increase by **7** levels; (ii) if a firearm was otherwise used, increase by **6** levels; (iii) if a firearm was brandished or possessed, increase by **5** levels; (iv) if a dangerous weapon was otherwise used, increase by **4** levels; or (v) if a dangerous weapon was brandished or possessed, increase by **3** levels; or

(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of clauses (i)(I) through (i)(V), increase by **3** levels.

(4) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	Degree of Bodily Injury	Increase in Level
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the cumulative adjustments from application of paragraphs (3) and (4) shall not exceed **11** levels.

(5) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

(c) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), (d), 876(b), (d), 877, 1030(a)(7), 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Abducted***," "***bodily injury***," "***brandished***," "***dangerous weapon***," "***firearm***," "***otherwise used***," "***permanent or life-threatening bodily injury***," "***physically restrained***," and "***serious bodily injury***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"***Critical infrastructure***" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"***Government entity***" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

2. **Threat of Injury or Serious Damage.**—This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.

3. **Offenses Involving Public Officials and Other Extortion Offenses.**—Guidelines for bribery involving public officials are found in Part C, Offenses Involving Public Officials. "Extortion under color of official right," which usually is solicitation of a bribe by a public official, is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprises and Racketeering.

4. **Cumulative Application of Subsections (b)(3) and (b)(4).**—The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.

5. **Definition of "Loss to the Victim".**—"***Loss to the victim***," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (*e.g.*, the cost of defensive measures taken in direct response to the offense).

6. **Defendant's Preparation or Ability to Carry Out a Threat.**—In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous

weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant's preparation or ability to carry out the threatened harm (*e.g.*, an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product's tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person's daily routine). Subsection (b)(3)(B) addresses such cases.

~~7. **Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims.** If the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.*, in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.~~

~~8. **Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim.** If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.~~

Background: The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years. 18 U.S.C. §§ 875–877 prohibit communication of extortionate demands through various means. The maximum penalty under these statutes varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of 18 U.S.C. § 877 involve mailing threatening communications from foreign countries. This guideline also applies to offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a "protected computer."

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 112, 113, and 303); November 1, 1990 (amendment 316); November 1, 1991 (amendment 366); November 1, 1993 (amendment 479); November 1, 1997 (amendment 551); November 1, 1998 (amendment 586); November 1, 2000 (amendment 601); November 1, 2003 (amendment 654); November 1, 2015 (amendment 791); November 1, 2023 (amendment 824); November 1, 2024 (amendment 831).

§2B3.3. Blackmail and Similar Forms of Extortion

(a) Base Offense Level: **9**

(b) Specific Offense Characteristic

(1) If the greater of the amount obtained or demanded (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(c) Cross References

(1) If the offense involved extortion under color of official right, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the

Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

(2) If the offense involved extortion by force or threat of injury or serious damage, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provisions: 18 U.S.C. §§ 873, 875–877, 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. This section applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property. "***Blackmail***" (18 U.S.C. § 873) is defined as a threat to disclose a violation of United States law unless money or some other item of value is given.

Background: Under 18 U.S.C. § 873, the maximum term of imprisonment authorized for blackmail is one year. Extortionate threats to injure a reputation, or other threats that are less serious than those covered by §2B3.2, may also be prosecuted under 18 U.S.C. §§ 875–877, which carry higher maximum sentences.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 114); November 1, 1993 (amendment 479); November 1, 2001 (amendment 617); November 1, 2005 (amendment 679); November 1, 2015 (amendment 791).

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4. COMMERCIAL BRIBERY AND KICKBACKS

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(c) Special Instruction for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 215, 220, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 8702, 8707; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government, foreign governments, or public international organizations. *See* Part C, Offenses Involving Public Officials, if any such officials are involved.

2. The "***value of the improper benefit to be conferred***" refers to the value of the action to be taken or effected in return for the bribe. *See* Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

3. "***Financial institution***," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (*e.g.*, pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons.

4. **Gross Receipts Enhancement under Subsection (b)(2)(A).—**

(A) **In General.—**For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

(B) **Definition.**—"***Gross receipts from the offense***" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. *See* 18 U.S.C. § 982(a)(4).

5. **Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).**—For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.

6. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."

Background: This guideline applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

One of the more commonly prosecuted offenses to which this guideline applies is offering or accepting a fee in connection with procurement of a loan from a financial institution in violation of 18 U.S.C. § 215.

As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, if a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the $25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain. If that amount could not be estimated, the amount of the bribe would be used to determine the appropriate increase in offense level.

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized is ten years. 41 U.S.C. §§ 8702, 8707. Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (*e.g.*, the Medicare and Medicaid programs).

This guideline also applies to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

This guideline also applies to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

Subsection (b)(2)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(2)(B) implements the instruction to the Commission in section 2507 of Public Law 101–647.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 317); November 1, 1991 (amendments 364 and 422); November 1, 1992 (amendment 468); November 1, 1997 (amendment 553); November 1, 2001 (amendment 617); November 1, 2002 (amendments 639 and 646); November 1, 2004 (amendment 666); November 1, 2010 (amendment 746); November 1, 2015 (amendments 791 and 796); November 1, 2023 (amendment 815).

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5. COUNTERFEITING AND INFRINGEMENT OF COPYRIGHT OR TRADEMARK

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481).

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

(1) If the face value of the counterfeit items (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the defendant (A) manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; (ii) genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed; or (iii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by **2** levels.

(3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level **15**, increase to level **15**.

(4) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

(5) If any part of the offense was committed outside the United States, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 470–474A, 476, 477, 500, 501, 1003. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

   "***Counterfeit***" refers to an instrument that has been falsely made, manufactured, or altered. For example, an instrument that has been falsely made or manufactured in its entirety is "counterfeit", as is a genuine instrument that has been falsely altered (such as a genuine $5 bill that has been altered to appear to be a genuine $100 bill).

   "***Distinctive counterfeit deterrent***" and "***distinctive paper***" have the meaning given those terms in 18 U.S.C. § 474A(c)(2) and (1), respectively.

   "***United States***" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

2. **Applicability to Counterfeit Bearer Obligations of the United States.**—This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, *i.e.*, that are not made out to a specific payee.

3. **Inapplicability to Certain Obviously Counterfeit Items.**—Subsection (b)(2)(A) does not apply to persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.

Background: Possession of counterfeiting devices to copy obligations (including securities) of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items.

Subsection (b)(4) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 16); November 1, 1989 (amendment 115); November 1, 1995 (amendment 513); November 1, 1997 (amendment 554); November 1, 1998 (amendment 587); November 1, 2000 (amendments 595 and 605); November 1, 2001 (amendments 617 and 618); November 1, 2009 (amendment 731); November 1, 2015 (amendment 791).

§2B5.2. [Deleted]

Historical Note	Section 2B5.2 (Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), effective November 1, 1987, amended effective January 15, 1988 (amendment 17) and November 1, 1989 (amendment 116), was deleted by consolidation with §2F1.1 effective November 1, 1993 (amendment 481).

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the infringement amount (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12.**

(4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

(5) If the offense involved a drug that uses a counterfeit mark on or in connection with the drug, increase by **2** levels.

(6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14.**

(7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318–2320, 2511. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Circumvention devices***" are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

"***Commercial advantage or private financial gain***" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"***Counterfeit military good or service***" has the meaning given that term in 18 U.S.C. § 2320(f)(4).

"***Drug***" and "***counterfeit mark***" have the meaning given those terms in 18 U.S.C. § 2320(f).

"***Infringed item***" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"***Infringing item***" means the item that violates the copyright or trademark laws.

"***Uploading***" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"***Work being prepared for commercial distribution***" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. **Determination of Infringement Amount.**—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) **Use of Retail Value of Infringed Item.**—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.

(ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

(iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.

(iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)

(v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.

(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

(viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.

(B) **Use of Retail Value of Infringing Item.**—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.

(C) **Retail Value Defined.**—For purposes of this Application Note, the "***retail value***" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.

(D) **Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.**—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (*i.e.*, the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (*i.e.*, the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

(E) **Indeterminate Number of Infringing Items.**—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.

3. **Application of Subsection (b)(7).**—In subsection (b)(7), "***other significant harm to a member of the Armed Forces***" means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

4. **Application of §3B1.3.**—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

~~5. **Departure Considerations.** If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:~~

~~(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.~~

~~(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.~~

~~(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.~~

~~(D) The offense resulted in death or serious bodily injury.~~

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendments 481 and 482); May 1, 2000 (amendment 590); November 1, 2000 (amendment 593); November 1, 2001 (amendment 617); October 24, 2005 (amendment 675); September 12, 2006 (amendment 682); November 1, 2006 (amendment 687); November 1, 2007 (amendment 704); November 1, 2009 (amendment 735); November 1, 2013 (amendment 773); November 1, 2015 (amendment 791); November 1, 2018 (amendment 812).

§2B5.4. [Deleted]

Historical Note	Section 2B5.4 (Criminal Infringement of Trademark), effective November 1, 1987, was deleted by consolidation with §2B5.3 effective November 1, 1993 (amendment 481).

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6. MOTOR VEHICLE IDENTIFICATION NUMBERS

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the retail value of the motor vehicles or parts (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the defendant was in the business of receiving and selling stolen property, increase by **2** levels.

(3) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 511, 553(a)(2), 2321.

Application Notes:

1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "***Vehicles***" refers to all forms of vehicles, including aircraft and watercraft. *See* Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

2. The term "***increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount***," as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

Background: The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of

18 U.S.C. § 511 carry a maximum of five years imprisonment. Violations of 18 U.S.C. §§ 553(a)(2) and 2321 carry a maximum of ten years imprisonment.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 117–119); November 1, 1993 (amendment 482); November 1, 2001 (amendment 617); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791).

PART C — OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS

Historical Note	Effective November 1, 1987. Amended effective January 25, 2003 (amendment 648). Introductory Commentary to Part C, effective November 1, 1987, was deleted effective January 25, 2003 (amendment 648), and November 1, 2003 (amendment 656).

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

(a) Base Offense Level:

(1) **14**, if the defendant was a public official; or

(2) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by **2** levels.

(2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by **2** levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 227, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Government identification document***" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

"***Payment***" means anything of value. A payment need not be monetary.

"***Public official***" shall be construed broadly and includes the following:

(A) "Public official" as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature. "State" means a State of the United States, and any commonwealth, territory, or possession of the United States.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (*e.g.*, which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. **More than One Bribe or Extortion.—**Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (*e.g.*, a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.

In a case involving more than one incident of bribery or extortion, the applicable amounts under subsection (b)(2) (*i.e.*, the greatest of the value of the payment, the benefit received or to be received, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government) are determined separately for each incident and then added together.

3. **Application of Subsection (b)(2).—**"***Loss***", for purposes of subsection (b)(2), shall be determined in accordance with §2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to §2B1.1. The value of "***the benefit received or to be received***" means the net value of such benefit. **Examples:** (A) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (B) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

4. **Application of Subsection (b)(3).—**

(A) **Definition.—**"***High-level decision-making or sensitive position***" means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.

(B) **Examples.—**Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

5. **Application of Subsection (c).**—For the purposes of determining whether to apply the cross references in this section, the "***resulting offense level***" means the final offense level (*i.e.*, the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts ~~A–D~~A–E). *See* §1B1.5(d); Application Note 2 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).

6. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

~~7. **Upward Departure Provisions.**—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).~~

~~In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).~~

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence such individual's official actions, or to a public official who solicits or accepts such a bribe.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (*e.g.*, preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. In a case in which the value of the bribe exceeds the value of the benefit, or in which the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is greater.

Under §2C1.1(b)(3), if the payment was for the purpose of influencing an official act by certain officials, the offense level is increased by 4 levels.

Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above.

For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.

Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of government officials under 18 U.S.C. §§ 1341–1343 and conspiracy to defraud by interference with governmental functions under 18 U.S.C. § 371. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.

Offenses involving attempted bribery are frequently not completed because the offense is reported to authorities or an individual involved in the offense is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 18); November 1, 1989 (amendments 120–122); November 1, 1991 (amendments 367 and 422); November 1, 1997 (amendment 547); November 1, 2001 (amendment 617); November 1, 2002 (amendment 639); November 1, 2003 (amendment 653); November 1, 2004 (amendment 666); November 1, 2007 (amendment 699); November 1, 2008 (amendment 720); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791); November 1, 2024 (amendment 827).

§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

(a) Base Offense Level:

(1) **11**, if the defendant was a public official; or

(2) **9**, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved more than one gratuity, increase by **2** levels.

(2) If the value of the gratuity exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **15**, increase to level **15**.

(4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by **2** levels.

(c) Special Instruction for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212–214, 217. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Government identification document***" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

"***Public official***" shall be construed broadly and includes the following:

(A) "Public official" as defined in 18 U.S.C. § 201(a)(1).

(B) A member of a state or local legislature. "State" means a State of the United States, and any commonwealth, territory, or possession of the United States.

(C) An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror.

(D) Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.

(E) An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (*e.g.*, which may include a leader of a state or local political party who acts in the manner described in this subdivision).

2. **Application of Subsection (b)(1).**—Related payments that, in essence, constitute a single gratuity (*e.g.*, separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

3. **Application of Subsection (b)(3).—**

   (A) **Definition.**—"***High-level decision-making or sensitive position***" means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.

   (B) **Examples.**—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, a law enforcement officer, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.

4. **Inapplicability of §3B1.3.**—Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 121); November 1, 1991 (amendment 422); November 1, 1995 (amendment 534); November 1, 2001 (amendment 617); November 1, 2004 (amendment 666); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791).

§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the offense involved actual or planned harm to the government, increase by **4** levels.

(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 1909; 40 U.S.C. § 14309(a), (b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. **Abuse of Position of Trust.—**Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1995 (amendment 534); November 1, 2001 (amendment 619); November 1, 2003 (amendment 661); November 1, 2005 (amendment 679).

§2C1.4. [Deleted]

Historical Note	Section 2C1.4 (Payment or Receipt of Unauthorized Compensation), effective November 1, 1987, amended effective November 1, 1998 (amendment 588), was deleted by consolidation with §2C1.3 effective November 1, 2001 (amendment 619).

§2C1.5. Payments to Obtain Public Office

(a) Base Offense Level: **8**

Commentary

Statutory Provisions: 18 U.S.C. §§ 210, 211.

Application Note:

1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.

Historical Note	Effective November 1, 1987.

§2C1.6. [Deleted]

Historical Note	Section 2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper), effective November 1, 1987, amended effective November 1, 2001 (amendment 617), was deleted by consolidation with §2C1.2 effective November 1, 2004 (amendment 666).

§2C1.7. [Deleted]

Historical Note	Section 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), effective November 1, 1991 (amendment 368), amended effective November 1, 1992 (amendment 468), November 1, 1997 (amendment 547), November 1, 2001 (amendment 617), and November 1, 2003 (amendment 653), was deleted by consolidation with §2C1.1 effective November 1, 2004 (amendment 666).

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—

(A) a foreign national, increase by **2** levels; or

(B) a government of a foreign country, increase by **4** levels.

(3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary federal benefit, increase by **2** levels.

(4) If the defendant engaged in 30 or more illegal transactions, increase by **2** levels.

(5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by **4** levels.

(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 607; 52 U.S.C. §§ 30109(d), 30114, 30116, 30117, 30118, 30119, 30120, 30121, 30122, 30123, 30124(a), 30125, 30126. For additional provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Foreign national***" has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 52 U.S.C. § 30121(b).

"***Government of a foreign country***" has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).

"***Governmental funds***" means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. "State" means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. "Local government" means the government of a political subdivision of a State.

"***Illegal transaction***" means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 52 U.S.C. § 30101 *et seq.*; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms "***contribution***" and "***expenditure***" have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (52 U.S.C. § 30101(8) and (9)), respectively.

2. **Application of Subsection (b)(3)(B).**—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened ac-

cess to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary federal benefit, such as a presidential pardon or information proprietary to the government.

3. **Application of Subsection (b)(4).**—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.

~~4. **Departure Provision.**—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.~~

Historical Note	Effective January 25, 2003 (amendment 648). Amended effective November 1, 2003 (amendment 656); November 1, 2005 (amendment 679); November 1, 2015 (amendments 791 and 796); November 1, 2024 (amendment 831).

PART D — OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 711).

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) **38**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) **30**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) **26**, if (A) the defendant is convicted of an offense under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or

level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

(13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by **4** levels; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term "***drug***," as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).

(14) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If—

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subparagraph (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(15) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.

(16) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(17) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

(18) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth after subsection (e) (Special Instruction).]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of ***Converted Drug Weight***.	**Level 38**
(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of "Ice"; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; ● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam; ● At least 30,000 KG but less than 90,000 KG of ***Converted Drug Weight***.	**Level 36**
(3) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 2.8 KG but less than 8.4 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);	**Level 34**

- At least 5 KG but less than 15 KG of Methamphetamine, or
  at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
  at least 500 G but less than 1.5 KG of "Ice";
- At least 5 KG but less than 15 KG of Amphetamine, or
  at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of ***Converted Drug Weight***.

(4) **Level 32**

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or
  at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or
  at least 150 G but less than 500 G of Methamphetamine (actual), or
  at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or
  at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam;
- At least 3,000 KG but less than 10,000 KG of ***Converted Drug Weight***.

(5) **Level 30**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or
  at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or
  at least 50 G but less than 150 G of Methamphetamine (actual), or
  at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or
  at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 100 G but less than 300 G of a Fentanyl Analogue;

- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
  at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
  at least 35 G but less than 50 G of Methamphetamine (actual), or
  at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or
  at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of ***Converted Drug Weight***.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
  at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or
  at least 20 G but less than 35 G of Methamphetamine (actual), or
  at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or
  at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of ***Converted Drug Weight***.

(8) **Level 24**
- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or
  at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or
  at least 5 G but less than 20 G of Methamphetamine (actual), or
  at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or
  at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam;
- At least 100 KG but less than 400 KG of ***Converted Drug Weight***.

(9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or
  at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or
  at least 4 G but less than 5 G of Methamphetamine (actual), or
  at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or
  at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 6,250 units of Flunitrazepam;
- At least 80 KG but less than 100 KG of ***Converted Drug Weight***.

(10) **Level 20**
- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or
  at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or
  at least 3 G but less than 4 G of Methamphetamine (actual), or
  at least 3 G but less than 4 G of "Ice";

- At least 30 G but less than 40 G of Amphetamine, or
  at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of ***Converted Drug Weight***.

(11) **Level 18**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or
  at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or
  at least 2 G but less than 3 G of Methamphetamine (actual), or
  at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or
  at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
- At least 2,500 but less than 3,750 units of Flunitrazepam;
- At least 40 KG but less than 60 KG of ***Converted Drug Weight***.

(12) **Level 16**

- At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or
  at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or
  at least 1 G but less than 2 G of Methamphetamine (actual), or
  at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or
  at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;

- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of ***Converted Drug Weight***.

(13) **Level 14**

- At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
- At least 2.8 G but less than 5.6 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or
  at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or
  at least 500 MG but less than 1 G of Methamphetamine (actual), or
  at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or
  at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
- At least 625 but less than 1,250 units of Flunitrazepam;
- At least 10 KG but less than 20 KG of ***Converted Drug Weight***.

(14) **Level 12**

- Less than 10 G of Heroin;
- Less than 50 G of Cocaine;
- Less than 2.8 G of Cocaine Base;
- Less than 10 G of PCP, or
  less than 1 G of PCP (actual);
- Less than 5 G of Methamphetamine, or
  less than 500 MG of Methamphetamine (actual), or
  less than 500 MG of "Ice";
- Less than 5 G of Amphetamine, or
  less than 500 MG of Amphetamine (actual);
- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- Less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of ***Converted Drug Weight***.

(15) ● At least 2.5 KG but less than 5 KG of Marihuana; **Level 10**
● At least 500 G but less than 1 KG of Hashish;
● At least 50 G but less than 100 G of Hashish Oil;
● At least 2,500 but less than 5,000 units of Ketamine;
● At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
● At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
● At least 156 but less than 312 units of Flunitrazepam;
● At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
● At least 2.5 KG but less than 5 KG of ***Converted Drug Weight***.

(16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
● At least 200 G but less than 500 G of Hashish;
● At least 20 G but less than 50 G of Hashish Oil;
● At least 1,000 but less than 2,500 units of Ketamine;
● At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
● At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
● Less than 156 units of Flunitrazepam;
● At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
● 160,000 units or more of Schedule V substances;
● At least 1 KG but less than 2.5 KG of ***Converted Drug Weight***.

(17) ● Less than 1 KG of Marihuana; **Level 6**
● Less than 200 G of Hashish;
● Less than 20 G of Hashish Oil;
● Less than 1,000 units of Ketamine;
● Less than 1,000 units of Schedule I or II Depressants;
● Less than 1,000 units of Schedule III substances (except Ketamine);
● Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
● Less than 160,000 units of Schedule V substances;
● Less than 1 KG of ***Converted Drug Weight***.

***Notes to Drug Quantity Table:**

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "***PCP (actual)***", "***Amphetamine (actual)***", and "***Methamphetamine (actual)***" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms "***Hydrocodone (actual)***" and "***Oxycodone (actual)***" refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "***Ice***," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "***Cocaine base***," for the purposes of this guideline, means "crack." "***Crack***" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "***unit***" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "***unit***" means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.

(H) ***Hashish***, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) ***Hashish oil***, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

(J) ***Fentanyl analogue***, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).

(K) The term "***Converted Drug Weight***," for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definition of "Plant".**—For purposes of the guidelines, a "***plant***" is an organism having leaves and a readily observable root formation (*e.g.*, a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

2. **Application of Subsection (a).**—Subsection (a) provides base offense levels for offenses under 21 U.S.C. §§ 841 and 960 based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

   Subsection (a)(1) provides a base offense level of 43 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the mandatory statutory term of life imprisonment applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense.

   Subsection (a)(2) provides a base offense level of 38 for offenses under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), to which the statutory minimum term of imprisonment of not less than 20 years to life applies because death or serious bodily injury resulted from the use of the controlled substance.

   Subsection (a)(3) provides a base offense level of 30 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a felony drug offense.

   Subsection (a)(4) provides a base offense level of 26 for offenses under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies because death or serious bodily injury resulted from the use of the controlled substance.

   The terms "serious drug felony," "serious violent felony," and "felony drug offense" are defined in 21 U.S.C. § 802. The base offense levels in subsections (a)(1) through (a)(4) would also apply if the parties stipulate to the applicable offense described in those provisions for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines) or to any such base offense level.

3. **"Mixture or Substance".**—"***Mixture or substance***" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from

the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

~~An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.~~

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

4. **In General.—**

(A) **Classification of Controlled Substances.—**Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

(B) **Applicability to "Counterfeit" Substances.—**The statute and guideline also apply to ***"counterfeit" substances***, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.

5. **Determining Drug Types and Drug Quantities.—**Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance — actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. Unless otherwise specified, "***analogue***," for purposes of this guideline, has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

   In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the converted drug weight of the most closely related controlled substance referenced in this guideline. *See* Application Note 8. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

   (A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

   (B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

   (C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

7. **Multiple Transactions or Multiple Drug Types.**—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

8. **Use of Drug Conversion Tables.—**

   (A) **Controlled Substances Not Referenced in Drug Quantity Table.**—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD, and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

      (i) Use the Drug Conversion Tables to find the converted drug weight of the controlled substance involved in the offense.

      (ii) Find the corresponding converted drug weight in the Drug Quantity Table.

      (iii) Use the offense level that corresponds to the converted drug weight determined above as the base offense level for the controlled substance involved in the offense.

   (*See also* Application Note 6.) For example, in the Drug Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to 5 kil-

ograms of converted drug weight. In a case involving 100 grams of oxymorphone, the converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

(B) **Combining Differing Controlled Substances.**—The Drug Conversion Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its converted drug weight, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the converted drug weights assigned in the Drug Conversion Tables are "capped" at specified amounts (*e.g.*, the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight). Where there are controlled substances from more than one schedule (*e.g.*, a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the converted drug weight for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the converted drug weights to determine the combined converted drug weight (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Conversion Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) **Examples for Combining Differing Controlled Substances.—**

(i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of converted drug weight; the LSD converts to 25 kilograms of converted drug weight. The total therefore converts to 95 kilograms of converted drug weight, for which the Drug Quantity Table provides an offense level of 22.

(ii) The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.

(iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine converts to 16 kilograms of converted drug weight, and the cocaine base converts to 7.142 kilograms of converted drug weight. The total therefore converts to 23.142 kilograms of converted drug weight, which has an offense level of 16 in the Drug Quantity Table.

(iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The converted drug weight for the Schedule III substance is 76 kilograms (below the cap of 79.99 kilograms of converted drug weight set forth as the maximum converted weight for Schedule III substances). The converted drug weight for the Schedule IV substance is subject to a cap of 9.99 kilograms set forth as the maximum converted weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The converted drug weight for the Schedule V substance is subject to the cap of 2.49 kilograms set forth as the maximum converted weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined converted weight, determined by adding together the above amounts, is subject to the cap

of 79.99 kilograms of converted drug weight set forth as the maximum combined converted weight for Schedule III, IV, and V substances. Without the cap, the combined converted weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.

(D) **Drug Conversion Tables.—**

SCHEDULE I OR II OPIATES*	CONVERTED DRUG WEIGHT
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) =	700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) =	700 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Alphaprodine =	100 gm
1 gm of Codeine =	80 gm
1 gm of Dextromoramide =	670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Dipipanone =	250 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Heroin =	1 kg
1 gm of Hydrocodone (actual) =	6,700 gm
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm
1 gm of Oxycodone (actual) =	6,700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylline =	40 gm
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a Synthetic Cathinone (except a Schedule III, IV, or V substance) =	380 gm

**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

SCHEDULE I MARIHUANA	CONVERTED DRUG WEIGHT
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Hashish Oil =	50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) =	1 gm
1 gm of Tetrahydrocannabinol (organic) =	167 gm
1 gm of Tetrahydrocannabinol (synthetic) =	167 gm

SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a Synthetic Cannabinoid (except a Schedule III, IV, or V substance) =	167 gm

**Provided*, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

"***Synthetic Cannabinoid***," for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB_1 receptors).

FLUNITRAZEPAM **	CONVERTED DRUG WEIGHT
1 unit of Flunitrazepam =	16 gm

***Provided,* that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)	CONVERTED DRUG WEIGHT
1 unit of a Schedule I or II Depressant (except Gamma-hydroxybutyric Acid) =	1 gm

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of Gamma-hydroxybutyric Acid =	8.8 gm

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance (except Ketamine) =	1 gm

****Provided*, that the combined converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of converted drug weight.

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of Ketamine =	1 gm

SCHEDULE IV SUBSTANCES (EXCEPT FLUNITRAZEPAM)****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm

*****Provided*, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm

******Provided*, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF AMPHETAMINE OR METHAMPHETAMINE)******	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg
1 gm of Phenylpropanolamine =	10 kg
1 gm of Pseudoephedrine =	10 kg

*******Provided,* that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

DATE RAPE DRUGS (EXCEPT FLUNITRAZEPAM, GHB, OR KETAMINE)	CONVERTED DRUG WEIGHT
1 ml of 1,4-Butanediol =	8.8 gm
1 ml of Gamma Butyrolactone =	8.8 gm

To facilitate conversions to converted drug weight, the following table is provided:

MEASUREMENT CONVERSION TABLE
1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

HALLUCINOGENS	
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
3,4-Methylenedioxyamphetamine (MDA)	250 mg
3,4-Methylenedioxymethamphetamine (MDMA)	250 mg
Mescaline	500 mg
Phencyclidine (PCP)*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg

MARIHUANA	
1 marihuana cigarette	0.5 gm

STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

10. **Determining Quantity of LSD.**—LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

~~In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.~~

11. **Application of Subsections (b)(1) and (b)(2).**—

(A) **Application of Subsection (b)(1).**—Definitions of "***firearm***" and "***dangerous weapon***" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; *see* §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).

(B) **Interaction of Subsections (b)(1) and (b)(2).**—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

12. **Application of Subsection (b)(5).**—If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(3) applies, do not apply subsection (b)(5).

13. **Application of Subsection (b)(7).**—For purposes of subsection (b)(7), "***mass-marketing by means of an interactive computer service***" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(7) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "***Interactive computer service***", for purposes of subsection (b)(7) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

14. **Application of Subsection (b)(8).**—For purposes of subsection (b)(8), "***masking agent***" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.

15. **Application of Subsection (b)(9).**—For purposes of subsection (b)(9), "***athlete***" means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

16. **Application of Subsection (b)(11).**—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(16)(D).

17. **Application of Subsection (b)(12).**—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (*i.e.*, a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

    Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

    Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

18. **Application of Subsection (b)(14).**—

    (A) **Hazardous or Toxic Substances (Subsection (b)(14)(A)).**—Subsection (b)(14)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). ~~In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in~~ In determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. *See* 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

(B) **Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(14)(C)–(D)).—**

(i) **Factors to Consider.—**In determining, for purposes of subsection (b)(14)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

(I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.

(II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.

(III) The duration of the offense, and the extent of the manufacturing operation.

(IV) The location of the laboratory (*e.g.*, whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(ii) **Definitions.—**For purposes of subsection (b)(14)(D):

"***Incompetent***" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"***Minor***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

19. **Application of Subsection (b)(15).—**Subsection (b)(15) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.

The enhancements in subsection (b)(14)(A) and (b)(15) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* §1B1.1 (Application Instructions), Application Note 4(A).

20. **Application of Subsection (b)(16).—**

(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(16)(B)).—**If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(16)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).

(B) **Directly Involved in the Importation of a Controlled Substance (Subsection (b)(16)(C)).—**Subsection (b)(16)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), *i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(16)(C).

(C) **Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(16)(E)).—** For purposes of subsection (b)(16)(E), "***pattern of criminal conduct***" and "***engaged in as a livelihood***" have the meaning given such terms in §4B1.3 (Criminal Livelihood).

21. **Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section 5C1.2(b), which provides that the applicable guideline range shall not be less than 24 to 30 months of imprisonment, is not pertinent to the determination of whether subsection (b)(18) applies.

22. **Application of Subsection (e)(1).—**

~~(A) **Definition.—**~~For purposes of this guideline, "***sexual offense***" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

~~(B) **Upward Departure Provision.—** If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.~~

23. **Interaction with §3B1.3.**—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. § 822(g).

Note, however, that if an adjustment from subsection (b)(3)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

24. **Cases Involving Mandatory Minimum Penalties.**—Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed ~~(including a downward departure)~~, as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. *See* §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

25. **Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.**—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.

26. **Cases Involving "Small Amount of Marihuana for No Remuneration".**—Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.

~~27. **Departure Considerations.—**~~

~~(A) **Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.—** If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.~~

~~(B) **Upward Departure Based on Drug Quantity.—** In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.~~

~~(C) **Upward Departure Based on Unusually High Purity.—** Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.~~

~~(D) **Departure Based on Potency of Synthetic Cathinones.—** In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.~~

~~(E) **Departures for Certain Cases involving Synthetic Cannabinoids.**~~

~~(i) **Departure Based on Concentration of Synthetic Cannabinoids.** Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.~~

~~There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.~~

~~(ii) **Downward Departure Based on Potency of Synthetic Cannabinoids.** In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.~~

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 30 and 24 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; *e.g.*, level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b)).

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from section 6453 of Public Law 100–690.

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.

Subsection (b)(14)(A) implements the instruction to the Commission in section 303 of Public Law 104–237.

Subsections (b)(14)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(16) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(17) implements the directive to the Commission in section 7(2) of Public Law 111–220.

The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or "equivalents") for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1.

See USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term "converted drug weight" and to change the title of the Drug Equivalency Tables to the "Drug Conversion Tables." *See* USSG App. C, Amendment 808 (effective November 1, 2018).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 19, 20, and 21); November 1, 1989 (amendments 123–134, 302, and 303); November 1, 1990 (amendment 318); November 1, 1991 (amendments 369–371 and 394–396); November 1, 1992 (amendments 446 and 447); November 1, 1993 (amendments 479, 484–488, and 499); September 23, 1994 (amendment 509); November 1, 1994 (amendment 505); November 1, 1995 (amendments 514–518); November 1, 1997 (amendments 555 and 556); November 1, 2000 (amendments 594 and 605); December 16, 2000 (amendment 608); May 1, 2001 (amendments 609–611); November 1, 2001 (amendments 620–625); November 1, 2002 (amendment 640); November 1, 2003 (amendment 657); November 1, 2004 (amendments 667, 668, and 674); November 1, 2005 (amendment 679); March 27, 2006 (amendment 681); November 1, 2006 (amendments 684 and 688); November 1, 2007 (amendments 705, 706, and 711); May 1, 2008 (amendment 715); November 1, 2009 (amendments 727 and 728); November 1, 2010 (amendments 746 and 748); November 1, 2011 (amendments 750, 751, and 760); November 1, 2012 (amendments 762 and 770); November 1, 2013 (amendment 777); November 1, 2014 (amendments 782 and 783); November 1, 2015 (amendments 793 and 797); November 1, 2018 (amendments 807 and 808); November 1, 2023 (amendments 817, 818, and 824); November 1, 2024 (amendments 830 and 831).

§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **2** plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or

(2) **1** plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or

(3) **26**, if the offense involved a person less than eighteen years of age; or

(4) **13**, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).

Application Note:

1. This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. *See* §1B1.2(a). In a case involving such a conviction but in which only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 14 (2 plus the offense level for the sale of

5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 15 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).

Background: This section implements the direction to the Commission in section 6454 of Public Law 100–690.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 22); November 1, 1989 (amendment 135); November 1, 1990 (amendment 319); November 1, 1991 (amendment 421); November 1, 1992 (amendment 447); November 1, 2000 (amendment 591); November 1, 2014 (amendment 782); November 1, 2024 (amendment 831).

§2D1.3. [Deleted]

Historical Note	Section 2D1.3 (Distributing Controlled Substances to Individuals Younger than Twenty-One Years, to Pregnant Women, or Within 1000 Feet of a School or College), effective November 1, 1987, amended effective January 15, 1988 (amendment 23), was deleted by consolidation with §2D1.2 effective November 1, 1989 (amendment 135).

§2D1.4. [Deleted]

Historical Note	Section 2D1.4 (Attempts and Conspiracies), effective November 1, 1987, amended effective November 1, 1989 (amendments 136–138), was deleted by consolidation with the guidelines applicable to the underlying substantive offenses effective November 1, 1992 (amendment 447).

§2D1.5. Continuing Criminal Enterprise; Attempt or Conspiracy

(a) Base Offense Level (Apply the greater):

(1) **4** plus the offense level from §2D1.1 applicable to the underlying offense; or

(2) **38**.

Commentary

Statutory Provision: 21 U.S.C. § 848.

Application Notes:

1. **Inapplicability of Chapter Three Adjustment.**—Do not apply any adjustment from Chapter Three, Part B (Role in the Offense).

~~2. **Upward Departure Provision.**—If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.~~

~~3~~2. **"Continuing Series of Violations".**—Under 21 U.S.C. § 848, certain conduct for which the defendant has previously been sentenced may be charged as part of the instant offense to establish a "continuing series of violations." A sentence resulting from a conviction sustained prior to the last overt act of the instant offense is to be considered a prior sentence under §4A1.2(a)(1) and not part of the instant offense.

~~4~~3. **Multiple Counts.**—Violations of 21 U.S.C. § 848 will be grouped with other drug offenses for the purpose of applying Chapter Three, Part D (Multiple Counts).

Background: Because a conviction under 21 U.S.C. § 848 establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity, this guideline provides a minimum base offense level of 38. An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense.

Section 848 of title 21, United States Code, provides a 20-year minimum mandatory penalty for the first conviction, a 30-year minimum mandatory penalty for a second conviction, and a mandatory life sentence for principal administrators of extremely large enterprises. If the application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence. *See* §5G1.1(b).

Historical Note	Effective November 1, 1987. Amended effective October 15, 1988 (amendment 66); November 1, 1989 (amendment 139); November 1, 1992 (amendment 447); November 1, 2024 (amendment 831).

§2D1.6. Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy

(a) Base Offense Level: the offense level applicable to the underlying offense.

Commentary

Statutory Provision: 21 U.S.C. § 843(b).

Application Note:

1. Where the offense level for the underlying offense is to be determined by reference to §2D1.1, *see* Application Note 5 of the Commentary to §2D1.1 for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II opiates), cocaine (or other Schedule I or II stimulants), cocaine base, PCP, methamphetamine, LSD (or other Schedule I or II hallucinogens), fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), or fentanyl analogue (§2D1.1(c)(14)); a minimum offense level of 8 where the offense involves flunitrazepam (§2D1.1(c)(16)); and a minimum offense level of 6 otherwise (§2D1.1(c)(17)).

Background: This section covers the use of a communication facility in committing a drug offense. A communication facility includes any public or private instrument used in the transmission of writing, signs, signals, pictures, and sound; *e.g.*, telephone, wire, radio.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 320); November 1, 1992 (amendment 447); November 1, 1994 (amendment 505); November 1, 2009 (amendment 737); November 1, 2012 (amendment 770); November 1, 2018 (amendment 807).

§2D1.7. Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy

(a) Base Offense Level: **12**

(b) Cross Reference

(1) If the offense involved a controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) or §2D2.1 (Unlawful Possession), as appropriate, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 21 U.S.C. § 863 (formerly 21 U.S.C. § 857).

~~**Application Note:**~~

~~1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (*e.g.*, transportation for the defendant's personal use), a downward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 397); November 1, 1992 (amendment 447).

§2D1.8. Renting or Managing a Drug Establishment; Attempt or Conspiracy

(a) Base Offense Level:

(1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.

(2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be **4** levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level **26**.

(b) Special Instruction

(1) If the offense level is determined under subsection (a)(2), do not apply an adjustment under §3B1.2 (Mitigating Role).

Commentary

Statutory Provision: 21 U.S.C. § 856.

Application Note:

1. Subsection (a)(2) does not apply unless the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises. For example, subsection (a)(2) would not apply to a defendant who possessed a dangerous weapon in connection with the offense, a defendant who guarded the cache of controlled substances, a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction, a defendant who allowed the use of more than one premises, a defendant who made telephone calls to facilitate the underlying controlled substance offense, or a defendant who otherwise assisted in the commission of the underlying controlled substance offense. Furthermore, subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose. Finally, subsection (a)(2) does not apply if the defendant had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction.

Background: This section covers the offense of knowingly opening, maintaining, managing, or controlling any building, room, or enclosure for the purpose of manufacturing, distributing, storing, or using a controlled substance contrary to law (*e.g.*, a "crack house").

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 394); November 1, 1992 (amendments 447 and 448); November 1, 2002 (amendment 640).

§2D1.9. Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy

(a) Base Offense Level: **23**

Commentary

Statutory Provision: 21 U.S.C. § 841(d)(1).

Background: This section covers the offense of assembling, placing, or causing to be placed, or maintaining a "booby-trap" on federal property where a controlled substance is being manufactured or distributed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1992 (amendment 447); November 1, 2002 (amendment 646).

§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy

(a) Base Offense Level (Apply the greater):

(1) **3** plus the offense level from the Drug Quantity Table in §2D1.1; or

(2) **20**.

(b) Specific Offense Characteristic

(1) (Apply the greater):

(A) If the offense involved the manufacture of amphetamine or methamphetamine, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

Commentary

Statutory Provision: 21 U.S.C. § 858.

Application Note:

1. **Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—**

(A) **Factors to Consider.**—In determining, for purposes of subsection (b)(1)(B), whether the offense created a substantial risk of harm to the life of a minor or an incompetent, the court shall include consideration of the following factors:

(i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.

(ii) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.

(iii) The duration of the offense, and the extent of the manufacturing operation.

(iv) The location of the laboratory (*e.g.*, whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(B) **Definitions.**—For purposes of subsection (b)(1)(B):

"***Incompetent***" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"***Minor***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

Background: Subsection (b)(1) implements the instruction to the Commission in section 102 of Public Law 106–310.

Historical Note	Effective November 1, 1989 (amendment 140). Amended effective November 1, 1992 (amendment 447); December 16, 2000 (amendment 608); November 1, 2001 (amendment 620).

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.

(3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by **2** levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(6) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

(c) Cross Reference

(1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

(d) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*
(Methamphetamine and Amphetamine Precursor Chemicals)

QUANTITY		BASE OFFENSE LEVEL
(1)	9 KG or more of Ephedrine; 9 KG or more of Phenylpropanolamine; 9 KG or more of Pseudoephedrine.	**Level 38**
(2)	At least 3 KG but less than 9 KG of Ephedrine; At least 3 KG but less than 9 KG of Phenylpropanolamine; At least 3 KG but less than 9 KG of Pseudoephedrine.	**Level 36**
(3)	At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	**Level 34**
(4)	At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	**Level 32**
(5)	At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	**Level 30**
(6)	At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.	**Level 28**

(7)	At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	**Level 26**
(8)	At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	**Level 24**
(9)	At least 8 G but less than 10 G of Ephedrine; At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	**Level 22**
(10)	At least 6 G but less than 8 G of Ephedrine; At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	**Level 20**
(11)	At least 4 G but less than 6 G of Ephedrine; At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	**Level 18**
(12)	At least 2 G but less than 4 G of Ephedrine; At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	**Level 16**
(13)	At least 1 G but less than 2 G of Ephedrine; At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	**Level 14**
(14)	Less than 1 G of Ephedrine; Less than 1 G of Phenylpropanolamine; Less than 1 G of Pseudoephedrine.	**Level 12**

(e) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)

LISTED CHEMICALS AND QUANTITY	BASE OFFENSE LEVEL
(1) **List I Chemicals** 2.7 KG or more of Benzaldehyde; 60 KG or more of Benzyl Cyanide; 600 G or more of Ergonovine; 1.2 KG or more of Ergotamine; 60 KG or more of Ethylamine; 6.6 KG or more of Hydriodic Acid; 3.9 KG or more of Iodine; 960 KG or more of Isosafrole; 600 G or more of Methylamine; 1500 KG or more of N-Methylephedrine; 1500 KG or more of N-Methylpseudoephedrine;	**Level 30**

1.9 KG or more of Nitroethane;
30 KG or more of Norpseudoephedrine;
60 KG or more of Phenylacetic Acid;
30 KG or more of Piperidine;
960 KG or more of Piperonal;
4.8 KG or more of Propionic Anhydride;
960 KG or more of Safrole;
1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
3406.5 L or more of Gamma-butyrolactone;
2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

(2) **List I Chemicals** **Level 28**

At least 890 G but less than 2.7 KG of Benzaldehyde;
At least 20 KG but less than 60 KG of Benzyl Cyanide;
At least 200 G but less than 600 G of Ergonovine;
At least 400 G but less than 1.2 KG of Ergotamine;
At least 20 KG but less than 60 KG of Ethylamine;
At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;
At least 1.3 KG but less than 3.9 KG of Iodine;
At least 320 KG but less than 960 KG of Isosafrole;
At least 200 G but less than 600 G of Methylamine;
At least 500 KG but less than 1500 KG of N-Methylephedrine;
At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;
At least 625 G but less than 1.9 KG of Nitroethane;
At least 10 KG but less than 30 KG of Norpseudoephedrine;
At least 20 KG but less than 60 KG of Phenylacetic Acid;
At least 10 KG but less than 30 KG of Piperidine;
At least 320 KG but less than 960 KG of Piperonal;
At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;
At least 320 KG but less than 960 KG of Safrole;
At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

33 KG or more of Acetic Anhydride;
3525 KG or more of Acetone;
60 KG or more of Benzyl Chloride;
3225 KG or more of Ethyl Ether;
3600 KG or more of Methyl Ethyl Ketone;
30 KG or more of Potassium Permanganate;
3900 KG or more of Toluene.

(3) **List I Chemicals** **Level 26**

At least 267 G but less than 890 G of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 660 G but less than 2.2 KG of Hydriodic Acid;
At least 376.2 G but less than 1.3 KG of Iodine;
At least 96 KG but less than 320 KG of Isosafrole;

At least 60 G but less than 200 G of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 187.5 G but less than 625 G of Nitroethane;
At least 3 KG but less than 10 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 11 KG but less than 33 KG of Acetic Anhydride;
At least 1175 KG but less than 3525 KG of Acetone;
At least 20 KG but less than 60 KG of Benzyl Chloride;
At least 1075 KG but less than 3225 KG of Ethyl Ether;
At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;
At least 10 KG but less than 30 KG of Potassium Permanganate;
At least 1300 KG but less than 3900 KG of Toluene.

(4) **List I Chemicals** **Level 24**
At least 89 G but less than 267 G of Benzaldehyde;
At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 220 G but less than 660 G of Hydriodic Acid;
At least 125.4 G but less than 376.2 G of Iodine;
At least 32 KG but less than 96 KG of Isosafrole;
At least 20 G but less than 60 G of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 62.5 G but less than 187.5 G of Nitroethane;
At least 1 KG but less than 3 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;

At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene.

(5) **List I Chemicals** **Level 22**

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 87.8 G but less than 125.4 G of Iodine;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 700 G but less than 1 KG of Piperidine;
At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene.

(6) **List I Chemicals** **Level 20**

At least 35.6 G but less than 62.3 G of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 88 G but less than 154 G of Hydriodic Acid;
At least 50.2 G but less than 87.8 G of Iodine;
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 8 G but less than 14 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 25 G but less than 43.8 G of Nitroethane;
At least 400 G but less than 700 G of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;

At least 64 G but less than 112 G of Propionic Anhydride;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene.

(7) **List I Chemicals** **Level 18**
At least 8.9 G but less than 35.6 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 22 G but less than 88 G of Hydriodic Acid;
At least 12.5 G but less than 50.2 G of Iodine;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 2 G but less than 8 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 6.3 G but less than 25 G of Nitroethane;
At least 100 G but less than 400 G of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

(8) **List I Chemicals** **Level 16**
At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;

At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 10 G but less than 12.5 G of Iodine;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 1.6 G but less than 2 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 5 G but less than 6.3 G of Nitroethane;
At least 80 G but less than 100 G of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 80 G but less than 100 G of Piperidine;
At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene.

(9) **List I Chemicals** **Level 14**
3.6 KG or more of Anthranilic Acid;
At least 5.3 G but less than 7.1 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 13.2 G but less than 17.6 G of Hydriodic Acid;
At least 7.5 G but less than 10 G of Iodine;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 1.2 G but less than 1.6 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 3.8 G but less than 5 G of Nitroethane;
At least 60 G but less than 80 G of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;
At least 10.4 KG but less than 13 KG of Toluene.

(10) **List I Chemicals** **Level 12**
Less than 3.6 KG of Anthranilic Acid;
Less than 5.3 G of Benzaldehyde;
Less than 120 G of Benzyl Cyanide;
Less than 1.2 G of Ergonovine;
Less than 2.4 G of Ergotamine;
Less than 120 G of Ethylamine;
Less than 13.2 G of Hydriodic Acid;
Less than 7.5 G of Iodine;
Less than 1.92 KG of Isosafrole;
Less than 1.2 G of Methylamine;
Less than 4.8 KG of N-Acetylanthranilic Acid;
Less than 3 KG of N-Methylephedrine;
Less than 3 KG of N-Methylpseudoephedrine;
Less than 3.8 G of Nitroethane;
Less than 60 G of Norpseudoephedrine;
Less than 120 G of Phenylacetic Acid;
Less than 60 G of Piperidine;
Less than 1.92 KG of Piperonal;
Less than 9.6 G of Propionic Anhydride;
Less than 1.92 KG of Safrole;
Less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
Less than 6.8 L of Gamma-butyrolactone;
Less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals
Less than 88 G of Acetic Anhydride;
Less than 9.4 KG of Acetone;
Less than 160 G of Benzyl Chloride;
Less than 8.6 KG of Ethyl Ether;
Less than 9.6 KG of Methyl Ethyl Ketone;
Less than 80 G of Potassium Permanganate;
Less than 10.4 KG of Toluene.

***Notes:**

(A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.*, list I or list II) under subsection (d) or (e) of this guideline, as appropriate.

(B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(1), (2), (f)(1), 865, 960(d)(1), (2), (3), (4).

Application Notes:

1. **Cases Involving Multiple Chemicals.—**

(A) **Determining the Base Offense Level for Two or More Chemicals.**—Except as provided in subdivision (B), if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.*, list I or list II) under this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 36; 300 grams of hydriodic acid result in a base offense level of level 24. In this case, the base offense level would be level 36.

(B) **Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.**—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 30.

~~(C) **Upward Departure.**— In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.~~

2. **Application of Subsection (b)(1).**—"***Firearm***" and "***dangerous weapon***" are defined in the Commentary to §1B1.1 (Application Instructions). The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.

3. **Application of Subsection (b)(2).**—Convictions under 21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. In a case in which the defendant possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.

4. **Application of Subsection (b)(3).**—Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). ~~In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any~~ Any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

5. **Application of Subsection (b)(4).**—For purposes of subsection (b)(4), "***mass-marketing by means of an interactive computer service***" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "***Interactive computer service***", for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

6. **Imposition of Consecutive Sentence for 21 U.S.C. § 865.**—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.

7. **Applicability of Subsection (b)(6).**—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. *See* §5C1.2(b)(2)(requiring an applicable guideline range of not less than 24 to 30 months of imprisonment if the "statutorily required minimum sentence is at least five years").

8. **Application of Subsection (c)(1).**—"***Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully***," as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute

the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

9. **Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.**—In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Conversion Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (*see* Application Note 5 in the Commentary to §2D1.1).

Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and phenylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

Historical Note	Effective November 1, 1991 (amendment 371). Amended effective November 1, 1992 (amendment 447); November 1, 1995 (amendment 519); May 1, 1997 (amendment 541); November 1, 1997 (amendment 557); November 1, 2000 (amendments 605 and 606); May 1, 2001 (amendment 611); November 1, 2001 (amendment 625); November 1, 2002 (amendment 646); November 1, 2003 (amendment 661); November 1, 2004 (amendments 667 and 668); November 1, 2005 (amendment 679); November 1, 2007 (amendments 705 and 707); November 1, 2010 (amendments 745 and 746); November 1, 2012 (amendments 763 and 770); November 1, 2014 (amendment 782); November 1, 2015 (amendment 796); November 1, 2018 (amendments 808 and 813); November 1, 2023 (amendment 817).

§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

(a) Base Offense Level (Apply the greater):

(1) **12**, if the defendant intended to manufacture a controlled substance or knew or believed the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance; or

(2) **9**, if the defendant had reasonable cause to believe the prohibited flask, equipment, chemical, product, or material was to be used to manufacture a controlled substance.

(b) Specific Offense Characteristics

(1) If the defendant (A) intended to manufacture methamphetamine, or (B) knew, believed, or had reasonable cause to believe that prohibited flask, equipment, chemical, product, or material was to be used to manufacture methamphetamine, increase by **2** levels.

(2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(3) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed any prohibited flask, equipment, chemical, product, or material through mass-marketing by means of an interactive computer service, increase by **2** levels.

(4) If the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia, increase by **6** levels.

(c) Cross Reference

(1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 21 U.S.C. §§ 843(a)(6), (7), 864.

Application Notes:

~~1. If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.~~

~~2~~1. "***Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully***," as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

~~3~~2. Subsection (b)(2) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b), and 49 U.S.C. § 5124 (relating

to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). ~~In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any~~ Any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).

43. **Application of Subsection (b)(3).**—For purposes of subsection (b)(3), "***mass-marketing by means of an interactive computer service***" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(3) would apply to a defendant who operated a web site to promote the sale of prohibited flasks but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "***Interactive computer service***", for purposes of subsection (b)(3) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

Historical Note	Effective November 1, 1991 (amendment 371). Amended effective November 1, 1992 (amendment 447); November 1, 1995 (amendment 520); November 1, 1997 (amendment 558); November 1, 2000 (amendment 605); November 1, 2001 (amendment 626); November 1, 2004 (amendment 667); November 1, 2010 (amendment 746).

§2D1.13. Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) The offense level from §2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical) if the defendant knew or believed that the chemical was to be used to manufacture a controlled substance unlawfully; or

(2) The offense level from §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) reduced by **3** levels if the defendant had reason to believe that the chemical was to be used to manufacture a controlled substance unlawfully; or

(3) **6**, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(3), (f)(1), 843(a)(4)(B), (a)(8).

Application Note:

1. "***The offense level from §2D1.11***" includes the base offense level and any applicable specific offense characteristic or cross reference; *see* §1B1.5 (Interpretation of References to Other Offense Guidelines).

Historical Note	Effective November 1, 1991 (amendment 371). Amended effective November 1, 1992 (amendment 447); November 1, 2002 (amendment 646).

§2D1.14. Narco-Terrorism

(a) Base Offense Level:

(1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(18) shall not apply.

(b) Specific Offense Characteristic

(1) If §3A1.4 (Terrorism) does not apply, increase by **6** levels.

Commentary

Statutory Provision: 21 U.S.C. § 960a.

Historical Note	Effective November 1, 2007 (amendment 700). Amended effective November 1, 2010 (amendments 746 and 748); November 1, 2011 (amendment 750); November 1, 2014 (amendment 783); November 1, 2018 (amendment 807).

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2. UNLAWFUL POSSESSION

§2D2.1. Unlawful Possession; Attempt or Conspiracy

(a) Base Offense Level:

(1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or

(2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or

(3) **4**, if the substance is any other controlled substance or a list I chemical.

(b) Cross Reference

(1) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), *see* Appendix A (Statutory Index).

~~**Application Note:**~~

~~1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.~~

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to three years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. *See* §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. *See* §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 24); November 1, 1989 (amendment 304); November 1, 1990 (amendment 321); November 1, 1992 (amendment 447); September 23, 1994 (amendment 509); November 1, 1995 (amendment 514); November 1, 1997 (amendments 556 and 558); November 1, 2010 (amendments 746 and 748); November 1, 2011 (amendment 750).

§2D2.2. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy

(a) Base Offense Level: **8**

Commentary

Statutory Provision: 21 U.S.C. § 843(a)(3).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1992 (amendment 447).

§2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

(a) Base Offense Level (Apply the greatest):

(1) **26**, if death resulted; or

(2) **21**, if serious bodily injury resulted; or

(3) **13**, otherwise.

(b) Special Instruction:

(1) If the defendant is convicted of a single count involving the death or serious bodily injury of more than one person, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 18 U.S.C. § 342.

Background: This section implements the direction to the Commission in section 6482 of the Anti-Drug Abuse Act of 1988. Offenses covered by this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, *e.g.*, a bus. ~~If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 25); November 1, 1989 (amendment 141); November 1, 2023 (amendment 824).

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3. REGULATORY VIOLATIONS

§2D3.1. Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Scheduled Substances; Attempt or Conspiracy

(a) Base Offense Level: **6**

Commentary

Statutory Provisions: 21 U.S.C. §§ 842(a)(1), 843(a)(1), (2). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 421); November 1, 1992 (amendment 447); November 1, 1995 (amendment 534); November 1, 2009 (amendment 727).

§2D3.2. Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy

(a) Base Offense Level: **4**

Commentary

Statutory Provisions: 21 U.S.C. §§ 842(a)(2), (9), (10), (b), 954, 961. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 421); November 1, 1992 (amendment 447); November 1, 1993 (amendment 481); November 1, 1995 (amendment 534).

§2D3.3. [Deleted]

Historical Note	Section 2D3.3 (Illegal Use of Registration Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy), effective November 1, 1987, amended effective November 1, 1991 (amendment 421) and November 1, 1992 (amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (amendment 481).

§2D3.4. [Deleted]

Historical Note	Section 2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy), effective November 1, 1987, amended effective November 1, 1990 (amendment 359) and November 1, 1992 (amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (amendment 481).

§2D3.5. [Deleted]

Historical Note	Section 2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy), effective November 1, 1991 (amendment 371), amended effective November 1, 1992 (amendment 447), was deleted by consolidation with §2D3.2 effective November 1, 1993 (amendment 481).

PART E — OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING

1. RACKETEERING

Introductory Commentary

Because of the jurisdictional nature of the offenses included, this subpart covers a wide variety of criminal conduct. The offense level usually will be determined by the offense level of the underlying conduct.

Historical Note	Effective November 1, 1987.

§2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

(a) Base Offense Level (Apply the greater):

(1) **19**; or

(2) the offense level applicable to the underlying racketeering activity.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1962, 1963.

Application Notes:

1. Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

2. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

3. If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (*i.e.*, 19), the alternative minimum base offense level is to be used.

4. Certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. ~~If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 26); November 1, 1989 (amendment 142).

§2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise

(a) Base Offense Level (Apply the greater):

(1) **6**; or

(2) the offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken.

Commentary

Statutory Provision: 18 U.S.C. § 1952.

Application Notes:

1. Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

2. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

3. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (*i.e.*, 6), the alternative minimum base offense level is to be used.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 27).

§2E1.3. Violent Crimes in Aid of Racketeering Activity

(a) Base Offense Level (Apply the greater):

(1) **12**; or

(2) the offense level applicable to the underlying crime or racketeering activity.

Commentary

Statutory Provision: 18 U.S.C. § 1959 (formerly 18 U.S.C. § 1952B).

Application Notes:

1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (*i.e.*, 12), the alternative minimum base offense level is to be used.

Background: The conduct covered under this section ranges from threats to murder. The maximum term of imprisonment authorized by statute ranges from three years to life imprisonment.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 143).

§2E1.4. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

(a) Base Offense Level (Apply the greater):

(1) **32**; or

(2) the offense level applicable to the underlying unlawful conduct.

Commentary

Statutory Provision: 18 U.S.C. § 1958 (formerly 18 U.S.C. § 1952A).

Application Note:

1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.

Background: This guideline and the statute to which it applies do not require that a murder actually have been committed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 144); November 1, 1990 (amendment 311); November 1, 1992 (amendment 449).

§2E1.5. [Deleted]

Historical Note	Section 2E1.5 (Hobbs Act Extortion or Robbery), effective November 1, 1987, amended effective November 1, 1989 (amendment 145), was deleted by consolidation with §§2B3.1, 2B3.2, 2B3.3, and 2C1.1 effective November 1, 1993 (amendment 481).

* * * * *

2. EXTORTIONATE EXTENSION OF CREDIT

§2E2.1. Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

(1) (A) If a firearm was discharged increase by **5** levels; or

(B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; or

(C) if a dangerous weapon (including a firearm) was brandished or possessed, increase by **3** levels.

(2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the combined increase from application of paragraphs (1) and (2) shall not exceed **9** levels.

(3) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or

(B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 892–894.

Application Notes:

1. **Definitions.—**Definitions of "***firearm***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," "***abducted***," and "***physically restrained***" are found in the Commentary to §1B1.1 (Application Instructions).

2. **Interpretation of Specific Offense Characteristics.—***See also* Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.

Background: This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve threats of violence and provide economic support for organized crime. The base offense level for these offenses is higher than the offense level for extortion because loan sharking is in most cases a continuing activity. In addition, the guideline does not include the amount of money involved because the amount of money in such cases is often difficult to determine. Other enhancements parallel those in §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 146–148); November 1, 1991 (amendment 398); November 1, 1993 (amendment 479); November 1, 2000 (amendment 601); November 1, 2024 (amendment 831).

* * * * *

3. GAMBLING

Introductory Commentary

This subpart covers a variety of proscribed conduct. The adjustments in Chapter Three, Part B (Role in the Offense) are particularly relevant in providing a measure of the scope of the offense and the defendant's participation.

Historical Note	Effective November 1, 1987.

§2E3.1. Gambling Offenses; Animal Fighting Offenses

(a) Base Offense Level: (Apply the greatest)

(1) **16**, if the offense involved an animal fighting venture, except as provided in paragraph (3) below;

(2) **12**, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation;

(3) **10**, if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or

(4) **6**, otherwise.

Commentary

Statutory Provisions: 7 U.S.C. § 2156 (felony provisions only); 15 U.S.C. §§ 1172–1175; 18 U.S.C. §§ 1082, 1301–1304, 1306, 1511, 1953, 1955; 31 U.S.C. § 5363. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application ~~Notes~~Note:

1. **Definition.**—For purposes of this guideline, "***animal fighting venture***" has the meaning given that term in 7 U.S.C. § 2156(f).

~~2. **Upward Departure Provision.**—The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481); November 1, 2007 (amendment 703); November 1, 2008 (amendment 721); November 1, 2016 (amendment 800); November 1, 2024 (amendment 831).

§2E3.2. [Deleted]

Historical Note	Section 2E3.2 (Transmission of Wagering Information), effective November 1, 1987, was deleted by consolidation with §2E3.1 effective November 1, 1993 (amendment 481).

§2E3.3. [Deleted]

Historical Note	Section 2E3.3 (Other Gambling Offenses), effective November 1, 1987, was deleted by consolidation with §2E3.1 effective November 1, 1993 (amendment 481).

* * * * *

4. TRAFFICKING IN CONTRABAND CIGARETTES AND SMOKELESS TOBACCO

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 700).

§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco

(a) Base Offense Level (Apply the greater):

(1) **9**; or

(2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a).

Application Note:

1. "***Tax evaded***" refers to state and local excise taxes.

Background: The conduct covered by this section generally involves evasion of state and local excise taxes. At least 10,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in §2T4.1.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 700); November 1, 2008 (amendment 724).

* * * * *

5. LABOR RACKETEERING

Introductory Commentary

The statutes included in this subpart protect the rights of employees under the Taft–Hartley Act, members of labor organizations under the Labor-Management Reporting and Disclosure Act of 1959, and participants of employee pension and welfare benefit plans covered under the Employee Retirement Income Security Act.

The base offense levels for many of the offenses in this subpart have been determined by reference to analogous sections of the guidelines. Thus, the base offense levels for bribery, theft, and fraud in this subpart generally correspond to similar conduct under other parts of the guidelines. The base offense levels for bribery and graft have been set higher than the level for commercial bribery due to the particular vulnerability to exploitation of the organizations covered by this subpart.

Historical Note	Effective November 1, 1987.

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

(a) Base Offense Level:

(1) **10**, if a bribe; or

(2) **6**, if a gratuity.

(b) Specific Offense Characteristics

(1) If the defendant was a fiduciary of the benefit plan or labor organization, increase by **2** levels.

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(c) Special Instruction for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. § 1954; 29 U.S.C. § 186.

Application Notes:

1. "***Bribe***" refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.

2. "***Gratuity***" refers to the offer or acceptance of an unlawful payment other than a bribe.

3. "***Fiduciary of the benefit plan***" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

4. "***Value of the improper benefit to the payer***" is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

5. If the adjustment for a fiduciary at §2E5.1(b)(1) applies, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section covers the giving or receipt of bribes and other unlawful gratuities involving employee welfare or pension benefit plans, or labor organizations. The seriousness of the offense is determined by several factors, including the value of the bribe or gratuity and the magnitude of the loss resulting from the transaction.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 149); November 1, 1991 (amendment 422); November 1, 1993 (amendment 481); November 1, 2001 (amendment 617); November 1, 2004 (amendment 666); November 1, 2015 (amendment 791).

§2E5.2. [Deleted]

Historical Note	Section 2E5.2 (Theft or Embezzlement from Employee Pension and Welfare Benefit Plans), effective November 1, 1987, amended effective June 15, 1988 (amendment 28), November 1, 1989 (amendment 150), and November 1, 1991 (amendment 399), was deleted by consolidation with §2B1.1 effective November 1, 1993 (amendment 481).

§2E5.3. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records

(a) Base Offense Level (Apply the greater):

(1) **6**; or

(2) If the offense was committed to facilitate or conceal (A) an offense involving a theft, a fraud, or an embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Property Destruction, and Fraud), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of

an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Obstruction of Justice), as applicable.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1027, 1520; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Background: This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. It also covers failure to maintain proper documents required by the LMRDA or falsification of such documents. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation under this section occurs in connection with another offense, the offense level is determined by reference to the offense facilitated by the false statements or documents.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 151); November 1, 1993 (amendment 481); January 25, 2003 (amendment 647); November 1, 2003 (amendment 653).

§2E5.4. [Deleted]

Historical Note	Section 2E5.4 (Embezzlement or Theft from Labor Unions in the Private Sector), effective November 1, 1987, amended effective June 15, 1988 (amendment 29) and November 1, 1989 (amendment 152), was deleted by consolidation with §2B1.1 effective November 1, 1993 (amendment 481).

§2E5.5. [Deleted]

Historical Note	Section 2E5.5 (Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act), effective November 1, 1987, amended effective November 1, 1989 (amendment 153), was deleted by consolidation with §2E5.3 effective November 1, 1993 (amendment 481).

§2E5.6. [Deleted]

Historical Note	Section 2E5.6 (Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), effective November 1, 1987, amended effective November 1, 1991 (amendment 422), was deleted by consolidation with §2E5.1 effective November 1, 1993 (amendment 481).

PART F — [DELETED]

Historical Note	The heading to Part F — Offenses Involving Fraud or Deceit, effective November 1, 1987, was deleted due to the deletion of §§2F1.1 and 2F1.2 effective November 1, 2001 (amendment 617).

§2F1.1. [Deleted]

Historical Note	Section 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), effective November 1, 1987, amended effective June 15, 1988 (amendment 30), November 1, 1989 (amendments 154–156 and 303), November 1, 1990 (amendment 317), November 1, 1991 (amendments 364 and 393), November 1, 1992 (amendment 470), November 1, 1993 (amendments 481 and 482), November 1, 1995 (amendment 513), November 1, 1997 (amendment 551), November 1, 1998 (amendments 577 and 587), November 1, 2000 (amendments 595, 596, and 597), was deleted by consolidation with §2B1.1 effective November 1, 2001 (amendment 617).

§2F1.2. [Deleted]

Historical Note	Section 2F1.2 (Insider Trading), effective November 1, 1987, was deleted by consolidation with §2B1.1 effective November 1, 2001 (amendment 617).

PART G — OFFENSES INVOLVING COMMERCIAL SEX ACTS, SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 641).

1. PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT

Historical Note	Effective November 1, 1987. Amended effective November 1, 2000 (amendment 592); November 1, 2002 (amendment 641).

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

(1) **34**, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or

(2) **14**, otherwise.

(b) Specific Offense Characteristic

(1) If (A) subsection (a)(2) applies; and (B)(i) the offense involved fraud or coercion; or (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2), increase by **4** levels.

(c) Cross Reference

(1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

(1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2421A (only if the offense involved a victim other than a minor),

2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

   "***Commercial sex act***" has the meaning given that term in 18 U.S.C. § 1591(e)(3).

   "***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

   "***Promoting a commercial sex act***" means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

   "***Victim***" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. **Application of Subsection (b)(1).**—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. ~~If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~ For purposes of subsection (b)(1), "***coercion***" includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. **Application of Chapter Three Adjustment.**—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. **Application of Subsection (c)(1).—**

   (A) **Conduct Described in 18 U.S.C. § 2241(a) or (b).**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

   (B) **Conduct Described in 18 U.S.C. § 2242.**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

~~6. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 157 and 158); November 1, 1990 (amendment 322); November 1, 1996 (amendment 538); November 1, 2000 (amendment 592); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2002 (amendment 641); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2009 (amendment 737); November 1, 2023 (amendment 815).

§2G1.2. [Deleted]

Historical Note	Section 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct), effective November 1, 1987, amended effective November 1, 1989 (amendments 159 and 160), November 1, 1990 (amendment 323), November 1, 1991 (amendment 400), and November 1, 1992 (amendment 444), was deleted by consolidation with §2G1.1 effective November 1, 1996 (amendment 538).

§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

(1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

(2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);

(3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or

(4) **24**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels. *Provided*, however, that subsection (b)(3)(B) shall not apply if the offense of conviction is 18 U.S.C. § 2421A.

(4) (Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.

(B) If (i) subsection (a)(4) applies; and (ii) the offense of conviction is 18 U.S.C. § 2421A(b)(2), increase by **4** levels.

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **8** levels.

(c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1

(First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Commercial sex act***" has the meaning given that term in 18 U.S.C. § 1591(e)(3).

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Illicit sexual conduct***" has the meaning given that term in 18 U.S.C. § 2423(f).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Participant***" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"***Sexual act***" has the meaning given that term in 18 U.S.C. § 2246(2).

"***Sexual contact***" has the meaning given that term in 18 U.S.C. § 2246(3).

2. **Application of Subsection (b)(1).—**

(A) **Custody, Care, or Supervisory Control.**—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(2).—**

(A) **Misrepresentation of Participant's Identity.**—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Undue Influence.**—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.

However, subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. **Application of Subsection (b)(3)(A).**—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. **Application of Subsection (c).—**

(A) **Application of Subsection (c)(1).—**The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "***sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

(B) **Application of Subsection (c)(3).—**For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):

(i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

(ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).

(iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

6. **Application of Subsection (d)(1).—**For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

~~7. **Upward Departure Provision.**—If the offense involved more than ten minors, an upward departure may be warranted.~~

Historical Note	Effective November 1, 2004 (amendment 664). Amended effective November 1, 2007 (amendment 701); November 1, 2009 (amendments 732 and 737); November 1, 2018 (amendment 812); November 1, 2023 (amendment 815).

* * * * *

2. SEXUAL EXPLOITATION OF A MINOR

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

(a) Base Offense Level: **32**

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by **2** levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

(3) If the defendant knowingly engaged in distribution, increase by **2** levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by **4** levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (B) the use of a computer or an

interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)–(c), 2251(d)(1)(B), 2260(a). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Distribution***" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Material***" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

2. **Application of Subsection (b)(2).**—For purposes of subsection (b)(2):

"***Conduct described in 18 U.S.C. § 2241(a) or (b)***" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

"***Sexual act***" has the meaning given that term in 18 U.S.C. § 2246(2).

"***Sexual contact***" has the meaning given that term in 18 U.S.C. § 2246(3).

3. **Application of Subsection (b)(3).**—For purposes of subsection (b)(3), the defendant "knowingly engaged in distribution" if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

4. **Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).**—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).

5. **Application of Subsection (b)(5).—**

(A) **In General.**—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

6. **Application of Subsection (b)(6).—**

(A) **Misrepresentation of Participant's Identity.**—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live.

Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Use of a Computer or an Interactive Computer Service.**—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

7. **Application of Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

~~8. **Upward Departure Provision.**—An upward departure may be warranted if the offense involved more than 10 minors.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 161); November 1, 1990 (amendment 324); November 1, 1991 (amendment 400); November 1, 1996 (amendment 537); November 1, 1997 (amendment 575); November 1, 2000 (amendment 592); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2009 (amendments 733, 736, and 737); November 1, 2016 (amendment 801); November 1, 2023 (amendment 824).

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution

of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), 2260(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Distribution***" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"***Distribution for pecuniary gain***" means distribution for profit.

"***The defendant distributed in exchange for any valuable consideration***" means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

"***Distribution to a minor***" means the knowing distribution to an individual who is a minor at the time of the offense.

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Material***" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Pattern of activity involving the sexual abuse or exploitation of a minor***" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"***Sexual abuse or exploitation***" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. **Application of Subsection (b)(3)(F).**—For purposes of subsection (b)(3)(F), the defendant "knowingly engaged in distribution" if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

3. **Application of Subsection (b)(4)(A).**—Subsection (b)(4)(A) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.

4. **Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).**—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).

5. **Application of Subsection (b)(5).**—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

6. **Application of Subsection (b)(7).—**

   (A) **Definition of "Images".**—"***Images***" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

   (B) **Determining the Number of Images.**—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. ~~If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.~~

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. ~~If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.~~

7. **Application of Subsection (c)(1).—**

(A) **In General.—**The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) **Definition.—**"***Sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

8. **Cases Involving Adapted or Modified Depictions.—**If the offense involved material that is an adapted or modified depiction of an identifiable minor (*e.g.*, a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

~~9. **Upward Departure Provision.** If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.~~

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 31); November 1, 1990 (amendment 325); November 1, 1991 (amendment 372); November 27, 1991 (amendment 435); November 1, 1996 (amendment 537); November 1, 1997 (amendment 575); November 1, 2000 (amendment 592); November 1, 2001 (amendment 617); April 30, 2003 (amendment 649); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2009 (amendments 733 and 736); November 1, 2016 (amendment 801).

§2G2.3. Selling or Buying of Children for Use in the Production of Pornography

(a) Base Offense Level: **38**

Commentary

Statutory Provision: 18 U.S.C. § 2251A.

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is thirty years imprisonment.

Historical Note	Effective November 1, 1989 (amendment 162). Amended effective November 1, 2009 (amendment 736).

§2G2.4. [Deleted]

Historical Note	Section 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), effective November 1, 1991 (amendment 372), amended effective November 27, 1991 (amendment 436), November 1, 1996 (amendment 537), November 1, 2000 (amendment 592), and April 30, 2003 (amendment 649), was deleted by consolidation with §2G2.2 effective November 1, 2004 (amendment 664).

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email

(a) Base Offense Level: **6**

(b) Cross References

(1) If the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

(2) If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

Statutory Provisions: 15 U.S.C. § 7704(d); 18 U.S.C. §§ 2257, 2257A.

Historical Note	Effective November 1, 1991 (amendment 372). Amended effective November 1, 2006 (amendment 689); November 1, 2007 (amendment 701).

§2G2.6. Child Exploitation Enterprises

(a) Base Offense Level: **35**

(b) Specific Offense Characteristics

(1) If a victim (A) had not attained the age of 12 years, increase by **4** levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by **2** levels.

(2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by **2** levels.

(4) If a computer or an interactive computer service was used in furtherance of the offense, increase by **2** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252A(g).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. **Application of Subsection (b)(2).—**

(A) **Custody, Care, or Supervisory Control.**—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement under subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(3).**—For purposes of subsection (b)(3), "***conduct described in 18 U.S.C. § 2241(a) or (b)***" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

Historical Note	Effective November 1, 2007 (amendment 701).

* * * * *

3. OBSCENITY

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

(a) Base Offense Level: **10**

(b) Specific Offense Characteristics

(1) (Apply the Greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

(2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a website, increase by **2** levels.

(3) If the offense involved the use of a computer or an interactive computer service, increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(c) Cross Reference

(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460–1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Distribution***" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"***Distribution for pecuniary gain***" means distribution for profit.

"***The defendant distributed in exchange for any valuable consideration***" means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.

"***Distribution to a minor***" means the knowing distribution to an individual who is a minor at the time of the offense.

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Material that is harmful to minors***" has the meaning given that term in 18 U.S.C. § 2252B(d).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"***Prohibited sexual conduct***" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"***Sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

2. **Application of Subsection (b)(1)(F).—**For purposes of subsection (b)(1)(F), the defendant "knowingly engaged in distribution" if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

3. **Inapplicability of Subsection (b)(3).—**If the defendant is convicted of 18 U.S.C. § 2252B or § 2252C, subsection (b)(3) shall not apply.

4. **Application of Subsection (b)(4).—**Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 163); November 1, 1990 (amendment 326); November 1, 1991 (amendment 372); November 27, 1991 (amendment 437); November 1, 2000 (amendment 592); November 1, 2001 (amendment 617); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2009 (amendment 736); November 1, 2010 (amendment 746); November 1, 2016 (amendment 801).

§2G3.2. Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by **4** levels.

(2) If **6** plus the offense level from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1464, 1468; 47 U.S.C. § 223(b)(1)(A).

Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale "dial-a-porn" or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.

Historical Note	Effective November 1, 1989 (amendment 164). Amended effective November 1, 2000 (amendment 592); November 1, 2001 (amendment 617). A former §2G3.2 (Obscene or Indecent Telephone Communications), effective November 1, 1987, was deleted effective November 1, 1989 (amendment 164).

PART H — OFFENSES INVOLVING INDIVIDUAL RIGHTS

1. CIVIL RIGHTS

Historical Note	Introductory Commentary to Part H, Subpart 1, effective November 1, 1987, was deleted effective November 1, 1995 (amendment 521).

§2H1.1. Offenses Involving Individual Rights

(a) Base Offense Level (Apply the Greatest):

(1) the offense level from the offense guideline applicable to any underlying offense;

(2) **12**, if the offense involved two or more participants;

(3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) **6**, otherwise.

(b) Specific Offense Characteristic

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b), 246–250, 1091; 42 U.S.C. § 3631.

Application Notes:

1. "***Offense guideline applicable to any underlying offense***" means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (*e.g.*, two instances of assault, or one instance of assault and one instance of arson). In such cases, use the following comparative procedure to determine the applicable base offense level: (i) determine the underlying offenses encompassed within the count of conviction as if the defendant had been charged with a conspiracy to commit multiple offenses. *See* Application Note 4 of §1B1.2 (Applicable Guidelines); (ii) determine the Chapter Two offense level (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions) for each such underlying offense; and (iii) compare each of the Chapter Two offense levels determined above with the alternative base offense level under subsection (a)(2), (3), or (4). The determination of the applicable alternative base offense level is to be based on the entire conduct

underlying the count of conviction (*i.e.*, the conduct taken as a whole). Use the alternative base offense level only if it is greater than each of the Chapter Two offense levels determined above. Otherwise, use the Chapter Two offense levels for each of the underlying offenses (with each underlying offense treated as if contained in a separate count of conviction). Then apply subsection (b) to the alternative base offense level, or to the Chapter Two offense levels for each of the underlying offenses, as appropriate.

2. "***Participant***" is defined in the Commentary to §3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).

4. If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. *See* §3A1.1(c).

5. If subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 303); November 1, 1990 (amendments 313 and 327); November 1, 1991 (amendment 430); November 1, 1995 (amendment 521); November 1, 2000 (amendment 591); November 1, 2010 (amendment 743); November 1, 2023 (amendment 816).

§2H1.2. [Deleted]

Historical Note	Section 2H1.2 (Conspiracy to Interfere with Civil Rights), effective November 1, 1987, amended effective November 1, 1989 (amendment 303), was deleted by consolidation with §2H1.1 effective November 1, 1990 (amendment 327).

§2H1.3. [Deleted]

Historical Note	Section 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), effective November 1, 1987, amended effective November 1, 1989 (amendment 165), was deleted by consolidation with §2H1.1 effective November 1, 1995 (amendment 521).

§2H1.4. [Deleted]

Historical Note	Section 2H1.4 (Interference with Civil Rights Under Color of Law), effective November 1, 1987, amended effective November 1, 1989 (amendment 166), was deleted by consolidation with §2H1.1 effective November 1, 1995 (amendment 521).

§2H1.5. [Deleted]

Historical Note	Section 2H1.5 (Other Deprivations of Rights or Benefits in Furtherance of Discrimination), effective November 1, 1987, amended effective November 1, 1989 (amendment 167) and November 1, 1990 (amendment 328), was deleted by consolidation with §2H1.1 effective November 1, 1995 (amendment 521).

* * * * *

2. POLITICAL RIGHTS

§2H2.1. Obstructing an Election or Registration

(a) Base Offense Level (Apply the greatest):

(1) **18**, if the obstruction occurred by use of force or threat of force against person(s) or property; or

(2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in paragraph (3) below; or

(3) **6**, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597, 1015(f); 52 U.S.C. §§ 10307, 10308(a), (b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

~~**Application Note:**~~

~~1. **Upward Departure Provision.** If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Background: Alternative base offense levels cover three major ways of obstructing an election: by force, by deceptive or dishonest conduct, or by bribery. A defendant who is a public official or who directs others to engage in criminal conduct is subject to an enhancement from Chapter Three, Part B (Role in the Offense).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 168); November 1, 1995 (amendment 534); November 1, 2003 (amendment 661); November 1, 2015 (amendment 796); November 1, 2024 (amendment 831).

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3. PRIVACY AND EAVESDROPPING

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

(a) Base Offense Level (Apply the greater):

(1) **9**; or

(2) **6**, if the offense of conviction has a statutory maximum term of imprisonment of one year or less but more than six months.

(b) Specific Offense Characteristics

(1) If (A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B) the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by **3** levels.

(2) (Apply the greater) If—

(A) the defendant is convicted under 18 U.S.C. § 119, increase by **8** levels; or

(B) the defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by **10** levels.

(c) Cross Reference

(1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(5)(B)(i), (ii); 18 U.S.C. §§ 119, 1039, 1905, 2511; 26 U.S.C. §§ 7213(a)(1)–(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 44 U.S.C. § 3572; 47 U.S.C. § 605. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Satellite Cable Transmissions.**—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

2. **Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).**—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15–21 months and the court determines a "total punishment" of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the "total punishment" in a manner that satisfies the statutory requirement.

3. **Inapplicability of Chapter Three (Adjustments).**—If the enhancement under subsection (b)(2) applies, do not apply §3A1.2 (Official Victim).

4. **Definitions.**—For purposes of this guideline:

"***Computer***" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"***Covered person***" has the meaning given that term in 18 U.S.C. § 119(b).

"***Interactive computer service***" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"***Means of identification***" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"***Personal information***" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.

"***Restricted personal information***" has the meaning given that term in 18 U.S.C. § 119(b).

~~5. **Upward Departure.** There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:~~

~~(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.~~

~~(B) The offense caused or risked substantial non-monetary harm (*e.g.*, physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 169); November 1, 2001 (amendment 628); May 1, 2007 (amendment 697); November 1, 2007 (amendment 708); November 1, 2008 (amendment 718); November 1, 2009 (amendments 726 and 737); November 1, 2014 (amendment 781); November 1, 2023 (amendments 815 and 824).

§2H3.2. Manufacturing, Distributing, Advertising, or Possessing an Eavesdropping Device

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the offense was committed for pecuniary gain, increase by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2512.

Historical Note	Effective November 1, 1987.

§2H3.3. Obstructing Correspondence

(a) Base Offense Level:

(1) **6**; or

(2) if the conduct was theft or destruction of mail, apply §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Statutory Provision: 18 U.S.C. § 1702. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Background: The statutory provision covered by this guideline is sometimes used to prosecute offenses more accurately described as theft or destruction of mail. In such cases, §2B1.1 (Theft, Property Destruction, and Fraud) is to be applied.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 313); November 1, 2001 (amendment 617).

* * * * *

4. PEONAGE, INVOLUNTARY SERVITUDE, SLAVE TRADE, AND CHILD SOLDIERS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2009 (amendment 733).

§2H4.1. Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers

(a) Base Offense Level:

(1) **22**; or

(2) **18**, if (A) the defendant was convicted of an offense under 18 U.S.C. § 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. § 1593A based on an act in violation of 18 U.S.C. § 1592.

(b) Specific Offense Characteristics

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if any victim sustained serious bodily injury, increase by **2** levels.

(2) If (A) a dangerous weapon was used, increase by **4** levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by **2** levels.

(3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by **3** levels; (B) between 180 days and one year, increase by **2** levels; or (C) more than 30 days but less than 180 days, increase by **1** level.

(4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:

(A) **2** plus the offense level as determined above, or

(B) **2** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581–1590, 1592, 1593A, 2442.

Application Notes:

1. For purposes of this guideline—

"***A dangerous weapon was used***" means that a firearm was discharged, or that a firearm or other dangerous weapon was otherwise used. "***The use of a dangerous weapon was threatened***" means that the use of a dangerous weapon was threatened regardless of whether a dangerous weapon was present.

Definitions of "***firearm***," "***dangerous weapon***," "***otherwise used***," "***serious bodily injury***," and "***permanent or life-threatening bodily injury***" are found in the Commentary to §1B1.1 (Application Instructions).

"***Peonage or involuntary servitude***" includes forced labor, slavery, and recruitment or use of a child soldier.

2. Under subsection (b)(4), "***any other felony offense***" means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. *See* Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

~~3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.~~

~~4. In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1995 (amendment 521); May 1, 1997 (amendment 542); November 1, 1997 (amendment 559); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2009 (amendments 730 and 733).

§2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the offense involved (A) serious bodily injury, increase by **4** levels; or (B) bodily injury, increase by **2** levels.

(2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by **2** levels.

Commentary

Statutory Provision: 29 U.S.C. § 1851.

Application Notes:

1. **Definitions.**—For purposes of subsection (b)(1), "***bodily injury***" and "***serious bodily injury***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Application of Subsection (b)(2).**—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 *et seq*.).

Historical Note	Effective May 1, 2001 (amendment 612). Amended effective November 1, 2001 (amendment 627); November 1, 2010 (amendment 746); November 1, 2015 (amendment 796).

PART I — [NOT USED]

PART J — OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

§2J1.1. Contempt

Apply §2X5.1 (Other Offenses).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **In General.**—Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply.

2. **Willful Failure to Pay Court-Ordered Child Support.**—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. In such a case, do not apply §2B1.1(b)(9)(C) (pertaining to a violation of a prior, specific judicial order). *Note*: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.

3. **Violation of Judicial Order Enjoining Fraudulent Behavior.**—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(9)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 170 and 171); November 1, 1993 (amendment 496); November 1, 1998 (amendment 588); November 1, 2001 (amendment 617); November 1, 2003 (amendment 653); November 1, 2009 (amendment 736); November 1, 2011 (amendments 752 and 760).

§2J1.2. Obstruction of Justice

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) (Apply the greatest):

(A) If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, increase by **4** levels.

(B) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.

(C) If the (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, increase by **12** levels.

(2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.

(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 (when the statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code), 1503, 1505–1513, 1516, 1519. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Domestic terrorism***" has the meaning given that term in 18 U.S.C. § 2331(5).

"***International terrorism***" has the meaning given that term in 18 U.S.C. § 2331(1).

"***Records, documents, or tangible objects***" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"***Substantial interference with the administration of justice***" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. **Chapter Three Adjustments.—**

   (A) **Inapplicability of §3C1.1.—**For offenses covered under this section, §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

   (B) **Interaction with Terrorism Adjustment.—**If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(C).

3. **Convictions for the Underlying Offense.—**In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (*i.e.*, the offense that is the object of the obstruction), *see* the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).

~~4. **Upward Departure Considerations.—**If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) or a particularly serious sex offense, an upward departure would be warranted.~~

~~5~~4. **Subsection (b)(1)(B).—**The inclusion of "property damage" under subsection (b)(1)(B) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (*e.g.*, to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1)(B) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 172–174); November 1, 1991 (amendment 401); January 25, 2003 (amendment 647); November 1, 2003 (amendment 653); October 24, 2005 (amendment 676); November 1, 2006 (amendment 690); November 1, 2007 (amendment 701); November 1, 2011 (amendment 758); November 1, 2013 (amendment 777).

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by **8** levels.

(2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by **3** levels.

(c) Cross Reference

(1) If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely Related Counts).

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(b)(3), (4), 1621–1623. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Substantial interference with the administration of justice***" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. For offenses covered under this section, §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), *see* the Commentary to §3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).

~~4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

~~5~~4. "***Separate proceedings***," as used in subsection (d)(1), includes different proceedings in the same case or matter (*e.g.*, a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (*e.g.*, separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.

Background: This section applies to perjury, subornation of perjury, and witness bribery, generally prosecuted under the referenced statutes. The guidelines provide a higher penalty for perjury than the pre-guidelines practice estimate of ten months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 175); November 1, 1991 (amendments 401 and 402); November 1, 1993 (amendment 481); November 1, 2003 (amendment 653); November 1, 2011 (amendment 758); November 1, 2013 (amendment 777).

§2J1.4. Impersonation

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by **6** levels.

(c) Cross Reference

(1) If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 912, 913.

Background: This section applies to impersonation of a federal officer, agent, or employee; and impersonation to conduct an unlawful search or arrest.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 176).

§2J1.5. Failure to Appear by Material Witness

(a) Base Offense Level:

(1) **6**, if in respect to a felony; or

(2) **4**, if in respect to a misdemeanor.

(b) Specific Offense Characteristic

(1) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.

Commentary

Statutory Provisions: 18 U.S.C. § 3146(b)(1)(B). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Substantial interference with the administration of justice***" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. By statute, a term of imprisonment imposed for an offense under 18 U.S.C. § 3146(b)(1)(B) runs consecutively to any other term of imprisonment imposed. 18 U.S.C. § 3146(b)(2).

Background: This section applies to a failure to appear by a material witness. The base offense level incorporates a distinction as to whether the failure to appear was in respect to a felony or misdemeanor prosecution. The offense under 18 U.S.C. § 3146(b)(1)(B) is a misdemeanor for which the maximum period of imprisonment authorized by statute is one year.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 177); November 1, 1991 (amendment 401); November 1, 2009 (amendment 737).

§2J1.6. Failure to Appear by Defendant

(a) Base Offense Level:

(1) **11**, if the offense constituted a failure to report for service of sentence; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the base offense level is determined under subsection (a)(1), and the defendant—

(A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by **5** levels; or

(B) was ordered to report to a community corrections center, community treatment center, "halfway house," or similar facility, and subdivision (A) above does not apply, decrease by **2** levels.

Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.

(2) If the base offense level is determined under subsection (a)(2), and the underlying offense is—

(A) punishable by death or imprisonment for a term of fifteen years or more, increase by **9** levels; or

(B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by **6** levels; or

(C) a felony punishable by a term of imprisonment of less than five years, increase by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 3146(b)(1).

Application Notes:

1. "***Underlying offense***" means the offense in respect to which the defendant failed to appear.

2. For offenses covered under this section, §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.

3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. *See* §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.1–3D1.5 do not apply.

However, in the case of a conviction on both the underlying offense and the failure to appear, other than a case of failure to appear for service of sentence, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense

are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1–3D1.5 apply. *See* §3D1.1(b)(1), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

~~4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.~~

~~5~~4. In some cases, the defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentence imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense level is determined under subsection (a)(1) (*i.e.*, where the offense constituted a failure to report for service of sentence).

Background: This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service of sentence. Where the base offense level is determined under subsection (a)(2), the offense level increases in relation to the statutory maximum of the underlying offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 329); November 1, 1991 (amendment 403); November 1, 1998 (amendment 579); November 1, 2001 (amendment 636); November 1, 2005 (amendment 680); November 1, 2011 (amendment 758); November 1, 2013 (amendment 777).

§2J1.7. [Deleted]

Historical Note	Section 2J1.7 (Commission of Offense While on Release), effective November 1, 1987, amended effective January 15, 1988 (amendment 32), November 1, 1989 (amendment 178), and November 1, 1991 (amendment 431), was deleted from Chapter Two and replaced by §3C1.3 effective November 1, 2006 (amendment 684).

§2J1.8. [Deleted]

Historical Note	Section 2J1.8 (Bribery of Witness), effective November 1, 1987, amended effective January 15, 1988 (amendment 33), November 1, 1989 (amendment 179), and November 1, 1991 (amendment 401), was deleted by consolidation with §2J1.3 effective November 1, 1993 (amendment 481).

§2J1.9. Payment to Witness

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the payment was made or offered for refusing to testify or for the witness absenting himself to avoid testifying, increase by **4** levels.

Commentary

Statutory Provisions: 18 U.S.C. § 201(c)(2), (3).

Application Notes:

1. For offenses covered under this section, §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.

2. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which the payment was made), *see* the Commentary to §3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).

Background: This section applies to witness gratuities in federal proceedings.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 180 and 181); November 1, 2011 (amendment 758); November 1, 2013 (amendment 777).

PART K — OFFENSES INVOLVING PUBLIC SAFETY

1. EXPLOSIVES AND ARSON

§2K1.1. Failure to Report Theft of Explosive Materials; Improper Storage of Explosive Materials

(a) Base Offense Level: **6**

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(j), (k), 844(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Background: The above-referenced provisions are misdemeanors. The maximum term of imprisonment authorized by statute is one year.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 404); November 1, 1993 (amendment 481).

§2K1.2. [Deleted]

Historical Note	Section 2K1.2 (Improper Storage of Explosive Materials), effective November 1, 1987, amended effective November 1, 1991 (amendment 404), was deleted by consolidation with §2K1.1 effective November 1, 1993 (amendment 481).

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

(a) Base Offense Level (Apply the Greatest):

(1) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **20**, if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);

(4) **16**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or

(5) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved twenty-five pounds or more of explosive materials, increase as follows:

	WEIGHT OF EXPLOSIVE MATERIAL	INCREASE IN LEVEL
(A)	At least 25 but less than 100 lbs.	add **1**
(B)	At least 100 but less than 250 lbs.	add **2**
(C)	At least 250 but less than 500 lbs.	add **3**
(D)	At least 500 but less than 1000 lbs.	add **4**
(E)	1000 lbs. or more	add **5**.

(2) If the offense involved any explosive material that the defendant knew or had reason to believe was stolen, increase by **2** levels.

Provided, that the cumulative offense level determined above shall not exceed level **29**.

(3) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with another felony offense; or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(c) Cross Reference

(1) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with the commission or attempted commission of another offense, or possessed or transferred any explosive material with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)–(e), (h), (i), (l)–(o), (p)(2), 844(d), (g), 1716, 2283; 26 U.S.C. § 5685.

Application Notes:

1. "***Explosive material(s)***" include explosives, blasting agents, and detonators. *See* 18 U.S.C. § 841(c). "Explosives" is defined at 18 U.S.C. § 844(j). A destructive device, defined in the Commentary to §1B1.1 (Application Instructions), may contain explosive materials. Where the conduct charged in the count of which the defendant was convicted establishes that the offense involved a destructive device, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) if the resulting offense level is greater.

2. For purposes of this guideline:

   "***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

   "***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

   "***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

3. For purposes of subsection (a)(4), "***prohibited person***" means any person described in 18 U.S.C. § 842(i).

4. "***Felony offense***," as used in subsection (b)(3), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

5. For purposes of calculating the weight of explosive materials under subsection (b)(1), include only the weight of the actual explosive material and the weight of packaging material that is necessary for the use or detonation of the explosives. Exclude the weight of any other shipping or packaging materials. For example, the paper and fuse on a stick of dynamite would be included; the box that the dynamite was shipped in would not be included.

6. For purposes of calculating the weight of explosive materials under subsection (b)(1), count only those explosive materials that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any explosive material that a defendant attempted to obtain by making a false statement.

7. If the defendant is convicted under 18 U.S.C. § 842(h) (offense involving stolen explosive materials), and is convicted of no other offenses subject to this guideline, do not apply the adjustment in subsection (b)(2) because the base offense level itself takes such conduct into account.

8. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

9. For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

   Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~10. An upward departure may be warranted in any of the following circumstances: (A) the quantity of explosive materials significantly exceeded 1000 pounds; (B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (*e.g.*, plastic explosives); (C) the defendant knowingly distributed explosive materials to a person under twenty one years of age; or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals.~~

~~11~~10. As used in subsections (b)(3) and (c)(1), "***another felony offense***" and "***another offense***" refer to offenses other than explosives or firearms possession or trafficking offenses. ~~However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.~~

   In addition, for purposes of subsection (c)(1)(A), "***that other offense***" means, with respect to an offense under 18 U.S.C. § 842(p)(2), the underlying Federal crime of violence.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 183); November 1, 1991 (amendment 373); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 534); November 1, 1997 (amendment 568); November 1, 1998 (amendment 586); November 1, 2001 (amendments 629 and 630); November 1, 2002 (amendment 646); November 1, 2003 (amendment 655); November 1, 2007 (amendment 700); November 1, 2010 (amendments 746 and 747).

§2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level (Apply the Greatest):

(1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass

transportation facility, a mass transportation vehicle, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;

(2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a maritime facility, a vessel, or a vessel's cargo, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;

(3) **16**, if the offense involved the destruction of or tampering with aids to maritime navigation; or

(4) **2** plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).

(b) Specific Offense Characteristics

(1) If the offense was committed to conceal another offense, increase by **2** levels.

(2) If the base offense level is not determined under subsection (a)(4), and the offense occurred on a national cemetery, increase by **2** levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1855, 1992(a)(1), (a)(2), (a)(4), 2275, 2282A, 2282B, 2291, 2332a, 2332f; 49 U.S.C. § 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Aids to maritime navigation***" means any device external to a vessel intended to assist the navigator to determine position or save course, or to warn of dangers or obstructions to navigation.

"***Explosives***" includes any explosive, explosive material, or destructive device.

"***Maritime facility***" means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation.

"***National cemetery***" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"***Mass transportation***" has the meaning given that term in 18 U.S.C. § 1992(d)(7).

"***State or government facility***", "***infrastructure facility***", "***place of public use***", and "***public transportation system***" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

"***Vessel***" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

2. **Risk of Death or Serious Bodily Injury.**—Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

~~3. **Upward Departure Provision.**—If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Background: Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105–101.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 182, 184, and 185); November 1, 1990 (amendment 330); November 1, 1991 (amendment 404); November 1, 1998 (amendment 576); November 1, 2001 (amendment 617); November 1, 2002 (amendment 637); November 1, 2003 (amendment 655); November 1, 2007 (amendments 699 and 700); November 1, 2014 (amendment 781); November 1, 2024 (amendment 831).

§2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

If more than one applies, use the greatest:

(1) If the offense was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, increase by **15** levels.

(2) If the defendant was prohibited by another federal law from possessing the weapon or material, increase by **2** levels.

(3) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. § 46505 and he acted with mere negligence, decrease by **3** levels.

(c) Cross Reference

(1) If the defendant used or possessed the weapon or material in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt, Solicitation, or Conspiracy), as appropriate, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 49 U.S.C. § 46505 (formerly 49 U.S.C. § 1472(l)).

Background: This guideline provides an enhancement where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided in a case of mere negligence where the defendant was otherwise authorized to possess the weapon or material.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 182, 186, 187, and 303); November 1, 1991 (amendment 404); November 1, 1992 (amendment 443); November 1, 1995 (amendment 534); November 1, 1997 (amendment 560).

§2K1.6. Licensee Recordkeeping Violations Involving Explosive Materials

(a) Base Offense Level: **6**

(b) Cross Reference

(1) If a recordkeeping offense reflected an effort to conceal a substantive explosive materials offense, apply §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials).

Commentary

Statutory Provisions: 18 U.S.C. § 842(f), (g).

Background: The above-referenced provisions are recordkeeping offenses applicable only to "***licensees***," who are defined at 18 U.S.C. § 841(m).

Historical Note	Effective November 1, 1991 (amendment 373). A former §2K1.6 (Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes), effective November 1, 1987, amended effective November 1, 1989 (amendment 303) and November 1, 1990 (amendment 331), was deleted by consolidation with §2K1.3 effective November 1, 1991 (amendment 373).

§2K1.7. [Deleted]

Historical Note	Section 2K1.7 (Use of Fire or Explosives to Commit a Federal Felony), effective November 1, 1989 (amendment 188), amended effective November 1, 1990 (amendment 332), was deleted by consolidation with §2K2.4 effective November 1, 1993 (amendment 481).

* * * * *

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 932, or § 933; or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(A)	3–7	add **2**
(B)	8–24	add **4**
(C)	25–99	add **6**
(D)	100–199	add **8**
(E)	200 or more	add **10**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If (A) any firearm was stolen, increase by **2** levels; or (B)(i) any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye; or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **2** levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by **2** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose

of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by **5** levels.

Provided, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(8) If the defendant—

(A) receives an enhancement under subsection (b)(5); and

(B) committed the offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, knowing or acting with willful blindness or conscious avoidance of knowledge that the group, club, organization, or association had as one of its primary purposes the commission of criminal offenses;

increase by **2** levels.

(9) If the defendant—

(A) receives an enhancement under subsection (b)(5);

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together~~, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)~~; and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; or (ii) was unusually vulnerable to being persuaded or induced to commit the offense due to a physical or mental condition;

decrease by **2** levels.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 932, 933, 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Ammunition***" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"***Controlled substance offense***" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Crime of violence***" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"***Destructive device***" has the meaning given that term in 26 U.S.C. § 5845(f).

"***Felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"***Firearm***" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—** For purposes of subsections (a)(1), (a)(3), and (a)(4), a "***semiautomatic firearm that is capable of accepting a large capacity magazine***" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **Definition of "Prohibited Person".—**For purposes of subsections (a)(4)(B), (a)(6), and (b)(5), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection (a)(7).—**Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. **Application of Subsection (b)(1).—**For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. **Application of Subsection (b)(2).—**Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. **Destructive Devices.—**A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a)

(*e.g.*, subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

~~Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).~~

8. **Application of Subsection (b)(4).—**

(A) **Interaction with Subsection (a)(7).—**If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).

(B) **Defendant's State of Mind.—**Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

9. **Application of Subsection (b)(7).—**Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (*e.g.*, if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. **Prior Felony Convictions.—**For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In

addition, for purposes of applying subsections (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~11. **Upward Departure Provisions.** An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).~~

~~12~~11. **Armed Career Criminal.**—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. *See* §4B1.4.

~~13~~12. **Application of Subsection (b)(5).**—

(A) **Definitions.**—For purposes of this subsection:

"***Crime of violence***" and "***controlled substance offense***" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Misdemeanor crime of domestic violence***" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "***criminal justice sentence***" includes probation, parole, supervised release, imprisonment, work release, or escape status.

The term "***defendant***," consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

~~(B) **Upward Departure Provision.** If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.~~

(~~C~~B) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

~~14~~13. **Application of Subsections (b)(6)(B) and (c)(1).**—

(A) **In General.**—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) **Application When Other Offense is Burglary or Drug Offense.**—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) **Definitions.—**

"***Another felony offense***", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"***Another offense***", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

~~(D) **Upward Departure Provision.**—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.~~

(~~E~~D) **Relationship Between the Instant Offense and the Other Offense.**—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. *See* §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) **Firearm Cited in the Offense of Conviction.** Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) **Firearm Not Cited in the Offense of Conviction.** Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that,

on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629–631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804); November 1, 2023 (amendment 819); November 1, 2024 (amendment 828).

§2K2.2. [Deleted]

Historical Note	Section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), effective November 1, 1987, amended effective January 15, 1988 (amendment 34), November 1, 1989 (amendment 189), and November 1, 1990 (amendment 333), was deleted by consolidation with §2K2.1 effective November 1, 1991 (amendment 374).

§2K2.3. [Deleted]

Historical Note	Section 2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense), effective November 1, 1989 (amendment 189), was deleted by consolidation with §2K2.1 effective November 1, 1991 (amendment 374). A former §2K2.3 (Prohibited Transactions in or Shipment of Firearms and Other Weapons), effective November 1, 1987, was deleted by consolidation with §2K2.2 effective November 1, 1989 (amendment 189).

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments), Parts A through E, and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three, Parts A through E, and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three, Parts A through E, and Four shall not apply to that count of conviction.

(d) Special Instructions for Fines

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), (o), 924(c), 929(a).

Application Notes:

1. **Application of Subsection (a).**—Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United States Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. **Application of Subsection (b).—**

~~(A) **In General.—**~~Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

~~(B) **Upward Departure Provision.—** In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.~~

3. **Application of Subsection (c).**—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction)

4. **Non-Applicability of Certain Enhancements.—**

(A) **In General.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the con-

viction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

(B) **Impact on Grouping.**—If two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. § 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. § 924(c), the counts shall be grouped pursuant to §3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include "conduct that is treated as a specific offense characteristic" in the other count, but the otherwise applicable enhancements did not apply due to the rules in §2K2.4 related to 18 U.S.C. § 924(c) convictions.

~~(C) **Upward Departure Provision.**—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).~~

5. **Chapters Three and Four.**—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) , Parts A through E, and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three, Parts A through D, and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.

6. **Terms of Supervised Release.**—Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).

7. **Fines.**—Subsection (d) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (*see* Application Note 4). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms

of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 190); November 1, 1990 (amendment 332); November 1, 1991 (amendment 405); November 1, 1993 (amendments 481 and 489); November 1, 2000 (amendments 598, 599, and 600); November 1, 2002 (amendment 642); November 1, 2006 (amendment 696); November 1, 2010 (amendment 748); November 1, 2011 (amendments 750 and 760); November 1, 2023 (amendment 824); November 1, 2024 (amendments 828 and 831).

§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If—

(A) the defendant unlawfully possessed or caused any firearm or dangerous weapon to be present in a federal court facility; or

(B) the defendant unlawfully possessed or caused any firearm to be present in a school zone,

increase by **2** levels.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or dangerous weapon in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or dangerous weapon with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(q), 930; 40 U.S.C. § 5104(e)(1).

Application Notes:

1. "***Dangerous weapon***" and "***firearm***" are defined in the Commentary to §1B1.1 (Application Instructions).

2. "***Federal court facility***" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. *See* 18 U.S.C. § 930(g)(3).

3. "***School zone***" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. *See* 18 U.S.C. § 924(a)(4). In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C. § 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the guideline range is 30–37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense, plus 6 months under 18 U.S.C. § 922(q) would satisfy this requirement.

~~4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1989 (amendment 191). Amended effective November 1, 1991 (amendment 374); November 1, 2003 (amendment 661); November 1, 2010 (amendment 746).

§2K2.6. Possessing, Purchasing, or Owning Body Armor by Violent Felons

(a) Base Offense Level: **10**

(b) Specific Offense Characteristic

(1) If the defendant used the body armor in connection with another felony offense, increase by **4** levels.

Commentary

Statutory Provision: 18 U.S.C. § 931.

Application Notes:

1. **Application of Subsection (b)(1).—**

   (A) **Meaning of "Defendant".**—Consistent with §1B1.3 (Relevant Conduct), the term "***defendant***", for purposes of subsection (b)(1), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

   (B) **Meaning of "Felony Offense".**—For purposes of subsection (b)(1), "***felony offense***" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

   (C) **Meaning of "Used".**—For purposes of subsection (b)(1), "***used***" means the body armor was (i) actively employed in a manner to protect the person from gunfire; or (ii) used as a means of bartering. Subsection (b)(1) does not apply if the body armor was merely possessed. For example, subsection (b)(1) would not apply if the body armor was found in the trunk of a car but was not being actively used as protection.

2. **Inapplicability of §3B1.5.**—If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).

3. **Grouping of Multiple Counts.**—If subsection (b)(1) applies (because the defendant used the body armor in connection with another felony offense) and the instant offense of conviction includes a count of conviction for that other felony offense, the counts of conviction for the 18 U.S.C. § 931 offense and that other felony offense shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).

Historical Note	Effective November 1, 2004 (amendment 670).

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3. MAILING INJURIOUS ARTICLES

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481).

§2K3.1. [Deleted]

Historical Note	Section 2K3.1 (Unlawfully Transporting Hazardous Materials in Commerce), effective November 1, 1987, was deleted by consolidation with §2Q1.2 effective November 1, 1993 (amendment 481).

§2K3.2. Feloniously Mailing Injurious Articles

(a) Base Offense Level (Apply the greater):

(1) If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or

(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provision: 18 U.S.C. § 1716 (felony provisions only).

Background: This guideline applies only to the felony provisions of 18 U.S.C. § 1716. The Commission has not promulgated a guideline for the misdemeanor provisions of this statute.

Historical Note	Effective November 1, 1990 (amendment 334).

PART L — OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

1. IMMIGRATION

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

(1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) **12**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

	Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(A)	6–24	add **3**
(B)	25–99	add **6**
(C)	100 or more	add **9**.

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(4) If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor's parent, adult relative, or legal guardian, increase by **4** levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEATH OR DEGREE OF INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2** levels
(B)	Serious Bodily Injury	add **4** levels
(C)	Permanent or Life-Threatening Bodily Injury	add **6** levels
(D)	Death	add **10** levels.

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***The offense was committed other than for profit***" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

"***Number of unlawful aliens smuggled, transported, or harbored***" does not include the defendant.

"***Aggravated felony***" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

"***Child***" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

"***Spouse***" has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

"***Immigration and naturalization offense***" means any offense covered by Chapter Two, Part L.

"***Minor***" means an individual who had not attained the age of 18 years.

"***Parent***" means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

"***Bodily injury***," "***serious bodily injury***," and "***permanent or life-threatening bodily injury***" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

2. **Prior Convictions Under Subsection (b)(3).**—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. **Application of Subsection (b)(6).**—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (*e.g.*, transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane

condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).

4. **Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.**—Consistent with Application Note 1(~~M~~L) of §1B1.1 (Application Instructions), "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

5. **Inapplicability of §3A1.3.**—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

6. **Interaction with §3B1.1.**—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.

~~7. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following cases:~~

~~(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.~~

~~(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).~~

~~(C) The offense involved substantially more than 100 aliens.~~

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 35, 36, and 37); November 1, 1989 (amendment 192); November 1, 1990 (amendment 335); November 1, 1991 (amendment 375); November 1, 1992 (amendment 450); May 1, 1997 (amendment 543); November 1, 1997 (amendment 561); November 1, 2006 (amendments 686 and 692); November 1, 2007 (amendment 702); November 1, 2009 (amendment 730); November 1, 2014 (amendment 785); November 1, 2016 (amendment 802); November 1, 2018 (amendment 805).

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by **4** levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by **2** levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

(3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **In General.—**

(A) **"Ordered Deported or Ordered Removed from the United States for the First Time".—**For purposes of this guideline, a defendant shall be considered "ordered deported or ordered removed from the United States" if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. "For the first time" refers to the first time the defendant was ever the subject of such an order.

(B) **Offenses Committed Prior to Age Eighteen.—**Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

2. **Definitions.—**For purposes of this guideline:

"***Crime of violence***" means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. "Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. "Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance. "Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

"***Drug trafficking offense***" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

"***Felony***" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"***Illegal reentry offense***" means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

"***Misdemeanor***" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

"***Sentence imposed***" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

3. **Criminal History Points.**—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. **Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.**—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(2) or (b)(3), as appropriate, if it independently would have received criminal history points.

5. **Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.**—There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).

~~6. **Departure Based on Seriousness of a Prior Offense.**—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.~~

7. **Departure Based on Time Served in State Custody.**—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). *See* §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

8. **Departure Based on Cultural Assimilation.**—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 38); November 1, 1989 (amendment 193); November 1, 1991 (amendment 375); November 1, 1995 (amendment 523); November 1, 1997 (amendment 562); November 1, 2001 (amendment 632); November 1, 2002 (amendment 637); November 1, 2003 (amendment 658); November 1, 2007 (amendment 709); November 1, 2008 (amendment 722); November 1, 2010 (amendment 740); November 1, 2011 (amendment 754); November 1, 2012 (amendment 764); November 1, 2014 (amendment 787); November 1, 2015 (amendment 795); November 1, 2016 (amendment 802); November 1, 2018 (amendment 809); November 1, 2023 (amendment 822).

§2L1.3. [Deleted]

Historical Note	Section 2L1.3 (Engaging in a Pattern of Unlawful Employment of Aliens), effective November 1, 1987, was deleted effective November 1, 1989 (amendment 194).

* * * * *

2. NATURALIZATION AND PASSPORTS

§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

(a) Base Offense Level: **11**

(b) Specific Offense Characteristics

(1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by **3** levels.

(2) If the offense involved six or more documents or passports, increase as follows:

	NUMBER OF DOCUMENTS/PASSPORTS	INCREASE IN LEVEL
(A)	6–24	add **3**
(B)	25–99	add **6**
(C)	100 or more	add **9**.

(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by **4** levels.

(4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by **4** levels; or (B) a foreign passport, increase by **2** levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(c), (d); 18 U.S.C. §§ 1015, 1028, 1425–1427, 1542, 1544, 1546. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

   "***The offense was committed other than for profit***" means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

   "***Immigration and naturalization offense***" means any offense covered by Chapter Two, Part L.

   "***Child***" has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

   "***Spouse***" has the meaning set forth in section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

2. Where it is established that multiple documents are part of a set of documents intended for use by a single person, treat the set as one document.

~~3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.~~

~~4~~3. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 195); November 1, 1992 (amendment 450); November 1, 1993 (amendment 481); November 1, 1995 (amendment 524); May 1, 1997 (amendment 544); November 1, 1997 (amendment 563); November 1, 2006 (amendment 692); November 1, 2010 (amendment 746).

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by **2** levels.

(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(3) If the defendant fraudulently obtained or used (A) a United States passport, increase by **4** levels; or (B) a foreign passport, increase by **2** levels.

(4) (Apply the Greater):

(A) If the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

(B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by **6** levels; or (ii) any other serious human rights offense, increase by **10** levels. If clause (ii) applies and the resulting offense level is less than level **25**, increase to level **25**.

(c) Cross Reference

(1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(c), (d); 18 U.S.C. §§ 911, 1015, 1028, 1423–1426, 1542–1544, 1546.

Application Notes:

1. **Definition.**—For purposes of this guideline, "***immigration and naturalization offense***" means any offense covered by Chapter Two, Part L.

2. **Application of Subsection (b)(2).**—Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. **Application of Subsection (b)(3).**—The term "***used***" is to be construed broadly and includes the attempted renewal of previously-issued passports.

4. **Application of Subsection (b)(4).**—For purposes of subsection (b)(4):

   "***Serious human rights offense***" means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, *see* 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

   "***The offense of incitement to genocide***" means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

5. **Multiple Counts.**—For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.

~~6. **Upward Departure Provision.**—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 39); November 1, 1989 (amendment 196); November 1, 1992 (amendment 450); November 1, 1993 (amendment 481); November 1, 1995 (amendment 524); May 1, 1997 (amendment 544); November 1, 1997 (amendment 563); November 1, 2004 (amendment 671); November 1, 2006 (amendment 692); November 1, 2010 (amendment 746); November 1, 2012 (amendment 765).

§2L2.3. [Deleted]

Historical Note	Section 2L2.3 (Trafficking in a United States Passport), effective November 1, 1987, amended effective November 1, 1989 (amendment 197) and November 1, 1992 (amendment 450), was deleted by consolidation with §2L2.1 effective November 1, 1993 (amendment 481).

§2L2.4. [Deleted]

Historical Note	Section 2L2.4 (Fraudulently Acquiring or Improperly Using a United States Passport), effective November 1, 1987, amended effective January 15, 1988 (amendment 40) and November 1, 1989 (amendment 198), was deleted by consolidation with §2L2.2 effective November 1, 1993 (amendment 481).

§2L2.5. Failure to Surrender Canceled Naturalization Certificate

(a) Base Offense Level: **6**

Commentary

Statutory Provision: 18 U.S.C. § 1428.

Historical Note	Effective November 1, 1987.

PART M — OFFENSES INVOLVING NATIONAL DEFENSE AND WEAPONS OF MASS DESTRUCTION

Historical Note	Effective November 1, 1987. Amended effective November 1, 2001 (amendment 633).

1. TREASON

§2M1.1. Treason

(a) Base Offense Level:

(1) **43**, if the conduct is tantamount to waging war against the United States;

(2) the offense level applicable to the most analogous offense, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 2381.

Background: Treason is a rarely prosecuted offense that could encompass a relatively broad range of conduct, including many of the more specific offenses in this part. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous offense guideline in lesser cases.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2023 (amendment 824).

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2. SABOTAGE

§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities

(a) Base Offense Level: **32**

Commentary

Statutory Provisions: 18 U.S.C. §§ 2153, 2154; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. Violations of 42 U.S.C. § 2284 are included in this section where the defendant was convicted of acting with intent to injure the United States or aid a foreign nation.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481); November 1, 2002 (amendment 637); November 1, 2018 (amendment 813).

§2M2.2. [Deleted]

Historical Note	Section 2M2.2 (Production of Defective War Material, Premises, or Utilities), effective November 1, 1987, was deleted by consolidation with §2M2.1 effective November 1, 1993 (amendment 481).

§2M2.3. Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities

(a) Base Offense Level: **26**

Commentary

Statutory Provisions: 18 U.S.C. §§ 2155, 2156; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b).

Application Note:

1. Violations of 42 U.S.C. § 2284 not included in §2M2.1 are included in this section.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481); November 1, 2002 (amendment 637).

§2M2.4. [Deleted]

Historical Note	Section 2M2.4 (Production of Defective National Defense Material, Premises, or Utilities), effective November 1, 1987, was deleted by consolidation with §2M2.3 effective November 1, 1993 (amendment 481).

* * * * *

3. ESPIONAGE AND RELATED OFFENSES

§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

(a) Base Offense Level:

(1) **42**, if top secret information was gathered or transmitted; or

(2) **37**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 794; 42 U.S.C. §§ 2274(a), (b), 2275.

Application Notes:

1. "***Top secret information***" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order 13526 (50 U.S.C. § 3161 note).

2. The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. ~~When revelation is likely to cause little or no harm, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

~~3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.~~

Background: Offense level distinctions in this subpart are generally based on the classification of the information gathered or transmitted. This classification, in turn, reflects the importance of the information to the national security.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2010 (amendment 746); November 1, 2013 (amendment 778); November 1, 2014 (amendment 789).

§2M3.2. Gathering National Defense Information

(a) Base Offense Level:

(1) **35**, if top secret information was gathered; or

(2) **30**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(a), (b), (c), (d), (e), (g), 1030(a)(1). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. *See* Commentary to §2M3.1.

2. If the defendant is convicted under 18 U.S.C. § 793(d) or (e), §2M3.3 may apply. *See* Commentary to §2M3.3.

Background: The statutes covered in this section proscribe diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2003 (amendment 654).

§2M3.3. Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information

(a) Base Offense Level:

(1) **29**, if top secret information; or

(2) **24**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g), 798; 50 U.S.C. § 783.

Application Notes:

1. *See* Commentary to §2M3.1.

2. If the defendant was convicted of 18 U.S.C. § 793(d) or (e) for the willful transmission or communication of intangible information with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation, apply §2M3.2.

Background: The statutes covered in this section proscribe willfully transmitting or communicating to a person not entitled to receive it a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense. Proof that the item was communicated with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation is required only where intangible information is communicated under 18 U.S.C. § 793(d) or (e).

This section also covers statutes that proscribe the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government, the unauthorized disclosure to a foreign government or a communist organization of classified information by a government employee, and the unauthorized receipt of classified information.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481); November 1, 2010 (amendment 746).

§2M3.4. Losing National Defense Information

(a) Base Offense Level:

(1) **18**, if top secret information was lost; or

(2) **13**, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 793(f).

Application Note:

1. *See* Commentary to §2M3.1.

Background: Offenses prosecuted under this statute generally do not involve subversive conduct on behalf of a foreign power, but rather the loss of classified information by the gross negligence of an employee of the federal government or a federal contractor.

Historical Note	Effective November 1, 1987.

§2M3.5. Tampering with Restricted Data Concerning Atomic Energy

(a) Base Offense Level: **24**

Commentary

Statutory Provision: 42 U.S.C. § 2276.

Application Note:

1. *See* Commentary to §2M3.1.

Historical Note	Effective November 1, 1987.

§2M3.6. [Deleted]

Historical Note	Section 2M3.6 (Disclosure of Classified Cryptographic Information), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (amendment 481).

§2M3.7. [Deleted]

Historical Note	Section 2M3.7 (Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (amendment 481).

§2M3.8. [Deleted]

Historical Note	Section 2M3.8 (Receipt of Classified Information), effective November 1, 1987, was deleted by consolidation with §2M3.3 effective November 1, 1993 (amendment 481).

§2M3.9. Disclosure of Information Identifying a Covert Agent

(a) Base Offense Level:

(1) **30**, if the information was disclosed by a person with, or who had authorized access to classified information identifying a covert agent; or

(2) **25**, if the information was disclosed by a person with authorized access only to other classified information.

Commentary

Statutory Provision: 50 U.S.C. § 3121.

Application Notes:

1. *See* Commentary to §2M3.1.

2. This guideline applies only to violations of 50 U.S.C. § 3121 by persons who have or previously had authorized access to classified information. This guideline does not apply to violations of 50 U.S.C. § 3121 by defendants, including journalists, who disclosed such information without having or having had authorized access to classified information. Violations of 50 U.S.C. § 3121 not covered by this guideline may vary in the degree of harm they inflict, and the court should impose a sentence that reflects such harm. *See* §2X5.1 (Other Offenses).

3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 3121 shall be imposed consecutively to any other term of imprisonment. *See* 50 U.S.C. § 3121(d).

Background: The alternative base offense levels reflect a statutory distinction by providing a greater base offense level for a violation of 50 U.S.C. § 3121 by an official who has or had authorized access to classified information identifying a covert agent than for a violation by an official with authorized access only to other classified information. This guideline does not apply to violations of 50 U.S.C. § 3121 by defendants who disclosed such information without having, or having had, authorized access to classified information.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2001 (amendment 636); November 1, 2010 (amendment 746); November 1, 2015 (amendment 796).

* * * * *

4. EVASION OF MILITARY SERVICE

§2M4.1. Failure to Register and Evasion of Military Service

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the offense occurred at a time when persons were being inducted for compulsory military service, increase by **6** levels.

Commentary

Statutory Provision: 50 U.S.C. § 3811.

~~**Application Note:**~~

~~1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 336); November 1, 2023 (amendment 824).

* * * * *

5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS, AND PROVIDING MATERIAL SUPPORT TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637).

§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

(a) Base Offense Level (Apply the greater):

(1) **26**, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or

(2) **14**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 22 U.S.C. § 8512; 50 U.S.C. §§ 1705, 4819. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definition.**—For purposes of subsection (a)(1)(B), "***a country supporting international terrorism***" means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. § 4813).

2. **Additional Penalties.**—In addition to the provisions for imprisonment, 50 U.S.C. § 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

~~3. **Departure Provisions.**~~

~~(A) **In General.**—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).~~

~~(B) **War or Armed Conflict.**—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 2001 (amendment 633); November 1, 2002 (amendment 637); November 1, 2011 (amendment 753); November 1, 2023 (amendment 824); November 1, 2024 (amendment 830).

§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

(a) Base Offense Level:

(1) **26**, except as provided in subdivision (2) below;

(2) **14**, if the offense involved only (A) non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed two, (B) ammunition for non-fully automatic small arms, and the number of rounds did not exceed 500, or (C) both.

Commentary

Statutory Provisions: 18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780, 8512; 50 U.S.C. § 1705.

Application ~~Notes~~Note:

1. Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

~~The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

~~2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 337); November 1, 2001 (amendment 633); November 1, 2007 (amendment 700); November 1, 2011 (amendment 753).

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose

(a) Base Offense Level: **26**

(b) Specific Offense Characteristic

(1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by **2** levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); 22 U.S.C. § 8512; 50 U.S.C. § 1705.

Application ~~Notes~~Note:

1. **Definitions.**—For purposes of this guideline:

"***Biological agent***", "***chemical weapon***", "***nuclear byproduct material***", "***nuclear material***", "***toxin***", and "***weapon of mass destruction***" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"***Dangerous weapon***", "***firearm***", and "***destructive device***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"***Explosives***" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"***Foreign terrorist organization***" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"***Material support or resources***" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

"***Specially designated global terrorist***" has the meaning given that term in 31 C.F.R. § 594.310.

~~2. **Departure Provisions.**~~

~~(A) **In General.** In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).~~

~~(B) **War or Armed Conflict.** In the case of a violation during time of war or armed conflict, an upward departure may be warranted.~~

Historical Note	Effective November 1, 2002 (amendment 637). Amended effective November 1, 2003 (amendment 655); November 1, 2007 (amendment 700); November 1, 2011 (amendment 753); November 1, 2023 (amendment 824).

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6. NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MATERIALS, AND OTHER WEAPONS OF MASS DESTRUCTION

Historical Note	Effective November 1, 1987. Amended effective November 1, 2001 (amendment 633).

§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

(a) Base Offense Level (Apply the Greatest):

(1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;

(2) **28**, if subsections (a)(1), (a)(3), and (a)(4) do not apply;

(3) **22**, if the defendant is convicted under 18 U.S.C. § 175b; or

(4) **20**, if (A) the defendant is convicted under 18 U.S.C. § 175(b); or (B) the offense (i) involved a threat to use a nuclear weapon, nuclear

material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) or (a)(4)(A) applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by **2** levels.

(2) If (A) subsection (a)(2), (a)(3), or (a)(4)(A) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by **4** levels; (ii) any victim sustained serious bodily injury, increase by **2** levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by **3** levels.

(3) If (A) subsection (a)(2), (a)(3), or (a)(4) applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) conduct that resulted in the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if such conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 175c, 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1992(a)(2), (a)(3), (a)(4), (b)(2), 2283, 2291, 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**For purposes of this guideline:

   "***Biological agent***" has the meaning given that term in 18 U.S.C. § 178(1).

   "***Chemical weapon***" has the meaning given that term in 18 U.S.C. § 229F(1).

   "***Foreign terrorist organization***" (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1189). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

   "***Listed precursor or a listed toxic chemical***" means a precursor or a toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. *See* 18 U.S.C. § 229F(6)(B), (8)(B). "Precursor" has the meaning given that term in 18 U.S.C. § 229F(6)(A). "Toxic chemical" has the meaning given that term in 18 U.S.C. § 229F(8)(A).

   "***Nuclear byproduct material***" has the meaning given that term in 18 U.S.C. § 831(g)(2).

   "***Nuclear material***" has the meaning given that term in 18 U.S.C. § 831(g)(1).

   "***Select biological agent***" means a biological agent or toxin identified (A) by the Secretary of Health and Human Services on the select agent list established and maintained pursuant to section 351A of the Public Health Service Act (42 U.S.C. § 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).

   "***Toxin***" has the meaning given that term in 18 U.S.C. § 178(2).

   "***Weapon of mass destruction***" has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).

2. **Threat Cases.—**Subsection (a)(4)(B) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct evidencing an intent or ability to carry out the threat. For example, subsection (a)(4)(B) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant's part to carry out the threat. In contrast, subsection (a)(4)(B) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant's belief that the talcum powder was anthrax.

Subsection (a)(4)(B) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

3. **Application of Special Instruction.**—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

Historical Note	Effective November 1, 1987. Amended effective November 1, 2001 (amendment 633); November 1, 2002 (amendment 637); November 1, 2003 (amendment 655); November 1, 2005 (amendment 679); November 1, 2006 (amendment 686); November 1, 2007 (amendments 699 and 700); November 1, 2010 (amendment 746); November 1, 2016 (amendment 804); November 1, 2023 (amendment 824).

§2M6.2. Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations

(a) Base Offense Level (Apply the greater):

(1) **30**, if the offense was committed with intent to injure the United States or to aid a foreign nation; or

(2) **6**.

Commentary

Statutory Provision: 42 U.S.C. § 2273.

Background: This section applies to offenses related to nuclear energy not specifically addressed elsewhere. This provision covers, for example, violations of statutes dealing with rules and regulations, license conditions, and orders of the Nuclear Regulatory Commission and the Department of Energy.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 359).

PART N — OFFENSES INVOLVING FOOD, DRUGS, AGRICULTURAL PRODUCTS, CONSUMER PRODUCTS, AND ODOMETER LAWS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2009 (amendment 733).

1. TAMPERING WITH CONSUMER PRODUCTS

§2N1.1. Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury

(a) Base Offense Level: **25**

(b) Specific Offense Characteristic

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if any victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

(3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provisions: 18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application ~~Notes~~Note:

~~1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.~~

~~2~~1. The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 338); November 1, 1991 (amendment 376); November 1, 2023 (amendment 815).

§2N1.2. Providing False Information or Threatening to Tamper with Consumer Products

(a) Base Offense Level: **16**

(b) Cross Reference

(1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provisions: 18 U.S.C. § 1365(c), (d).

~~**Application Note:**~~

~~1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 339).

§2N1.3. Tampering With Intent to Injure Business

(a) Base Offense Level: **12**

Commentary

Statutory Provision: 18 U.S.C. § 1365(b).

~~**Application Note:**~~

~~1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Historical Note	Effective November 1, 1987.

* * * * *

2. FOOD, DRUGS, AGRICULTURAL PRODUCTS, AND CONSUMER PRODUCTS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2009 (amendment 733).

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by **4** levels.

(c) Cross References

(1) If the offense involved fraud, apply §2B1.1 (Theft, Property Destruction, and Fraud).

(2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg, 6810, 7734, 8313; 21 U.S.C. §§ 115, 117, 122, 134–134e, 151–158, 331, 333(a)(1), (a)(2), (b)(1)–(6), (b)(8), 458–461, 463, 466, 610, 611, 614, 617, 619, 620, 642–644, 676; 42 U.S.C. § 262. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

~~1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

~~2~~1. The cross reference at subsection (c)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (c)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (*e.g.*, bribery).

~~3. **Upward Departure Provisions.** The following are circumstances in which an upward departure may be warranted:~~

~~(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).~~

~~(B) The defendant was convicted under 7 U.S.C. § 7734.~~

~~4~~2. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2B1.1 (Theft, Property Destruction, and Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 340); November 1, 1991 (amendment 432); November 1, 1992 (amendment 451); November 1, 2001 (amendment 617); November 1, 2002 (amendment 646); November 1, 2003 (amendment 661); November 1, 2006 (amendment 685); November 1, 2007 (amendment 711); November 1, 2008 (amendment 723); November 1, 2009 (amendment 733); November 1, 2023 (amendment 815).

* * * * *

3. ODOMETER LAWS AND REGULATIONS

§2N3.1. Odometer Laws and Regulations

(a) Base Offense Level: **6**

(b) Cross Reference

(1) If the offense involved more than one vehicle, apply §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Statutory Provisions: 49 U.S.C. §§ 32703–32705, 32709(b).

Background: The base offense level takes into account the deceptive aspect of the offense assuming a single vehicle was involved. If more than one vehicle was involved, §2B1.1 (Theft, Property Destruction, and Fraud) is to be applied because it is designed to deal with a pattern or scheme.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 199); November 1, 1997 (amendment 553); November 1, 2001 (amendment 617).

PART O — [NOT USED]

PART P — OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES

§2P1.1. Escape, Instigating or Assisting Escape

(a) Base Offense Level:

(1) **13**, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;

(2) **8**, otherwise.

(b) Specific Offense Characteristics

(1) If the use or the threat of force against any person was involved, increase by **5** levels.

(2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by **7** levels or the offense level under §2P1.1(a)(2) by **4** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.

(3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house," or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by **4** levels or the offense level under subsection (a)(2) by **2** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.

(4) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 751, 752, 755; 28 U.S.C. § 1826. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Non-secure custody***" means custody with no significant physical restraint (*e.g.*, where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier).

2. "***Returned voluntarily***" includes voluntarily returning to the institution or turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest or other charges).

3. If the adjustment in subsection (b)(4) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

~~4. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

~~5~~4. Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape) and §4A1.1(e) (custody status) would be applicable.

~~6~~5. If the adjustment in subsection (b)(1) applies as a result of conduct that involves an official victim, do not apply §3A1.2 (Official Victim).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 200 and 201); November 1, 1990 (amendment 341); November 1, 1991 (amendment 406); November 1, 2010 (amendment 747); November 1, 2023 (amendment 821).

§2P1.2. Providing or Possessing Contraband in Prison

(a) Base Offense Level:

(1) **23**, if the object was a firearm or destructive device.

(2) **13**, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, methamphetamine, or a narcotic drug.

(3) **6**, if the object was an alcoholic beverage, United States or foreign currency, a mobile phone or similar device, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug).

(4) **4**, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.

(b) Specific Offense Characteristic

(1) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

(c) Cross Reference

(1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level **26**, increase to level **26**.

Commentary

Statutory Provision: 18 U.S.C. § 1791.

Application Notes:

1. In this guideline, the term "***mobile phone or similar device***" means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).

2. If the adjustment in §2P1.2(b)(1) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1–3D1.5 apply. *See* §3D1.1(b)(1), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.

   Pursuant to 18 U.S.C. § 1791(c), a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served by the inmate at the time of the violation.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 202 and 203); November 1, 1995 (amendment 525); November 1, 1998 (amendment 579); November 1, 2005 (amendment 680); November 1, 2012 (amendment 769).

§2P1.3. Engaging In, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention

(a) Base Offense Level:

(1) **22**, if the offense was committed under circumstances creating a substantial risk of death or serious bodily injury to any person.

(2) **16**, if the offense involved a major disruption to the operation of an institution.

(3) **10**, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1792.

~~**Application Note:**~~

~~1. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Historical Note	Effective November 1, 1987.

§2P1.4. [Deleted]

Historical Note	Section 2P1.4 (Trespass on Bureau of Prisons Facilities), effective November 1, 1987, was deleted effective November 1, 1989 (amendment 204).

PART Q — OFFENSES INVOLVING THE ENVIRONMENT

1. ENVIRONMENT

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: **24**

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. §§ 6928(e), 7413(c)(5). For additional statutory provision(s), *see* Appendix A (Statutory Index).

~~**Application Note:**~~

~~1. If death or serious bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2007 (amendment 699); November 1, 2018 (amendment 813).

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by **4** levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **9** levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by **4** levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by **2** levels.

(7) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by **2** levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j–136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413(c)(1)–(4), 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. §§ 5124, 46312. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Recordkeeping offense***" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. "***Simple recordkeeping or reporting violation***" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.

3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (*e.g.*, 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (*e.g.*, 42 U.S.C. § 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.

~~4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.~~

~~5~~4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. ~~Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.~~

~~6~~5. Subsection (b)(2) applies to offenses where the public health is seriously endangered. ~~Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).~~

~~7~~6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. ~~Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.~~

~~8~~7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. ~~Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.~~

~~9. **Other Upward Departure Provisions.**~~

~~(A) **Civil Adjudications and Failure to Comply with Administrative Order.** In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).~~

~~(B) **Extreme Psychological Injury.** If the offense caused extreme psychological injury, an upward departure may be warranted. *See* §5K2.3 (Extreme Psychological Injury).~~

~~(C) **Terrorism.** If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).~~

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The fifth and sixth specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 481); November 1, 1997 (amendment 553); November 1, 2004 (amendment 672); November 1, 2010 (amendment 746); November 1, 2018 (amendment 813).

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by **6** levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by **4** levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **11** levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by **4** levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413(c)(1)–(4). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***Recordkeeping offense***" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations) rather than this guideline.

~~3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.~~

~~4~~3. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. ~~Depending upon the harm~~

~~resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.~~

~~5~~4. Subsection (b)(2) applies to offenses where the public health is seriously endangered. ~~Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).~~

~~6~~5. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. ~~Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.~~

~~7~~6. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. ~~Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.~~

~~8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).~~

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 205); November 1, 2018 (amendment 813).

§2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

(a) Base Offense Level (Apply the greatest):

(1) **26**;

(2) **22**, if the offense involved (A) a threat to tamper with a public water system; and (B) any conduct evidencing an intent to carry out the threat; or

(3) **16**, if the offense involved a threat to tamper with a public water system but did not involve any conduct evidencing an intent to carry out the threat.

(b) Specific Offense Characteristics

(1) If (A) any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) any victim sustained serious bodily injury, increase by **2** levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(2) If the offense resulted in (A) a substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by **2** levels.

(c) Cross References

(1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

(3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Application Notes:

1. **Definitions.**—For purposes of this guideline, "***permanent or life-threatening bodily injury***" and "***serious bodily injury***" have the meaning given those terms in Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Application of Special Instruction.**—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

~~3. **Departure Provisions.**—~~

~~(A) **Downward Departure Provision.**—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.~~

~~(B) **Upward Departure Provisions.**—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.~~

~~If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of §3A1.4 (Terrorism).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 206); November 1, 2003 (amendment 655).

§2Q1.5. [Deleted]

Historical Note	Section 2Q1.5 (Threatened Tampering with Public Water System), effective November 1, 1987, amended effective November 1, 1989 (amendment 207), was deleted by consolidation with §2Q1.4 effective November 1, 2003 (amendment 655).

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

(a) Base Offense Level (Apply the greatest):

(1) If the intent was to violate the Controlled Substances Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy);

(2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply §2B1.1 (Theft, Property Destruction, and Fraud);

(3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault); or

(4) **6**, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1864.

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled substance. Subsections (a)(1)–(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted.

Historical Note	Effective November 1, 1989 (amendment 208). Amended effective November 1, 1990 (amendment 313); November 1, 2001 (amendment 617); November 1, 2002 (amendment 646); November 1, 2010 (amendment 746).

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2. CONSERVATION AND WILDLIFE

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by **2** levels.

(2) If the offense (A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants, increase by **2** levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,500 but did not exceed $6,500, increase by **1** level; or (ii) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or

(B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

(c) Cross Reference

(1) If the offense involved a cultural heritage resource or paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. §§ 545, 554. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "***For pecuniary gain***" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, offenses committed for pecuniary gain include both monetary and barter transactions. Similarly, activities designed to increase gross revenue are considered to be committed for pecuniary gain.

2. The acquisition of fish, wildlife, or plants for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private nonprofit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose."

3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R., Subtitle B, Chapter III. State quarantine laws are included as well.

4. When information is reasonably available, "***market value***" under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (*e.g.*, taxidermy) cost. Market

value, however, shall not be based on measurement of aesthetic loss (so called "contingent valuation" methods).

~~5. If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.~~

~~6~~5. For purposes of subsection (c)(1), "***cultural heritage resource***" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. §§ 545 and 554 if the smuggling activity involved fish, wildlife, or plants.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 41); November 1, 1989 (amendments 209 and 210); November 1, 1991 (amendment 407); November 1, 1992 (amendment 452); November 1, 1995 (amendment 534); November 1, 2001 (amendment 617); November 1, 2002 (amendment 638); November 1, 2007 (amendment 700); November 1, 2010 (amendment 746); November 1, 2011 (amendment 758); November 1, 2015 (amendment 791).

§2Q2.2. [Deleted]

Historical Note	Section 2Q2.2 (Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants), effective November 1, 1987, was deleted by consolidation with §2Q2.1 effective November 1, 1989 (amendment 209).

PART R — ANTITRUST OFFENSES

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.

(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

	VOLUME OF COMMERCE (APPLY THE GREATEST)	ADJUSTMENT TO OFFENSE LEVEL
(A)	More than $1,000,000	add **2**
(B)	More than $10,000,000	add **4**
(C)	More than $50,000,000	add **6**
(D)	More than $100,000,000	add **8**
(E)	More than $300,000,000	add **10**
(F)	More than $600,000,000	add **12**
(G)	More than $1,200,000,000	add **14**
(H)	More than $1,850,000,000	add **16**.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

(c) Special Instruction for Fines

(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than $20,000.

(d) Special Instructions for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.

(2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.

(3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1, 3(a). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Application of Chapter Three (Adjustments).**—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.

2. **Considerations in Setting Fine for Individuals.**—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.

3. **Fines for Organizations.**—The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.

4. **Another Consideration in Setting Fine.**—Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.

5. **Use of Alternatives Other Than Imprisonment.**—It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.

6. **Understatement of Seriousness.**—Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.

7. **Defendant with Previous Antitrust Convictions.**—In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range~~, or an upward departure,~~ may be warranted. ~~*See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).~~

Background: This guideline applies to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect.

Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well.

The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging.

Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than $20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-estab-

lished amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 211 and 303); November 1, 1991 (amendments 377 and 422); November 1, 2003 (amendment 661); November 1, 2004 (amendment 674); November 1, 2005 (amendment 678); November 1, 2015 (amendment 791); November 1, 2018 (amendment 813); November 1, 2024 (amendment 830).

PART S — MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

Historical Note	Introductory Commentary to this Part, effective November 1, 1987, was deleted effective November 1, 1990 (amendment 342).

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) **8** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under 18 U.S.C. § 1957, increase by **1** level.

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by **2** levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by **4** levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957, 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(C)). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Crime of violence***" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"***Criminally derived funds***" means any funds derived, or represented by a law enforcement officer, or by another person at the direction or approval of an authorized federal official, to be derived from conduct constituting a criminal offense.

"***Laundered funds***" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957.

"***Laundering funds***" means making a transaction, financial transaction, monetary transaction, or transmission, or transporting or transferring property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956 or § 1957.

"***Sexual exploitation of a minor***" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

2. **Application of Subsection (a)(1).—**

(A) **Multiple Underlying Offenses.**—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Offense Guidelines).

(B) **Defendants Accountable for Underlying Offense.**—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) **Application of Chapter Three Adjustments.**—Notwithstanding §1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (*i.e.*, the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.

3. **Application of Subsection (a)(2).—**

(A) **In General.—**Subsection (a)(2) applies to any case in which (i) the defendant did not commit the underlying offense; or (ii) the defendant committed the underlying offense (or would be accountable for the underlying offense under §1B1.3(a)(1)(A)), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) **Commingled Funds.—**In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

(C) **Non-Applicability of Enhancement.—**Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957.

4. **Enhancement for Business of Laundering Funds.—**

(A) **In General.—**The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(C).

(B) **Factors to Consider.—**The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):

(i) The defendant regularly engaged in laundering funds.

(ii) The defendant engaged in laundering funds during an extended period of time.

(iii) The defendant engaged in laundering funds from multiple sources.

(iv) The defendant generated a substantial amount of revenue in return for laundering funds.

(v) At the time the defendant committed the instant offense, the defendant had one or more prior convictions for an offense under 18 U.S.C. § 1956 or § 1957, or under 31 U.S.C. § 5313, § 5314, § 5316, § 5324 or § 5326, or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. A conviction taken into account under subsection (b)(2)(C) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

(vi) During the course of an undercover government investigation, the defendant made statements that the defendant engaged in any of the conduct described in clauses (i) through (iv).

5. (A) **Sophisticated Laundering under Subsection (b)(3).—**For purposes of subsection (b)(3), "***sophisticated laundering***" means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense.

Sophisticated laundering typically involves the use of—

(i) fictitious entities;

(ii) shell corporations;

(iii) two or more levels (*i.e.*, layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or

(iv) offshore financial accounts.

(B) **Non-Applicability of Enhancement.—**If subsection (b)(3) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of subsection (b)(3) of this guideline, do not apply subsection (b)(3) of this guideline.

6. **Grouping of Multiple Counts.—**In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 212–214); November 1, 1991 (amendments 378 and 422); November 1, 2001 (amendment 634); November 1, 2003 (amendment 655); November 1, 2024 (amendment 831).

§2S1.2. [Deleted]

Historical Note	Section 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), effective November 1, 1987, amended effective November 1, 1989 (amendment 215), and November 1, 1991 (amendment 422), was deleted by consolidation with §2S1.1 effective November 1, 2001 (amendment 634).

§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

(a) Base Offense Level:

(1) **8**, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A; or

(2) **6** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.

(b) Specific Offense Characteristics

(1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by **2** levels.

(2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period, increase by **2** levels.

(3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.

(c) Cross Reference

(1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. §§ 7203 (if a violation based upon 26 U.S.C. § 6050I), 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5318, 5318A(b), 5322, 5324, 5326, 5331, 5332, 5335, 5336. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definition of "Value of the Funds".**—For purposes of this guideline, "***value of the funds***" means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.

2. **Bulk Cash Smuggling.**—For purposes of subsection (b)(1)(B), "***bulk cash smuggling***" means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than $10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. "United States" has the meaning given that term in Application Note 1 of the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

3. **Enhancement for Pattern of Unlawful Activity.**—For purposes of subsection (b)(2), "***pattern of unlawful activity***" means at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.

Background: Some of the offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over $10,000 Received in a Trade or Business.

This guideline also covers offenses under 31 U.S.C. §§ 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 216–218); November 1, 1991 (amendments 379 and 422); November 1, 1993 (amendment 490); November 1, 2001 (amendments 617 and 634); November 1, 2002 (amendment 637); November 1, 2003 (amendment 655); November 1, 2023 (amendment 815); November 1, 2024 (amendment 830).

§2S1.4. [Deleted]

Historical Note	Section 2S1.4 (Failure to File Currency and Monetary Instrument Report), effective November 1, 1991 (amendments 379 and 422), was deleted by consolidation with §2S1.3 effective November 1, 1993 (amendment 490).

PART T — OFFENSES INVOLVING TAXATION

1. INCOME TAXES, EMPLOYMENT TAXES, ESTATE TAXES, GIFT TAXES, AND EXCISE TAXES (OTHER THAN ALCOHOL, TOBACCO, AND CUSTOMS TAXES)

Historical Note	Effective November 1, 1987. Amended effective November 1, 1993 (amendment 491).

Introductory Commentary

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.

Historical Note	Effective November 1, 1987.

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) **6**, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(c) Special Instructions

For the purposes of this guideline—

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in subdivision (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in subdivision (A) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Tax Loss.—**"***Tax loss***" is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

   Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

   Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

   Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

   Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

   In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of

the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. **Total Tax Loss Attributable to the Offense.**—In determining the total tax loss attributable to the offense (*see* §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (A) there is a continuing pattern of violations of the tax laws by the defendant; (B) the defendant uses a consistent method to evade or camouflage income, *e.g.*, backdating documents or using off-shore accounts; (C) the violations involve the same or a related series of transactions; (D) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (E) the violation in each instance involves a failure to report or an understatement of a specific source of income, *e.g.*, interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

3. **Unclaimed Credits, Deductions, and Exemptions.**—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (*see* §6A1.3 (Resolution of Disputed Factors) (Policy Statement)).

   However, the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (*e.g.*, "under the table" payments to employees or expenses incurred to obstruct justice).

   The burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence. *See* §6A1.3, comment.

4. **Application of Subsection (b)(1) (Criminal Activity).**—"***Criminal activity***" means any conduct constituting a criminal offense under federal, state, local, or foreign law.

5. **Application of Subsection (b)(2) (Sophisticated Means).**—For purposes of subsection (b)(2), "***sophisticated means***" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

6. **Other Definitions.**—For purposes of this section:

   A "***credit claimed against tax***" is an item that reduces the amount of tax directly. In contrast, a "***deduction***" is an item that reduces the amount of taxable income.

   "***Gross income***" has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61-1.

7. **Aggregation of Individual and Corporate Tax Loss.**—If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to

report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the Treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses 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 offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately $90 billion annually. 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 loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.

The guideline does not make a distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should be used to make appropriate distinctions.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 219–223); November 1, 1990 (amendment 343); November 1, 1992 (amendment 468); November 1, 1993 (amendment 491); November 1, 1998 (amendment 577); November 1, 2001 (amendment 617); November 1, 2002 (amendment 646); November 1, 2013 (amendment 774); November 1, 2023 (amendment 824).

§2T1.2. [Deleted]

Historical Note	Section 2T1.2 (Willful Failure To File Return, Supply Information, or Pay Tax), effective November 1, 1987, amended effective November 1, 1989 (amendments 224–227), November 1, 1990 (amendment 343), and November 1, 1991 (amendment 408), was deleted by consolidation with §2T1.1 effective November 1, 1993 (amendment 491).

§2T1.3. [Deleted]

Historical Note	Section 2T1.3 (Fraud and False Statements Under Penalty of Perjury), effective November 1, 1987, amended effective November 1, 1989 (amendments 228–230), November 1, 1990 (amendment 343), and November 1, 1991 (amendment 426), was deleted by consolidation with §2T1.1 effective November 1, 1993 (amendment 491).

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) **6**, if there is no tax loss.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in §2T1.1, resulting from the defendant's aid, assistance, procurance or advice.

(b) Specific Offense Characteristics

(1) If (A) the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income; or (B) the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by **2** levels.

(2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

Commentary

Statutory Provision: 26 U.S.C. § 7206(2) (other than a violation based upon 26 U.S.C. § 6050I).

Application Notes:

1. For the general principles underlying the determination of tax loss, *see* §2T1.1(c) and Application Note 1 of the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents). In certain

instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws. If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."

2. Subsection (b)(1) has two prongs. The first prong applies to persons who derive a substantial portion of their income through the promotion of tax schemes, *e.g.*, through promoting fraudulent tax shelters. The second prong applies to persons who regularly prepare or assist in the preparation of tax returns for profit. If an enhancement from this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Sophisticated Means.—**For purposes of subsection (b)(2), "***sophisticated means***" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

Background: An increased offense level is specified for those in the business of preparing or assisting in the preparation of tax returns and those who make a business of promoting tax fraud because their misconduct poses a greater risk of revenue loss and is more clearly willful. Other considerations are similar to those in §2T1.1.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 231 and 303); November 1, 1990 (amendment 343); November 1, 1993 (amendment 491); November 1, 1998 (amendment 577); November 1, 2001 (amendment 617).

§2T1.5. [Deleted]

Historical Note	Section 2T1.5 (Fraudulent Returns, Statements, or Other Documents), effective November 1, 1987, was deleted by consolidation with §2T1.1 effective November 1, 1993 (amendment 491).

§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.

(b) Cross Reference

(1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 26 U.S.C. § 7202.

Application Note:

1. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.

Background: The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 232); November 1, 1991 (amendment 409); November 1, 2001 (amendment 617); November 1, 2016 (amendment 804).

§2T1.7. Failing to Deposit Collected Taxes in Trust Account as Required After Notice

(a) Base Offense Level (Apply the greater):

(1) **4**; or

(2) **5** less than the level from §2T4.1 (Tax Table) corresponding to the amount not deposited.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7215, 7512(b).

Application Notes:

1. If funds are deposited and withdrawn without being paid to the Internal Revenue Service, they should be treated as never having been deposited.

2. It is recommended that the fine be based on the total amount of funds not deposited.

Background: This offense is a misdemeanor that does not require any intent to evade taxes, nor even that taxes have not been paid. The more serious offense is 26 U.S.C. § 7202 (*see* §2T1.6).

This offense should be relatively easy to detect and fines may be feasible. Accordingly, the offense level has been set considerably lower than for tax evasion, although some effort has been made to tie the offense level to the level of taxes that were not deposited.

Historical Note	Effective November 1, 1987.

§2T1.8. Offenses Relating to Withholding Statements

(a) Base Offense Level: **4**

Commentary

Statutory Provisions: 26 U.S.C. §§ 7204, 7205.

~~**Application Note:**~~

~~1. If the defendant was attempting to evade, rather than merely delay, payment of taxes, an upward departure may be warranted.~~

Background: The offenses are misdemeanors. Under pre-guidelines practice, imprisonment was unusual.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2004 (amendment 674).

§2T1.9. Conspiracy to Impede, Impair, Obstruct, or Defeat Tax

(a) Base Offense Level (Apply the greater):

(1) Offense level determined from §2T1.1 or §2T1.4, as appropriate; or

(2) **10**.

(b) Specific Offense Characteristics

If more than one applies, use the greater:

(1) If the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by **4** levels.

(2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by **2** levels. Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied.

Commentary

Statutory Provision: 18 U.S.C. § 371.

Application Notes:

1. This section applies to conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." *United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984). *See also United States v. Browning*, 723 F.2d 1544 (11th Cir. 1984); *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). It does not apply to taxpayers, such as a husband and wife, who merely evade taxes jointly or file a fraudulent return.

2. The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or §2T1.4 (whichever guideline most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service) if that offense level is greater than 10. Otherwise, the base offense level is 10.

3. Specific offense characteristics from §2T1.9(b) are to be applied to the base offense level determined under §2T1.9(a)(1) or (2).

4. Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (*e.g.*, an offense involving a "tax protest" group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).

Background: This type of conspiracy generally involves substantial sums of money. It also typically is complex and may be far-reaching, making it quite difficult to evaluate the extent of the revenue loss caused. Additional specific offense characteristics are included because of the potential for these tax conspiracies to subvert the revenue system and the danger to law enforcement agents and the public.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 233 and 234); November 1, 1993 (amendment 491).

* * * * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in parts I–IV of subchapter J of chapter 51 of subtitle E of title 26, United States Code, chiefly 26 U.S.C. §§ 5601–5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. No effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2010 (amendment 746); November 1, 2016 (amendment 804); November 1, 2023 (amendment 824).

§2T2.1. Non-Payment of Taxes

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601–5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application ~~Notes~~Note:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.

~~2. Offense conduct directed at more than tax evasion (*e.g.*, theft or fraud) may warrant an upward departure.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 2012 (amendment 769); November 1, 2016 (amendment 804).

§2T2.2. Regulatory Offenses

(a) Base Offense Level: **4**

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603–5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 359); November 1, 2012 (amendment 769); November 1, 2016 (amendment 804).

* * * * *

3. CUSTOMS TAXES

Introductory Commentary

This subpart deals with violations of 18 U.S.C. §§ 496, 541–545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3907, and is designed to address violations involving revenue collection or trade regulation. It is intended to deal with some types of contraband,

such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this subpart would be a reason for referring to another, more specific guideline, if applicable~~, or for departing upward if there is not another more specific applicable guideline~~.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1992 (amendment 453); November 1, 2004 (amendment 674); November 1, 2006 (amendment 685); November 1, 2023 (amendment 824).

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded $1,500; or

(2) **5**, if the tax loss exceeded $200 but did not exceed $1,500; or

(3) **4**, if the tax loss did not exceed $200.

For purposes of this guideline, the "tax loss" is the amount of the duty.

(b) Specific Offense Characteristic

(1) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(c) Cross Reference

(1) If the offense involves a contraband item covered by another offense guideline, apply that offense guideline if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541–545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), 3907. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. A sentence at or near the minimum of the guideline range typically would be appropriate for cases involving tourists who bring in items for their own use. Such conduct generally poses a lesser threat to revenue collection.

~~2. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.~~

~~3~~2. **Sophisticated Means.**—For purposes of subsection (b)(1), "***sophisticated means***" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 235); November 1, 1991 (amendment 410); November 1, 1992 (amendment 453); November 1, 1998 (amendment 577); November 1, 2001 (amendment 617); November 1, 2006 (amendment 685); November 1, 2015 (amendment 791).

§2T3.2. [Deleted]

Historical Note	Section 2T3.2 (Receiving or Trafficking in Smuggled Property), effective November 1, 1987, amended effective November 1, 1989 (amendment 236) and November 1, 1991 (amendment 410), was deleted by consolidation with §2T3.1 effective November 1, 1992 (amendment 453).

* * * * *

4. TAX TABLE

§2T4.1. Tax Table

	Tax Loss (Apply the Greatest)	Offense Level
(A)	$2,500 or less	**6**
(B)	More than $2,500	**8**
(C)	More than $6,500	**10**
(D)	More than $15,000	**12**
(E)	More than $40,000	**14**
(F)	More than $100,000	**16**
(G)	More than $250,000	**18**
(H)	More than $550,000	**20**
(I)	More than $1,500,000	**22**
(J)	More than $3,500,000	**24**
(K)	More than $9,500,000	**26**
(L)	More than $25,000,000	**28**
(M)	More than $65,000,000	**30**
(N)	More than $150,000,000	**32**
(O)	More than $250,000,000	**34**
(P)	More than $550,000,000	**36**.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 237); November 1, 1993 (amendment 491); November 1, 2001 (amendment 617); January 25, 2003 (amendment 647); November 1, 2003 (amendment 653); November 1, 2015 (amendment 791).

PART U — [NOT USED]

PART V — [NOT USED]

PART W — [NOT USED]

PART X — OTHER OFFENSES

1. CONSPIRACIES, ATTEMPTS, SOLICITATIONS

§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

(a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

(b) Specific Offense Characteristics

(1) If an attempt, decrease by **3** levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(2) If a conspiracy, decrease by **3** levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

(3) (A) If a solicitation, decrease by **3** levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

(B) If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; *i.e.*, the offense level for solicitation is the same as that for the substantive offense.

(c) Cross Reference

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

(d) Special Instruction

(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5):

18 U.S.C. § 81;
18 U.S.C. § 930(c);
18 U.S.C. § 1362;
18 U.S.C. § 1363;
18 U.S.C. § 1992(a)(1)–(a)(7), (a)(9), (a)(10);
18 U.S.C. § 2339A;
18 U.S.C. § 2340A;
49 U.S.C. § 46504;
49 U.S.C. § 46505; and
49 U.S.C. § 60123(b).

(B) Any of the following offenses:

18 U.S.C. § 32; and
18 U.S.C. § 2332a.

Commentary

Statutory Provisions: 18 U.S.C. §§ 371, 372, 2271, 2282A, 2282B. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.

Offense guidelines that expressly cover attempts include:

§§2A2.1, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.2, 2A5.1;
§§2C1.1, 2C1.2;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2E5.1;
§2M6.1;
§2N1.1;
§2Q1.4.

Offense guidelines that expressly cover conspiracies include:

§2A1.5;
§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2;
§2H1.1;

§2M6.1;
§2T1.9.

Offense guidelines that expressly cover solicitations include:

§2A1.5;
§§2C1.1, 2C1.2;
§2E5.1.

2. "***Substantive offense***," as used in this guideline, means the offense that the defendant was convicted of soliciting, attempting, or conspiring to commit. Under §2X1.1(a), the base offense level will be the same as that for the substantive offense. But the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level ordinarily would not include aggravating factors regarding possible injury to others, hostage taking, discharge of a weapon, or obtaining a large sum of money, because such factors would be speculative. The offense level would simply reflect the level applicable to robbery of a financial institution, with the enhancement for possession of a weapon. If it was established that the defendants actually intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added. In an attempted theft, the value of the items that the defendant attempted to steal would be considered.

3. If the substantive offense is not covered by a specific guideline, *see* §2X5.1 (Other Offenses).

4. In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of $800,000 but the participants completed (or were about to complete) only the acts necessary to steal $30,000, the offense level is the offense level for the theft of $800,000 minus 3 levels, or the offense level for the theft of $30,000, whichever is greater.

   In the case of multiple counts that are not closely related counts, whether the 3-level reduction under §2X1.1(b)(1), (b)(2), or (b)(3)(A) applies is determined separately for each count.

Background: In most prosecutions for conspiracies or attempts, the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. Under such circumstances, a reduction of 3 levels is provided under §2X1.1(b)(1) or (2).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 42); November 1, 1989 (amendments 238–242); November 1, 1990 (amendments 311 and 327); November 1, 1991 (amendment 411); November 1, 1992 (amendments 444 and 447); November 1, 1993 (amendment 496); November 1, 2001 (amendment 633); November 1, 2002 (amendment 637); November 1, 2004 (amendment 669); November 1, 2007 (amendments 699 and 700).

* * * * *

2. AIDING AND ABETTING

§2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2284, 2339, 2339A, 2339C(a)(1)(A).

Application Note:

1. **Definition.**—For purposes of this guideline, "***underlying offense***" means the offense the defendant is convicted of aiding or abetting, or in the case of a violation of 18 U.S.C. § 2339A or § 2339C(a)(1)(A), "underlying offense" means the offense the defendant is convicted of having materially supported or provided or collected funds for, prior to or during its commission.

Background: A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same offense level as the underlying offense. An adjustment for a mitigating role (§3B1.2) may be applicable.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 359); November 1, 2002 (amendment 637); November 1, 2003 (amendment 655); November 1, 2007 (amendment 700).

* * * * *

3. ACCESSORY AFTER THE FACT

§2X3.1. Accessory After the Fact

(a) Base Offense Level:

(1) **6** levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).

(2) The base offense level under this guideline shall be not less than level **4**.

(3) (A) The base offense level under this guideline shall be not more than level **30**, except as provided in subdivision (B).

(B) In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall be not more than level **20**.

(C) The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. § 2339 or § 2339A; or (ii) the conduct involved harboring a person who committed any offense listed in 18 U.S.C. § 2339 or § 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5). In such a case, the base offense level under this guideline shall be not more than level **30**, as provided in subdivision (A).

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2284, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(A)).

Application Notes:

1. **Definition.—**For purposes of this guideline, "***underlying offense***" means the offense as to which the defendant is convicted of being an accessory, or in the case of a violation of 18 U.S.C. § 2339A, "***underlying offense***" means the offense the defendant is convicted of having materially supported after its commission (*i.e.*, in connection with the concealment of or an escape from that offense), or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), "***underlying offense***" means the violation of 18 U.S.C. § 2339B with respect to which the material support or resources were concealed or disguised. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; *see* Application Note 9 of the Commentary to §1B1.3 (Relevant Conduct).

2. **Application of Mitigating Role Adjustment.—**The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 243); November 1, 1991 (amendment 380); November 1, 1993 (amendment 496); November 1, 2002 (amendment 637); November 1, 2003 (amendment 655); November 1, 2007 (amendment 700); November 1, 2015 (amendments 790 and 797).

* * * * *

4. MISPRISION OF FELONY

§2X4.1. Misprision of Felony

(a) Base Offense Level: **9** levels lower than the offense level for the underlying offense, but in no event less than **4**, or more than **19**.

Commentary

Statutory Provision: 18 U.S.C. § 4.

Application Notes:

1. "***Underlying offense***" means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; *see* Application Note 9 of the Commentary to §1B1.3 (Relevant Conduct).

2. The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 244); November 1, 1993 (amendment 496); November 1, 2015 (amendments 790 and 797).

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5. ALL OTHER FELONY OFFENSES AND CLASS A MISDEMEANORS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2006 (amendment 685).

§2X5.1. Other Felony Offenses

If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control, except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

Commentary

Statutory Provision: 18 U.S.C. § 1841(a)(1).

Application Notes:

1. **In General.—**Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §3F1.1 (Early Disposition Programs (Policy Statement)); §5B1.3 (Conditions of Probation); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment); ~~Chapter Five, Part H (Specific Of-~~

~~fender Characteristics);~~ Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (~~Departures~~Assistance to Authorities); Chapter Six, Part A (Sentencing Procedures); and Chapter Six, Part B (Plea Agreements).

2. **Convictions under 18 U.S.C. § 1841(a)(1).—**

~~(A) **In General.—**~~If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

~~(B) **Upward Departure Provision.** For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.~~

3. **Application of §2X5.2.**—This guideline applies only to felony offenses not referenced in Appendix A (Statutory Index). For Class A misdemeanor offenses that have not been referenced in Appendix A, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Background: Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control.

The sentencing guidelines apply to convictions under 18 U.S.C. § 13 (Assimilative Crimes Act) and 18 U.S.C. § 1153 (Indian Major Crimes Act); *see* 18 U.S.C. § 3551(a), as amended by section 1602 of Public Law 101–647.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 43); November 1, 1991 (amendment 412); November 1, 1997 (amendment 569); November 1, 2006 (amendment 685); November 1, 2014 (amendment 787).

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

(a) Base Offense Level: **6**

Commentary

Statutory Provisions: 10 U.S.C. § 2733a(g)(2); 18 U.S.C. §§ 39B, 1365(f), 1801, 2259(d)(4); 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. **In General.**—This guideline applies to Class A misdemeanor offenses that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanor offenses that have not been referenced in Appendix A. Do not apply this guideline to a Class A misdemeanor that has been specifically referenced in Appendix A to another Chapter Two guideline.

Historical Note	Effective November 1, 2006 (amendment 685). Amended effective November 1, 2007 (amendment 699); November 1, 2008 (amendment 721); November 1, 2010 (amendment 746); November 1, 2018 (amendment 813); November 1, 2023 (amendment 815).

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6. OFFENSES INVOLVING USE OF A MINOR IN A CRIME OF VIOLENCE

Historical Note	Effective November 1, 2004 (amendment 674).

§2X6.1. Use of a Minor in a Crime of Violence

(a) Base Offense Level: **4** plus the offense level from the guideline applicable to the underlying crime of violence.

Commentary

Statutory Provision: 18 U.S.C. § 25.

Application Notes:

1. **Definition.**—For purposes of this guideline, "***underlying crime of violence***" means the crime of violence as to which the defendant is convicted of using a minor.

2. **Inapplicability of §3B1.4.**—Do not apply the adjustment under §3B1.4 (Using a Minor to Commit a Crime).

3. **Multiple Counts.—**

   (A) In a case in which the defendant is convicted under both 18 U.S.C. § 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (a) of §3D1.2 (Groups of Closely Related Counts).

   (B) Multiple counts involving the use of a minor in a crime of violence shall not be grouped under §3D1.2.

Historical Note	Effective November 1, 2004 (amendment 674).

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7. OFFENSES INVOLVING BORDER TUNNELS AND SUBMERSIBLE AND SEMI-SUBMERSIBLE VESSELS

Historical Note	Effective November 1, 2007 (amendment 700). Amended effective November 1, 2009 (amendment 728).

§2X7.1. Border Tunnels and Subterranean Passages

(a) Base Offense Level:

(1) If the defendant was convicted under 18 U.S.C. § 555(c), **4** plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level **16**, increase to level **16**.

(2) **16**, if the defendant was convicted under 18 U.S.C. § 555(a); or

(3) **8**, if the defendant was convicted under 18 U.S.C. § 555(b).

Commentary

Statutory Provision: 18 U.S.C. § 555.

Application Note:

1. **Definition.**—For purposes of this guideline, "***underlying smuggling offense***" means the smuggling offense the defendant committed through the use of the tunnel or subterranean passage.

Historical Note	Effective November 1, 2007 (amendment 700). Amended effective November 1, 2008 (amendment 724).

§2X7.2. Submersible and Semi-Submersible Vessels

(a) Base Offense Level: **26**

(b) Specific Offense Characteristic

(1) (Apply the greatest) If the offense involved—

(A) a failure to heave to when directed by law enforcement officers, increase by **2** levels;

(B) an attempt to sink the vessel, increase by **4** levels; or

(C) the sinking of the vessel, increase by **8** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2285.

~~**Application Note:**~~

~~1. **Upward Departure Provisions.** An upward departure may be warranted in any of the following cases:~~

~~(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.~~

~~(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.~~

Background: This guideline implements the directive to the Commission in section 103 of Public Law 110–407.

Historical Note	Effective November 1, 2009 (amendment 728).

PART Y — [NOT USED]

PART Z — [NOT USED]

CHAPTER THREE

ADJUSTMENTS

PART A — VICTIM-RELATED ADJUSTMENTS

Introductory Commentary

The following adjustments are included in this part because they may apply to a wide variety of offenses.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 344); November 1, 2023 (amendment 824).

§3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by **3** levels.

(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by **2** levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by **2** additional levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.

Commentary

Application Notes:

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

   Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline. Moreover, do not apply subsection (a) if an adjustment from §2H1.1(b)(1) applies.

2. For purposes of subsection (b), "***vulnerable victim***" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

   Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

   Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

3. The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation.

~~4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.~~

~~5~~4. For purposes of this guideline, "***gender identity***" means actual or perceived gender-related characteristics. *See* 18 U.S.C. § 249(c)(4).

Background: Subsection (a) reflects the directive to the Commission, contained in section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation. To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines are hate crimes. In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.

Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105–184.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 245); November 1, 1990 (amendment 344); November 1, 1992 (amendment 454); November 1, 1995 (amendment 521); November 1, 1997 (amendment 564); November 1, 1998 (amendment 587); November 1, 2000 (amendment 595); November 1, 2010 (amendment 743); November 1, 2023 (amendment 824).

§3A1.2. Official Victim

(Apply the greatest):

(a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by **3** levels.

(b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by **6** levels.

(c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—

(1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or

(2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by **6** levels.

Commentary

Application Notes:

1. **Applicability to Certain Victims.**—This guideline applies when specified individuals are victims of the offense. This guideline does not apply when the only victim is an organization, agency, or the government.

2. **Nonapplicability in Case of Incorporation of Factor in Chapter Two.**—Do not apply this adjustment if the offense guideline specifically incorporates this factor. The only offense guideline in Chapter Two that specifically incorporates this factor is §2A2.4 (Obstructing or Impeding Officers).

3. **Application of Subsections (a) and (b).**—"***Motivated by such status***", for purposes of subsections (a) and (b), means that the offense of conviction was motivated by the fact that the victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute. This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(b)(1)) that takes such conduct into account.

4. **Application of Subsection (c).—**

(A) **In General.—**Subsection (c) applies in circumstances tantamount to aggravated assault (i) against a law enforcement officer, committed in the course of, or in immediate flight following, another offense; or (ii) against a prison official, while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility. While subsection (c) may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against such official victims that is sufficiently serious to create at least a "substantial risk of serious bodily injury".

(B) **Definitions.—**For purposes of subsection (c):

"***Custody or control***" includes "non-secure custody", *i.e.*, custody with no significant physical restraint. For example, a defendant is in the custody or control of a prison or other correctional facility if the defendant (i) is on a work detail outside the security perimeter of the prison or correctional facility; (ii) is physically away from the prison or correctional facility while on a pass or furlough; or (iii) is in custody at a community corrections center, community treatment center, "halfway house", or similar facility. The defendant also shall be deemed to be in the custody or control of a prison or other correctional facility while the defendant is in the status of having escaped from that prison or correctional facility.

"***Prison official***" means any individual (including a director, officer, employee, independent contractor, or volunteer, but not including an inmate) authorized to act on behalf of a prison or correctional facility. For example, this enhancement would be applicable to any of the following: (i) an individual employed by a prison as a corrections officer; (ii) an individual employed by a prison as a work detail supervisor; and (iii) a nurse who, under contract, provides medical services to prisoners in a prison health facility.

"***Substantial risk of serious bodily injury***" includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious injury) if it occurs.

~~5. **Upward Departure Provision.** If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 44); November 1, 1989 (amendments 246–248); November 1, 1992 (amendment 455); November 1, 2002 (amendment 643); November 1, 2004 (amendment 663); November 1, 2010 (amendment 747); November 1, 2023 (amendment 824).

§3A1.3. Restraint of Victim

If a victim was physically restrained in the course of the offense, increase by **2** levels.

Commentary

Application Notes:

1. "***Physically restrained***" is defined in the Commentary to §1B1.1 (Application Instructions).

2. Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself (*e.g.*, this adjustment does not apply to offenses covered by §2A4.1 (Kidnapping, Abduction, Unlawful Restraint)).

~~3. If the restraint was sufficiently egregious, an upward departure may be warranted. *See* §5K2.4 (Abduction or Unlawful Restraint).~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 249 and 250); November 1, 1991 (amendment 413).

§3A1.4. Terrorism

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

1. **"Federal Crime of Terrorism" Defined.**—For purposes of this guideline, "***federal crime of terrorism***" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).

2. **Harboring, Concealing, and Obstruction Offenses.**—For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

3. **Computation of Criminal History Category.**—Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

~~4. **Upward Departure Provision.**—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.~~

Historical Note	Effective November 1, 1995 (amendment 526). Amended effective November 1, 1996 (amendment 539); November 1, 1997 (amendment 565); November 1, 2002 (amendment 637).

§3A1.5. Serious Human Rights Offense

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

(a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by **2** levels.

(b) If the defendant was convicted of any other serious human rights offense, increase by **4** levels. If (1) death resulted, and (2) the resulting offense level is less than level **37**, increase to level **37**.

Commentary

Application Notes:

1. **Definition.**—For purposes of this guideline, "***serious human rights offense***" means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. *See* 28 U.S.C. § 509B(e).

2. **Application of Minimum Offense Level in Subsection (b).**—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. *See* generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. *See* 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. *See* 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. *See* 18 U.S.C. § 1091(c).

Historical Note	Effective November 1, 2012 (amendment 765).

PART B — ROLE IN THE OFFENSE

Introductory Commentary

This part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)–(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 345); November 1, 1992 (amendment 456); November 1, 2023 (amendment 824).

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in subsection (a) or (b), increase by **2** levels.

Commentary

Application Notes:

1. **Definition of "Participant".**—A "***participant***" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.

2. **Organizer, Leader, Manager, or Supervisor of One or More Participants.**—To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. ~~An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.~~

3. **"Otherwise Extensive".**—In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. **Factors to Consider.**—In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 414); November 1, 1993 (amendment 500); November 1, 2024 (amendment 831).

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

Commentary

Application Notes:

1. **Definition.**—For purposes of this guideline, "***participant***" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

2. **Requirement of Multiple Participants.**—This guideline is not applicable unless more than one participant was involved in the offense. *See* the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. **Applicability of Adjustment.—**

   (A) **Substantially Less Culpable than Average Participant.**—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

   A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

   Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

   (B) **Conviction of Significantly Less Serious Offense.**—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

   (C) **Fact-Based Determination.**—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

   In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

4. **Minimal Participant.**—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

5. **Minor Participant.**—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.

6. **Application of Role Adjustment in Certain Drug Cases.**—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1992 (amendment 456); November 1, 2001 (amendment 635); November 1, 2002 (amendment 640); November 1, 2009 (amendment 737); November 1, 2011 (amendments 749 and 755); November 1, 2014 (amendment 782); November 1, 2015 (amendment 794).

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense

characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

Application Notes:

1. **Definition of "Public or Private Trust".**—"***Public or private trust***" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

2. **Application of Adjustment in Certain Circumstances.**—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:

   (A) An employee of the United States Postal Service who engages in the theft or destruction of undelivered United States mail.

   (B) A defendant who exceeds or abuses the authority of his or her position in order to obtain, transfer, or issue unlawfully, or use without authority, any means of identification. "***Means of identification***" has the meaning given that term in 18 U.S.C. § 1028(d)(7). The following are examples to which this subdivision would apply: (i) an employee of a state motor vehicle department who exceeds or abuses the authority of his or her position by knowingly issuing a driver's license based on false, incomplete, or misleading information; (ii) a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart; and (iii) a volunteer at a charitable organization who exceeds or abuses the authority of his or her position by obtaining or misusing identification information from a donor's file.

3. This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.

4. "***Special skill***" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

5. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

   (A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. "***Fiduciary of the benefit plan***" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

   (B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. § 501(a)), an adjustment under this section for an abuse of a position of trust will apply.

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not. Such persons generally are viewed as more culpable.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 346); November 1, 1993 (amendment 492); November 1, 1998 (amendment 580); November 1, 2001 (amendment 617); November 1, 2005 (amendment 677); November 1, 2009 (amendment 726).

§3B1.4. Using a Minor To Commit a Crime

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by **2** levels.

Commentary

Application Notes:

1. "***Used or attempted to use***" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.

2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(16)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.

~~3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.~~

Historical Note	Effective November 1, 1995 (amendment 527). Amended effective November 1, 1996 (amendment 540); November 1, 2010 (amendment 748); November 1, 2011 (amendment 750); November 1, 2014 (amendment 783); November 1, 2018 (amendment 807). A former §3B1.4 (untitled), effective November 1, 1987, amended effective November 1, 1989 (amendment 303), was deleted effective November 1, 1995 (amendment 527).

§3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

If—

(1) the defendant was convicted of a drug trafficking crime or a crime of violence; and

(2) (apply the greater)—

(A) the offense involved the use of body armor, increase by **2** levels; or

(B) the defendant used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense, increase by **4** levels.

Commentary

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Body armor***" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. *See* 18 U.S.C. § 921(a)(35).

"***Crime of violence***" has the meaning given that term in 18 U.S.C. § 16.

"***Drug trafficking crime***" has the meaning given that term in 18 U.S.C. § 924(c)(2).

"***Offense***" has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"***Use***" means (A) active employment in a manner to protect the person from gunfire; or (B) use as a means of bartering. "Use" does not mean mere possession (*e.g.*, "use" does not mean that the body armor was found in the trunk of the car but not used actively as protection). "***Used***" means put into "use" as defined in this paragraph.

2. **Application of Subdivision (2)(B).—**Consistent with §1B1.3 (Relevant Conduct), the term "***defendant***", for purposes of subdivision (2)(B), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

3. **Interaction with §2K2.6 and Other Counts of Conviction.—**If the defendant is convicted only of 18 U.S.C. § 931 and receives an enhancement under subsection (b)(1) of §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons), do not apply an adjustment under this guideline. However, if, in addition to the count of conviction under 18 U.S.C. § 931, the defendant (A) is convicted of an offense that is a drug trafficking crime or a crime of violence; and (B) used the body armor with respect to that offense, an adjustment under this guideline shall apply with respect to that offense.

Background: This guideline implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).

Historical Note	Effective November 1, 2003 (amendment 659). Amended effective November 1, 2004 (amendment 670).

PART C — OBSTRUCTION AND RELATED ADJUSTMENTS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2006 (amendment 684).

§3C1.1. Obstructing or Impeding the Administration of Justice

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. **In General.**—This adjustment applies if the defendant's obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

   Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

2. **Limitations on Applicability of Adjustment.**—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. **Covered Conduct Generally.**—Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. **Examples of Covered Conduct.**—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

   (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;

(C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(F) providing materially false information to a judge or magistrate judge;

(G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(I) other conduct prohibited by obstruction of justice provisions under title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511);

(J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);

(K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. **Examples of Conduct Ordinarily Not Covered.**—Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (*e.g.*, §3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (*i.e.*, the offense with respect to which the obstructive conduct occurred). *See* Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;

(C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(D) avoiding or fleeing from arrest (*see, however*, §3C1.2 (Reckless Endangerment During Flight));

(E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).

6. **"Material" Evidence Defined.**—"***Material***" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

7. **Inapplicability of Adjustment in Certain Circumstances.**—If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (*e.g.*, if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

   Similarly, if the defendant receives an enhancement under §2D1.1(b)(16)(D), do not apply this adjustment.

8. **Grouping Under §3D1.2(c).**—If the defendant is convicted both of an obstruction offense (*e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. **Accountability for §1B1.3(a)(1)(A) Conduct.**—Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 251 and 252); November 1, 1990 (amendment 347); November 1, 1991 (amendment 415); November 1, 1992 (amendment 457); November 1, 1993 (amendment 496); November 1, 1997 (amendment 566); November 1, 1998 (amendments 579, 581, and 582); November 1, 2002 (amendment 637); November 1, 2004 (amendment 674); November 1, 2006 (amendment 693); November 1, 2010 (amendments 746, 747, and 748); November 1, 2011 (amendments 750 and 758); November 1, 2014 (amendment 783); November 1, 2018 (amendment 807); November 1, 2023 (amendment 824).

§3C1.2. Reckless Endangerment During Flight

If the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by **2** levels.

Commentary

Application Notes:

1. Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct.

2. "***Reckless***" is defined in the Commentary to §2A1.4 (Involuntary Manslaughter). For the purposes of this guideline, "reckless" means that the conduct was at least reckless and includes any higher level of culpability. ~~However, where a higher degree of culpability was involved, an upward departure above the 2 level increase provided in this section may be warranted.~~

3. "***During flight***" is to be construed broadly and includes preparation for flight. Therefore, this adjustment also is applicable where the conduct occurs in the course of resisting arrest.

4. "***Another person***" includes any person, except a participant in the offense who willingly participated in the flight.

5. Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

~~6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).~~

Historical Note	Effective November 1, 1990 (amendment 347). Amended effective November 1, 1991 (amendment 416); November 1, 1992 (amendment 457); November 1, 2010 (amendment 747).

§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by **3** levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (*i.e.*, the sentence for the offense committed

while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, including, as in any other case in which a Chapter Three adjustment applies (*see* §1B1.1 (Application Instructions)), the adjustment provided by the enhancement in this section. For example, if the applicable adjusted guideline range is 30–37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement. Similarly, if the applicable adjusted guideline range is 30–37 months and the court determines a "total punishment" of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined "total punishment" consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement.

Historical Note	Effective November 1, 2006 (amendment 684). Amended effective November 1, 2009 (amendment 734).

§3C1.4. False Registration of Domain Name

If a statutory enhancement under 18 U.S.C. § 3559(g)(1) applies, increase by **2** levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108–482.

Historical Note	Effective November 1, 2006 (amendment 689). Amended effective November 1, 2008 (amendment 724).

PART D — MULTIPLE COUNTS

Introductory Commentary

This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, *e.g.*, racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct *(e.g.*, many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As

to other offenses (*e.g.*, independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 121); November 1, 2007 (amendment 707); November 1, 2023 (amendment 824).

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

(b) Exclude from the application of §§3D1.2–3D1.5 the following:

(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. *See* Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

Commentary

Application Notes:

1. **In General.**—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

2. **Application of Subsection (b).**—Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this part do not apply to a count of conviction covered by

subsection (b). However, a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this part do apply to a count of conviction under this type of statute.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Program), and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (~~Determining the Sentence~~Determining the Sentencing Range and Options Under the Guidelines) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (~~Determining the Sentence~~ Determining the Sentencing Range and Options Under the Guidelines) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 348); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2005 (amendments 677 and 680); November 1, 2007 (amendment 707); November 1, 2023 (amendment 824); November 1, 2024 (amendment 831).

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.3, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. Subsections (a)–(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. *See* §3D1.1(b)(1); *id.*, comment. (n.1).

2. The term "***victim***" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group "counts involving substantially the same harm."

3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

   When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

   Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. *But*: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts *are not* to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (*e.g.*, robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. *But*: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts *are not* to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense characteristic . . . or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

   A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

   Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; *see* §3D1.3(b). The "same general type" of offense is to be construed broadly.

   Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. *But*: (9) The defendant is convicted of three counts of bank robbery. The counts *are not* to be grouped together, nor are the amounts of money involved to be added.

7. A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.

8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. **Example:** The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because ~~it probably would require departure in many cases in order to capture adequately~~ , in many cases, it would not adequately capture the scope and impact of the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this part and resolving ambiguities, the court should look to the underlying policy of this part as stated in the Introductory Commentary.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 45); November 1, 1989 (amendments 121, 253–256, and 303); November 1, 1990 (amendments 309, 348, and 349); November 1, 1991 (amendment 417); November 1, 1992 (amendment 458); November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 1998 (amendment 579); November 1, 2001 (amendments 615, 617, and 634); November 1, 2002 (amendment 638); January 25, 2003 (amendment 648); November 1, 2003 (amendment 656); November 1, 2004 (amendments 664 and 674); November 1, 2005 (amendments 679 and 680); November 1, 2007 (amendment 701); November 1, 2023 (amendments 823 and 824).

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)–(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1. The "***offense level***" for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.

2. When counts are grouped pursuant to §3D1.2(a)–(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.

3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome.

~~4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).~~

Background: This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this part.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 257 and 303); November 1, 2001 (amendment 617); November 1, 2004 (amendment 674); November 1, 2023 (amendment 824).

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

NUMBER OF UNITS	INCREASE IN OFFENSE LEVEL
1	none

1 1/2	add **1** level
2	add **2** levels
2 1/2 – 3	add **3** levels
3 1/2 – 5	add **4** levels
More than 5	add **5** levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.

(b) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Commentary

Application Notes:

1. Application of the rules in §§3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3.

2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. ~~Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.~~

~~In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punish-~~

~~ment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 350); November 1, 2023 (amendment 824).

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (~~Determining the Sentence~~Determining the Sentencing Range and Options Under the Guidelines) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Program), and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders).

Historical Note	Effective November 1, 1987. Amended effective November 1, 2024 (amendment 831).

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Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery $21,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.

2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent $20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to converted drug weight (using the Drug Conversion Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of converted drug weight; the second count translates into 30 kilograms of converted drug weight; and the third count translates into 75 kilograms of converted drug weight. The total is 151 kilograms of converted drug weight. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).

3. Defendant C was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received $1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received $1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received $1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received $1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is $4,000, which results in an offense level of 9 under either §2B1.1 (assuming the application of the "sophisticated means" enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 9.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 303); November 1, 1990 (amendment 350); November 1, 1991 (amendment 417); November 1, 1995 (amendment 534); November 1, 2001 (amendment 617); November 1, 2009 (amendment 737); November 1, 2011 (amendment 760); November 1, 2014 (amendment 782); November 1, 2015 (amendment 796); November 1, 2018 (amendment 808).

PART E — ACCEPTANCE OF RESPONSIBILITY

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level. The term "***preparing for trial***" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

   (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;

   (B) voluntary termination or withdrawal from criminal conduct or associations;

   (C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 46); November 1, 1989 (amendment 258); November 1, 1990 (amendment 351); November 1, 1992 (amendment 459); April 30, 2003 (amendment 649); November 1, 2010 (amendments 746 and 747); November 1, 2013 (amendment 775); November 1, 2018 (amendment 810); November 1, 2023 (amendment 820).

PART F — EARLY DISPOSITION PROGRAM

§3F1.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may decrease the defendant's offense level pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The level of the decrease shall be consistent with the authorized program within the filing district and the government motion filed, but shall be not more than 4 levels.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21).

Historical Note	Effective October 27, 2003 (amendment 651).

CHAPTER FOUR

CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

PART A — CRIMINAL HISTORY

Introductory Commentary

The Comprehensive Crime Control Act sets forth four purposes of sentencing. (*See* 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

The specific factors included in §4A1.1 ~~and §4A1.3~~ are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, *e.g.*, age and drug abuse, for policy reasons they were not included here at this time. The Commission has made no definitive judgment as to the reliability of the existing data. However, the Commission will review additional data insofar as they become available in the future.

Historical Note	Effective November 1, 1987.

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in subsection (a).

(c) Add **1** point for each prior sentence not counted in subsection (a) or (b), up to a total of **4** points for this subsection.

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under subsection (a), (b), or (c)

above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

(e) Add **1** point if the defendant (1) receives 7 or more points under subsections (a) through (d), and (2) committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. **§4A1.1(a).—**Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. *See* §4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* §4A1.2(d).

   A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).—**Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

   An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. *See* §4A1.2(d).

   Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).**—One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

4. **§4A1.1(d).**—In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in §4B1.2(a). *See* §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(d) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(d) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

5. **§4A1.1(e).**—One point is added if the defendant (1) receives 7 or more points under §4A1.1(a) through (d), and (2) committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a "***criminal justice sentence***" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. ~~In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.~~

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(e) adds one point if the defendant receives 7 or more points under §4A1.1(a) through (d) and was under a criminal justice sentence during any part of the instant offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 259–261); November 1, 1991 (amendments 381 and 382); October 27, 2003 (amendment 651); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2023 (amendment 821); November 1, 2024 (amendment 831).

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing

the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by subparagraph (A) or (B) as a single sentence. *See also* §4A1.1(d).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(b) SENTENCE OF IMPRISONMENT DEFINED

(1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

(c) SENTENCES COUNTED AND EXCLUDED

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving
Contempt of court

Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
Juvenile status offenses and truancy
Local ordinance violations (except those violations that are also violations under state criminal law)
Loitering
Minor traffic infractions (*e.g.*, speeding)
Public intoxication
Vagrancy.

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add **3** points under §4A1.1(a) for each such sentence.

(2) In any other case,

(A) add **2** points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add **1** point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in subparagraph (A).

(e) APPLICABLE TIME PERIOD

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's com-

mencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).

(f) DIVERSIONARY DISPOSITIONS

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) MILITARY SENTENCES

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted~~, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))~~.

(i) TRIBAL COURT SENTENCES

Sentences resulting from tribal court convictions are not counted~~, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))~~.

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted~~, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))~~.

(k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* §4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (*see* §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (*see* §4A1.2(d)(2)(B) and (e)(2)).

(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(e), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) Failure to Report for Service of Sentence of Imprisonment

For the purposes of §4A1.1(e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) Felony Offense

For the purposes of §4A1.2(c), a "felony offense" means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(d), the definition of "crime of violence" is that set forth in §4B1.2(a).

Commentary

Application Notes:

1. **Prior Sentence.**—"***Prior sentence***" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. *See* §4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

   Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).

2. **Sentence of Imprisonment.**—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). *See* §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (*e.g.*, in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. *See* §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. **Application of "Single Sentence" Rule (Subsection (a)(2)).—**

   ~~(A) **Predicate Offenses.—**~~In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

   For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-

year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

~~(B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.~~

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (*e.g.*, $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

~~Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).~~

7. **Offenses Committed Prior to Age Eighteen.**—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "***commencement of the instant offense***" includes any relevant conduct. *See* §1B1.3 (Relevant Conduct). ~~If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).~~

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

    Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. **Application of Subsection (c).—**

    (A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) **Local Ordinance Violations.**—A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check.**—"***Insufficient funds check***," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 262–265); November 1, 1990 (amendments 352 and 353); November 1, 1991 (amendments 381 and 382); November 1, 1992 (amendment 472); November 1, 1993 (amendment 493); November 1, 2007 (amendment 709); November 1, 2010 (amendment 742); November 1, 2011 (amendment 758); November 1, 2012 (amendment 766); November 1, 2013 (amendment 777); November 1, 2015 (amendment 795); November 1, 2018 (amendment 813); November 1, 2023 (amendment 821); November 1, 2024 (amendment 831).

~~§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)~~

~~(a) Upward Departures.~~

~~(1) Standard for Upward Departure. If reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.~~

~~(2) Types of Information Forming the Basis for Upward Departure. The information described in subsection (a)(1) may include information concerning the following:~~

~~(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).~~

~~(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.~~

~~(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.~~

~~(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.~~

~~(E) Prior similar adult criminal conduct not resulting in a criminal conviction.~~

~~(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.~~

~~(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—~~

~~(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.~~

~~(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.~~

~~(b) DOWNWARD DEPARTURES.—~~

~~(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.~~

~~(2) PROHIBITIONS.—~~

~~(A) CRIMINAL HISTORY CATEGORY I.—Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.~~

~~(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).~~

~~(3) LIMITATIONS.—~~

~~(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.~~

~~(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE.—A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.~~

~~(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:~~

~~(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.~~

~~(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.~~

~~Commentary~~

~~Application Notes:~~

1. **~~Definitions.~~**—For purposes of this policy statement, the terms "***~~depart~~***", "***~~departure~~***", "***~~downward departure~~***", and "***~~upward departure~~***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **~~Upward Departures.~~**—

~~(A) **Examples.**—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:~~

~~(i) A previous foreign sentence for a serious offense.~~

~~(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.~~

~~(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.~~

~~(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.~~

(B) **Upward Departures from Criminal History Category VI.** In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.** In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.**

(A) **Examples.** A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) **Downward Departures from Criminal History Category I.** A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.

~~**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective November 1, 1991 (amendment 381); November 1, 1992 (amendment 460); October 27, 2003 (amendment 651); November 1, 2018 (amendment 805); November 1, 2023 (amendments 817, 821, and 824).~~

§4A1.3 [Deleted]

Historical Note	Section 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), effective November 1, 1987, amended effective November 1, 1991 (amendment 381), November 1, 1992 (amendment 460), October 27, 2003 (amendment 651), November 1, 2018 (amendment 805), November 1, 2023 (amendments 817, 821, and 824), was deleted effective November 1, 2025 (amendment ---).

PART B — CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

	OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1)	Life	**37**
(2)	25 years or more	**34**
(3)	20 years or more, but less than 25 years	**32**
(4)	15 years or more, but less than 20 years	**29**
(5)	10 years or more, but less than 15 years	**24**
(6)	5 years or more, but less than 10 years	**17**
(7)	More than 1 year, but less than 5 years	**12**.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or

§ 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C. § 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	262–327.

Commentary

Application Notes:

1. **Definitions.**—"***Crime of violence***," "***controlled substance offense***," and "***two prior felony convictions***" are defined in §4B1.2.

2. **"Offense Statutory Maximum".**—"***Offense Statutory Maximum***," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.

3. **Application of Subsection (c).—**

(A) **In General.**—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) **Subsection (c)(2).**—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

(C) **"Otherwise Applicable Guideline Range".**—For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).

(D) **Imposition of Consecutive Term of Imprisonment.**—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) **Example.**—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentence in accordance with §5G1.2(e).

~~4. **Departure Provision for State Misdemeanors.**—In a case in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).~~

Background: Section 994(h) of title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure

consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798); November 1, 2023 (amendment 824).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) CRIME OF VIOLENCE.—The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) CONTROLLED SUBSTANCE OFFENSE.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense,

or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

(d) INCHOATE OFFENSES INCLUDED.—The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) ADDITIONAL DEFINITIONS.—

(1) FORCIBLE SEX OFFENSE.—"***Forcible sex offense***" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) EXTORTION.—"***Extortion***" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) ROBBERY.—"***Robbery***" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase "actual or threatened force" refers to force that is sufficient to overcome a victim's resistance.

(4) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an

adult conviction if the defendant was expressly proceeded against as an adult).

Commentary

Application Notes:

1. **Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".**—For purposes of this guideline—

   Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

   Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

   Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

   Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

   A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

~~4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a "crime of violence" as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798); November 1, 2023 (amendment 822).

§4B1.3. Criminal Livelihood

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than **13**, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than **11**.

Commentary

Application Notes:

1. "***Pattern of criminal conduct***" means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.

2. "***Engaged in as a livelihood***" means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (*e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for the defendant's criminal conduct).

Background: Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to ensure that the guidelines specify a "substantial term of imprisonment" for a defendant who committed an offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 50); November 1, 1989 (amendment 269); November 1, 1990 (amendment 354); November 1, 2010 (amendment 747).

§4B1.4. Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

Commentary

Application Notes:

1. This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, committed on occasions different from one another. The terms "***violent felony***" and "***serious drug offense***" are defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definitions of "violent felony" and "serious drug offense" in 18 U.S.C. § 924(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in §4B1.1 (Career Offender), nor are the time periods for the counting of prior sentences under §4A1.2 (Definitions and Instructions for Computing Criminal History) applicable to the determination of whether a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).

   It is also to be noted that the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute and may vary to some extent from jurisdiction to jurisdiction.

2. **Application of §4B1.4 in Cases Involving Convictions Under 18 U.S.C. § 844(h), § 924(c), or § 929(a).**—If a sentence under this guideline is imposed in conjunction with a sentence for a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a), do not apply either subsection (b)(3)(A) or (c)(2). A sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a) accounts for the conduct covered by subsections (b)(3)(A) and (c)(2) because of the relatedness of the conduct covered by these subsections to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

   ~~In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if subsections (b)(3)(A)~~

~~and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).~~

Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. ~~In some cases, the criminal history category may not adequately reflect the defendant's criminal history; *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).~~

Historical Note	Effective November 1, 1990 (amendment 355). Amended effective November 1, 1992 (amendment 459); November 1, 2002 (amendment 646); November 1, 2004 (amendment 674); November 1, 2018 (amendment 813).

§4B1.5. Repeat and Dangerous Sex Offender Against Minors

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

	OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL
(i)	Life	**37**
(ii)	25 years or more	**34**
(iii)	20 years or more, but less than 25 years	**32**
(iv)	15 years or more, but less than 20 years	**29**
(v)	10 years or more, but less than 15 years	**24**
(vi)	5 years or more, but less than 10 years	**17**
(vii)	More than 1 year, but less than 5 years	**12**.

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be **5** plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level **22**, the offense level shall be level **22**, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. **Definition.**—For purposes of this guideline, "***minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. **Covered Sex Crime as Instant Offense of Conviction.**—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, *i.e.*: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.

3. **Application of Subsection (a).—**

(A) **Definitions.**—For purposes of subsection (a):

(i) "***Offense statutory maximum***" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.

(ii) "***Sex offense conviction***" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "***Child pornography***" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) **Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.**—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of

imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. **Application of Subsection (b).—**

(A) **Definition.—**For purposes of subsection (b), "***prohibited sexual conduct***" means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "***Child pornography***" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) **Determination of Pattern of Activity.—**

(i) **In General.—**For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.

(ii) **Occasion of Prohibited Sexual Conduct.—**An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. **Treatment and Monitoring.—**

(A) **Recommended Maximum Term of Supervised Release.—**The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) **Recommended Conditions of Probation and Supervised Release.—**Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

Background: This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (*see* 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Public Law 102–141 and section 505 of Public Law 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.

Historical Note	Effective November 1, 2001 (amendment 615). Amended effective April 30, 2003 (amendment 649); November 1, 2003 (amendment 661); November 1, 2007 (amendment 701).

PART C — ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§4C1.1. Adjustment for Certain Zero-Point Offenders

(a) ADJUSTMENT.—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

(4) the offense did not result in death or serious bodily injury;

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense);

(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by **2** levels.

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

(1) "***Dangerous weapon***," "***firearm***," "***offense***," and "***serious bodily injury***" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

(2) "***Sex offense***" means (A) an offense under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a record-keeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.

(3) In determining whether the defendant's acts or omissions resulted in "***substantial financial hardship***" to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Application ~~Notes~~Note:

1. **Application of Subsection (a)(6).**—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).

~~2. **Upward Departure.**—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.~~

Historical Note	Effective November 1, 2023 (amendment 821). Amended effective November 1, 2024 (amendments 830 and 831).

CHAPTER FIVE

~~DETERMINING THE SENTENCE~~DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES

Introductory Commentary

~~For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).~~ Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. Additionally, the provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines pursuant to subsection (a) of §1B1.1 (Application Instructions), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary. A sentence is within the guidelines if it complies with each applicable section of this chapter.

Historical Note	Effective November 1, 1987.

PART A — SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE
(in months of imprisonment)

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

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "***Life***" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 270); November 1, 1991 (amendment 418); November 1, 1992 (amendment 462); November 1, 2010 (amendment 738).

PART B — PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Historical Note	Effective November 1, 1987.

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

(A) **Where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months).** In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

(B) **Where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months).** In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2–8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is ten months or more), the guidelines do not authorize a sentence of probation. *See* §5C1.1 (Imposition of a Term of Imprisonment).

3. **Factors to Be Considered.—**

(A) **Statutory Factors.**—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, is required by statute to consider the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable. *See* 18 USC § 3562(a).

(B) **Substance Abuse.**—In a case in which a defendant sentenced to probation is an abuser of controlled substances or alcohol, it is recommended that the court consider imposing a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse may be appropriate. *See* §5B1.3(d)(4).

(C) **Domestic Violence.**—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of probation is required by statute if the defendant is not sentenced to a term of imprisonment. *See* 18 U.S.C. § 3561(b). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3563(a); §5B1.3(a)(4).

(D) **Mental and Emotional Conditions.**—In a case in which a defendant sentenced to probation is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* §5B1.3(d)(5).

(E) **Education and Vocational Skills.**—Education and vocational skills may be relevant in determining the conditions of probation for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

(F) **Employment Record.**—A defendant's employment record may be relevant in determining the conditions of probation (*e.g.*, the appropriate hours of home detention).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 271 and 302); November 1, 1992 (amendment 462); November 1, 2010 (amendments 738 and 747).

§5B1.2. Term of Probation

(a) When probation is imposed, the term shall be:

(1) at least one year but not more than five years if the offense level is **6** or greater;

(2) no more than three years in any other case.

Commentary

Background: This section governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level. Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.

Historical Note	Effective November 1, 1987

§5B1.3. Conditions of Probation

(a) MANDATORY CONDITIONS

(1) For any offense, the defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3563(a)).

(2) For a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (*see* 18 U.S.C. § 3563(a)(2)).

(3) For any offense, the defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3563(a)).

(4) For a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3563(a)).

(5) For any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3563(a)).

(6) The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

(7) The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (*see* 18 U.S.C. § 3563(a)).

(8) If the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (*see* 18 U.S.C. § 3563(a)).

(9) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3563(a)).

(10) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).

(b) DISCRETIONARY CONDITIONS

The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (*see* 18 U.S.C. § 3563(b)).

(c) "STANDARD" CONDITIONS (POLICY STATEMENT)

The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(d) "SPECIAL" CONDITIONS (POLICY STATEMENT)

The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) SUPPORT OF DEPENDENTS

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) DEBT OBLIGATIONS

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) ACCESS TO FINANCIAL INFORMATION

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) SUBSTANCE ABUSE

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program

may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) MENTAL HEALTH PROGRAM PARTICIPATION

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) DEPORTATION

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) SEX OFFENSES

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) ADDITIONAL CONDITIONS (POLICY STATEMENT)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) COMMUNITY CONFINEMENT

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. *See* §5F1.1 (Community Confinement).

(2) HOME DETENTION

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(3) COMMUNITY SERVICE

Community service may be imposed as a condition of probation. *See* §5F1.3 (Community Service).

(4) OCCUPATIONAL RESTRICTIONS

Occupational restrictions may be imposed as a condition of probation. *See* §5F1.5 (Occupational Restrictions).

(5) CURFEW

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) INTERMITTENT CONFINEMENT

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. *See* §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. **Application of Subsection (c)(4).**—Although the condition in subsection (c)(4) requires the defendant to "answer truthfully" the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 273, 274, and 302); November 1, 1997 (amendment 569); November 1, 1998 (amendment 584); November 1, 2000 (amendment 605); November 1, 2001 (amendment 615); November 1, 2002 (amendment 644); November 1, 2004 (amendment 664); November 1, 2007 (amendments 701 and 711); November 1, 2009 (amendment 733); November 1, 2016 (amendment 803); November 1, 2018 (amendment 813).

§5B1.4. [Deleted]

Historical Note	Section 5B1.4 (Recommended Conditions of Probation and Supervised Release (Policy Statement)), effective November 1, 1987, amended effective November 1, 1989 (amendments 271, 272, and 302), was deleted by consolidation with §§5B1.3 and 5D1.3 effective November 1, 1997 (amendment 569).

PART C — IMPRISONMENT

§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. **Application of Subsection (a).**—Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. **Application of Subsection (b).**—Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. **Application of Subsection (c).**—Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:

   (A) It may impose a sentence of imprisonment.

   (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

   (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. **Application of Subsection (d).**—Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

   (A) It may impose a sentence of imprisonment.

   (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

   The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. **Application of Subsection (e).**—Subsection (e) sets forth a schedule of imprisonment substitutes.

~~6. **Departures Based on Specific Treatment Purpose.** There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.~~

~~In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.~~

~~**Examples:** The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant~~

~~must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.~~

~~7~~6. **Use of Substitutes for Imprisonment.**—The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.

~~8~~7. **Residential Treatment Program.**—In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.

~~9~~8. **Application of Subsection (f).**—Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

~~10~~9. ~~**Zero-Point Offenders.—**~~

~~(A)~~ **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

~~(B) **Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.—** A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).~~

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 51); November 1, 1989 (amendments 271, 275, and 302); November 1, 1992 (amendment 462); November 1, 2002 (amendment 646); November 1, 2009 (amendment 733); November 1, 2010 (amendment 738); November 1, 2018 (amendment 811); November 1, 2023 (amendments 821 and 824).

§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or

§ 70506, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) as follows:

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the applicable guideline range shall not be less than 24 to 30 months of imprisonment.

Commentary

Application Notes:

1. **Definitions.—**

   (A) The term "***violent offense***" means a "crime of violence," as defined in 18 U.S.C. § 16, that is punishable by imprisonment.

   (B) "***Dangerous weapon***" and "***firearm***," as used in subsection (a)(2), and "***serious bodily injury***," as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

   (C) "***Offense***," as used in subsection (a)(2)–(4), and "***offense or offenses that were part of the same course of conduct or of a common scheme or plan***," as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

2. **Application of subsection (a)(2).—**Consistent with §1B1.3 (Relevant Conduct), the term "***defendant***," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

3. **Application of Subsection (a)(4).—**

   (A) **"Organizer, leader, manager, or supervisor of others in the offense".—**The first prong of subsection (a)(4) requires that the defendant was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

   (B) **"Engaged in a continuing criminal enterprise".—**"***Engaged in a continuing criminal enterprise***," as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."

4. **Use of Information Disclosed under Subsection (a).—**Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).

5. **Government's Opportunity to Make Recommendation.—**Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. *See also* Fed. R. Crim. P. 32(f), (i).

6. **Exemption from Otherwise Applicable Statutory Minimum Sentences.—**A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.

Background: This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994 and subsequently amended, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). *See also* H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

Historical Note	Effective September 23, 1994 (amendment 509). Amended effective November 1, 1995 (amendment 515); November 1, 1996 (amendment 540); November 1, 1997 (amendment 570); November 1, 2001 (amendment 624); October 27, 2003 (amendment 651); November 1, 2004 (amendment 674); November 1, 2009 (amendment 736); November 1, 2023 (amendment 817).

PART D — SUPERVISED RELEASE

§5D1.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (*see* 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. *See* 18 U.S.C. § 3583(a).

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Commentary

Application Notes:

1. **Application of Subsection (a).**—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court ~~may depart from this guideline and~~ need not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. **Application of Subsection (b).**—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. **Factors to Be Considered.**—

(A) **Statutory Factors.**—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

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

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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

(iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).

(B) **Criminal History.**—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) **Substance Abuse.**—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* ~~§5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)~~§5D1.3(d)(4).

(D) **Domestic Violence.**—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.

(E) **Mental and Emotional Conditions.**—In a case in which a defendant sentenced to imprisonment is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* 5D1.3(d)(5).

(F) **Education and Vocational Skills.**—Education and vocational skills may be relevant in determining the conditions of supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

(G) **Employment Record.**—A defendant's employment record may be relevant in determining the conditions of supervised release *(e.g.*, the appropriate hours of home detention).

4. **Community Confinement or Home Detention Following Imprisonment.**—A term of supervised release must be imposed if the court wishes to impose a "split sentence" under which the defendant serves a term of imprisonment followed by a period of community confinement or home detention pursuant to subsection (c)(2) or (d)(2) of §5C1.1 (Imposition of a Term of Imprisonment). In such a case, the period of community confinement or home detention is imposed as a condition of supervised release.

5. **Application of Subsection (c).**—In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 302); November 1, 1995 (amendment 529); November 1, 2010 (amendment 747); November 1, 2011 (amendment 756); November 1, 2014 (amendment 781).

§5D1.2. Term of Supervised Release

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).

(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

"***Minor***" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually

explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. **Safety Valve Cases.**—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. *See* 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

3. **Substantial Assistance Cases.**—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

4. **Factors Considered.**—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. **Early Termination and Extension.**—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. **Application of Subsection (c).**—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

   For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

   The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 52); November 1, 1989 (amendment 302); November 1, 1995 (amendment 529); November 1, 1997 (amendment 570); November 1, 2001 (amendment 615); November 1, 2002 (amendments 637 and 646); November 1, 2004 (amendment 664); November 1, 2005 (amendment 679); November 1, 2007 (amendment 701); November 1, 2009 (amendment 736); November 1, 2011 (amendment 756); November 1, 2014 (amendment 786).

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

(1) The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).

(2) The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

(3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).

(4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).

(5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).

(6) The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.

(7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).

(8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).

(b) DISCRETIONARY CONDITIONS

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) "STANDARD" CONDITIONS (POLICY STATEMENT)

The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(d) "SPECIAL" CONDITIONS (POLICY STATEMENT)

The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) SUPPORT OF DEPENDENTS

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) DEBT OBLIGATIONS

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) ACCESS TO FINANCIAL INFORMATION

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) SUBSTANCE ABUSE

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program

may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol. If participation in a substance abuse program is required, the length of the term of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

(5) MENTAL HEALTH PROGRAM PARTICIPATION

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) DEPORTATION

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) SEX OFFENSES

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any

probation officer in the lawful discharge of the officer's supervision functions.

(8) UNPAID RESTITUTION, FINES, OR SPECIAL ASSESSMENTS

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(e) ADDITIONAL CONDITIONS (POLICY STATEMENT)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) COMMUNITY CONFINEMENT

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(2) HOME DETENTION

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(3) COMMUNITY SERVICE

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(4) OCCUPATIONAL RESTRICTIONS

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(5) CURFEW

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) INTERMITTENT CONFINEMENT

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. **Application of Subsection (c)(4).**—Although the condition in subsection (c)(4) requires the defendant to "answer truthfully" the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 276, 277, and 302); November 1, 1997 (amendment 569); November 1, 1998 (amendment 584); November 1, 2000 (amendment 605); November 1, 2001 (amendment 615); November 1, 2002 (amendments 644 and 646); November 1, 2004 (amendment 664); November 1, 2007 (amendments 701 and 711); November 1, 2009 (amendment 733); November 1, 2016 (amendment 803); November 1, 2018 (amendments 812 and 813).

PART E — RESTITUTION, FINES, ASSESSMENTS, FORFEITURES

§5E1.1. Restitution

(a) In the case of an identifiable victim, the court shall—

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 1593, § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A, or 21 U.S.C. § 853(q); or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) In a case where there is no identifiable victim and the defendant was convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, the court, taking into consideration the amount of public harm caused by the offense and other relevant factors, shall order an amount of community restitution not to exceed the fine imposed under §5E1.2.

(e) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of

(1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. *See* 18 U.S.C. § 3664(f)(4).

(f) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(g) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §5E1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Application Note:

1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under chapter 46 or 96 of title 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). *See* 18 U.S.C. § 3663(c)(4).

   Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under subchapter C of chapter 227 of title 18, United States Code, shall take precedence over an order of community restitution under subsection (d). *See* 18 U.S.C. § 3663(c)(5).

Background: Section 3553(a)(7) of title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A, and 21 U.S.C. § 853(q). For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

Subsection (d) implements the instruction to the Commission in section 205 of the Antiterrorism and Effective Death Penalty Act of 1996. This provision directs the Commission to develop guidelines for community restitution in connection with certain drug offenses where there is no identifiable victim but the offense causes "public harm."

To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 53); November 1, 1989 (amendments 278, 279, and 302); November 1, 1991 (amendment 383); November 1, 1993 (amendment 501); November 1, 1995 (amendment 530); November 1, 1997 (amendment 571); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2023 (amendment 824).

§5E1.2. Fines for Individual Defendants

(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

(b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.

(c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.

(2) Except as specified in paragraph (4) below, the maximum of the fine guideline range is the amount shown in column B of the table below.

(3) FINE TABLE

OFFENSE LEVEL	A MINIMUM	B MAXIMUM
3 and below	$200	$9,500
4–5	$500	$9,500
6–7	$1,000	$9,500
8–9	$2,000	$20,000
10–11	$4,000	$40,000
12–13	$5,500	$55,000
14–15	$7,500	$75,000
16–17	$10,000	$95,000
18–19	$10,000	$100,000
20–22	$15,000	$150,000
23–25	$20,000	$200,000
26–28	$25,000	$250,000
29–31	$30,000	$300,000
32–34	$35,000	$350,000
35–37	$40,000	$400,000
38 and above	$50,000	$500,000.

(4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $500,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;

(4) any restitution or reparation that the defendant has made or is obligated to make;

(5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) whether the defendant previously has been fined for a similar offense;

(7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and

(8) any other pertinent equitable considerations.

The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(e) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(f) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the

time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(g) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

(h) Special Instruction

(1) For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.

Commentary

Application Notes:

1. A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.

2. In general, the maximum fine permitted by law as to each count of conviction is $250,000 for a felony or for any misdemeanor resulting in death; $100,000 for a Class A misdemeanor; and $5,000 for any other offense. 18 U.S.C. § 3571(b)(3)–(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).

3. The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.

~~4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.~~

~~Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged~~

~~(*e.g.*, by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.~~

~~5~~4. Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to $50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act; and 52 U.S.C. § 30109(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 52 U.S.C. § 30122, a fine up to the greater of $50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation.

~~6~~5. The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction and Related Adjustments).

~~7~~6. In considering subsection (d)(7), the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 54); November 1, 1989 (amendments 280, 281, and 302); November 1, 1990 (amendment 356); November 1, 1991 (amendment 384); November 1, 1997 (amendment 572); November 1, 2002 (amendment 646); January 25, 2003 (amendment 648); November 1, 2003 (amendment 656); November 1, 2011 (amendment 758); November 1, 2015 (amendments 791 and 796); November 1, 2024 (amendment 831).

§5E1.3. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

Commentary

Application Notes:

1. This guideline applies only if the defendant is an individual. *See* §8E1.1 for special assessments applicable to organizations.

2. The following special assessments are provided by statute (18 U.S.C. § 3013):

FOR OFFENSES COMMITTED BY INDIVIDUALS ON OR AFTER APRIL 24, 1996:
(A) $100, if convicted of a felony;
(B) $25, if convicted of a Class A misdemeanor;
(C) $10, if convicted of a Class B misdemeanor;
(D) $5, if convicted of a Class C misdemeanor or an infraction.

FOR OFFENSES COMMITTED BY INDIVIDUALS ON OR AFTER NOVEMBER 18, 1988 BUT PRIOR TO APRIL 24, 1996:
(E) $50, if convicted of a felony;
(F) $25, if convicted of a Class A misdemeanor;
(G) $10, if convicted of a Class B misdemeanor;
(H) $5, if convicted of a Class C misdemeanor or an infraction.

FOR OFFENSES COMMITTED BY INDIVIDUALS PRIOR TO NOVEMBER 18, 1988:
(I) $50, if convicted of a felony;
(J) $25, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of title 18, United States Code, added by the Victims of Crimes Act of 1984, Pub. L. No. 98–473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 282 and 302); November 1, 1997 (amendment 573); November 1, 2023 (amendment 824).

§5E1.4. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

Commentary

Background: Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

In addition, the provisions of 18 U.S.C. §§ 3681–3682 authorizes the court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 18 U.S.C. § 3681(c)(2).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 302); November 1, 2023 (amendment 824).

§5E1.5. Costs of Prosecution (Policy Statement)

Costs of prosecution shall be imposed on a defendant as required by statute.

Commentary

Background: Various statutes require the court to impose the costs of prosecution: 7 U.S.C. § 13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S.C. § 844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S.C. § 7201 (attempt to defeat or evade income tax); 26 U.S.C. § 7202 (willful failure to collect or pay tax); 26 U.S.C. § 7203 (willful failure to file income tax return, supply information, or pay tax); 26 U.S.C. § 7206 (fraud and false statements); 26 U.S.C. § 7210 (failure to obey summons); 26 U.S.C. § 7213 (unauthorized disclosure of information); 26 U.S.C. § 7215 (offenses with respect to collected taxes); 26 U.S.C. § 7216 (disclosure or use of information by preparers of returns); 26 U.S.C. § 7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. § 1320c-9 (improper FOIA disclosure); 43 U.S.C. § 942-6 (rights of way for Alaskan wagon roads).

Historical Note	Effective November 1, 1992 (amendment 463). Amended effective November 1, 2010 (amendment 747).

PART F — SENTENCING OPTIONS

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

Commentary

Application Notes:

1. "***Community confinement***" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.

2. Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 302); November 1, 2002 (amendment 646); November 1, 2009 (amendment 733).

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. "***Home detention***" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance for home detention. However, alternative means of surveillance may be used if appropriate.

2. The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.

3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the

residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no "call forwarding" or "call waiting" services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention. However, in some cases home detention may effectively be enforced without electronic monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant's case.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 271 and 302); November 1, 2018 (amendment 811).

§5F1.3. Community Service

Community service may be ordered as a condition of probation or supervised release.

Commentary

Application Note:

1. Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 283 and 302); November 1, 1991 (amendment 419).

§5F1.4. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

Commentary

Background: In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas

or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than $20,000 to give notice.

If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S.C. § 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 284 and 302).

§5F1.5. Occupational Restrictions

(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and

(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

(b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

Commentary

Background: The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(5), or supervised release, 18 U.S.C. § 3583(d). Pursuant to § 3563(b)(5), a court may require a defendant to:

> [R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.

Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96–97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." *Id.* at 96. Section 5F1.5 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(5) if the sentence includes a more limiting condition of probation or supervised release than the maximum established in the guideline. *See* 18 U.S.C. § 3742(a)(3). The government may appeal if the sentence includes a less limiting condition of probation than the minimum established in the guideline. *See* 18 U.S.C. § 3742(b)(3).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 285 and 302); November 1, 1991 (amendment 428); November 1, 2002 (amendment 646).

§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 862, may deny the eligibility for certain federal benefits of any individual convicted of distribution or possession of a controlled substance.

Commentary

Application Note:

1. **Definition of "Federal Benefit".**—"***Federal benefit***" is defined in 21 U.S.C. § 862(d) to mean "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States" but "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility."

Background: Subsections (a) and (b) of 21 U.S.C. § 862 provide that an individual convicted of a state or federal drug trafficking or possession offense may be denied certain federal benefits. Except for an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. § 862(a)(1) (for distribution offenses) and (b)(1)(for possession offenses), is at the discretion of the court. In the case of an individual convicted of a third or subsequent drug distribution offense, denial of benefits is mandatory and permanent under 21 U.S.C. § 862(a)(1)(C) (unless suspended by the court under 21 U.S.C. § 862(c)).

Subsection (b)(2) of 21 U.S.C. § 862 provides that the period of benefit ineligibility that may be imposed in the case of a drug possession offense "shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services."

Subsection (c) of 21 U.S.C. § 862 provides that the period of benefit ineligibility shall be suspended "if the individual (A) completes a supervised drug rehabilitation program after becoming ineligible under this section; (B) has otherwise been rehabilitated; or (C) has made a good faith effort to

gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program."

Subsection (e) of 21 U.S.C. § 862 provides that a period of benefit ineligibility "shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program."

Historical Note	Effective November 1, 1989 (amendment 305). Amended effective November 1, 1992 (amendment 464); November 1, 2024 (amendment 831).

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background: Section 4046 of title 18, United States Code, provides—

"(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.

(b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed 6 months, an inmate in the shock incarceration program shall be required to—

(1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and

(2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.

(c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate." 18 U.S.C. § 4046.

In 1990, the Bureau of Prisons issued an operations memorandum (174-90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the "intensive confinement program"). In 2008, however, the Bureau of Prisons terminated the program and removed the rules governing its operation. *See* 73 FR 39863 (July 11, 2008).

Historical Note	Effective November 1, 1991 (amendment 424). Amended effective November 1, 2002 (amendment 646); November 1, 2023 (amendment 823).

§5F1.8. Intermittent Confinement

Intermittent confinement may be imposed as a condition of probation during the first year of probation. *See* 18 U.S.C. § 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* 18 U.S.C. § 3583(d).

Commentary

Application Note:

1. "***Intermittent confinement***" means remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. *See* 18 U.S.C. § 3563(b)(10).

Historical Note	Effective November 1, 2009 (amendment 733).

PART G — IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

§5G1.1. Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months~~; a sentence of less than 48 months would be a guideline departure~~. If the applicable guideline range is 41–51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months~~; a sentence of more than 60 months would be a guideline departure~~. If the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51–60 months under subsection (c).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 286).

§5G1.2. Sentencing on Multiple Counts of Conviction

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

Commentary

Application Notes:

1. **In General.**—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

   Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Application Note 3, below.

   Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

   This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

   Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and

be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

2. **Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—**

(A) **In General.**—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subparagraph (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.*, the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.*, Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

(B) **Multiple Convictions Under 18 U.S.C. § 1028A.**—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . .".

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

(i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

(ii) Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

(C) **Imposition of Supervised Release.**—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e).

3. **Application of Subsection (b).—**

(A) **In General.**—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.*, the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) **Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.**—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* §5G1.1(a).

(C) **Examples.**—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate "total punishment" to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. *See* subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate "total punishment" to be imposed on Defendant B is

130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) **Special Rule on Resentencing.**—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.

4. **Career Offenders Covered under Subsection (e).—**

(A) **Imposing Sentence.**—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) **Examples.**—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

(ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20-year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.

(iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. § 113(a)(3) (10-year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of

120 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 287 and 288); November 1, 1994 (amendment 507); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2002 (amendment 642); November 1, 2004 (amendment 674); November 1, 2005 (amendments 677 and 680); November 1, 2010 (amendment 747); November 1, 2012 (amendments 767 and 770); November 1, 2024 (amendment 831).

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. **Consecutive Sentence — Subsection (a) Cases.** Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.

2. **Application of Subsection (b).—**

   (A) **In General.—**Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

   (B) **Inapplicability of Subsection (b).—**Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is a prior conviction for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

   (C) **Imposition of Sentence.—**If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (*e.g.*, §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

   (D) **Example.—**The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

   The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. **Application of Subsection (c).—**Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

4. **Application of Subsection (d).—**

(A) **In General.—**Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (*e.g.*, determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) **Partially Concurrent Sentence.—**In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) **Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—**Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) **Complex Situations.—**Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

~~(E) **Downward Departure.**—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant~~

~~offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.~~

~~To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.~~

~~5. **Downward Departure Provision.**—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* §5K2.23 (Discharged Terms of Imprisonment).~~

Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." *See Setser v. United States*, 566 U.S. 231, 236 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 566 U.S. at 236. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 289); November 1, 1991 (amendment 385); November 1, 1992 (amendment 465); November 1, 1993 (amendment 494); November 1, 1995 (amendment 535); November 1, 2002 (amendment 645); November 1, 2003 (amendment 660); November 1, 2010 (amendment 747); November 1, 2013 (amendment 776).; November 1, 2014 (amendments 782, 787, and 789); November 1, 2016 (amendment 802); November 1, 2023 (amendment 824).

~~PART H — SPECIFIC OFFENDER CHARACTERISTICS~~

PART H — [DELETED]

Historical Note	The heading to Part H — Specific Offender Characteristics, effective November 1, 1987, was deleted due to the deletion of §§5H1.1 through 5H1.12 effective November 1, 2025 (amendment ---).

~~Introductory Commentary~~

~~This part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the "Act") contains several provisions regarding specific offender characteristics:~~

~~*First*, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics — race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).~~

~~*Second*, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. § 994(d).~~

~~*Third*, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics — education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).~~

~~*Fourth*, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, "the history and characteristics of the defendant". *See* 18 U.S.C. § 3553(a)(1).~~

~~Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, *see* 28 U.S.C. § 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). *See* §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, *see* 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). *See* §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. *See, e.g.*, §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).~~

~~The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *See United States v. Booker*, 543 U.S. 220, 264–65 (2005). Although the court must consider "the history and characteristics of the defendant" among other factors, *see* 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable~~

~~guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007).~~

~~Accordingly, the purpose of this part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," *see Gall v. United States*, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," *see* 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), "provide certainty and fairness," *see* 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," *see* 18 U.S.C. § 3553(a)(2)(A).~~

~~This part allocates specific offender characteristics into three general categories.~~

~~In the first category are specific offender characteristics the consideration of which Congress has prohibited (*e.g.*, §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.~~

~~In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. *See* 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (*e.g.*, age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.~~

~~In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or various other aspects of an appropriate sentence (*e.g.*, the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. *See* §5K2.0 (Grounds for Departure).~~

~~As with the other provisions in this manual, these policy statements "are evolutionary in nature". *See* Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.~~

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. *See, e.g.*, 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 357); November 1, 1991 (amendment 386); November 1, 1994 (amendment 508); October 27, 2003 (amendment 651); November 1, 2010 (amendment 739); November 1, 2023 (amendment 824).

§5H1.1. Age (Policy Statement)

Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); November 1, 1993 (amendment 475); October 27, 2003 (amendment 651); November 1, 2004 (amendment 674); November 1, 2010 (amendment 739); November 1, 2024 (amendment 829).

§5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); November 1, 2004 (amendment 674).

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3(d)(5)).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); November 1, 1997 (amendment 569); November 1, 2004 (amendment 674); November 1, 2010 (amendment 739); November 1, 2018 (amendment 811).

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance,

~~individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.~~

~~Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.~~

~~In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.~~

~~In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4)).~~

~~Addiction to gambling is not a reason for a downward departure.~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); November 1, 1997 (amendment 569); October 27, 2003 (amendment 651); November 1, 2010 (amendment 739); November 1, 2018 (amendment 811).~~

~~§5H1.5. Employment Record (Policy Statement)~~

~~Employment record is not ordinarily relevant in determining whether a departure is warranted.~~

~~Employment record may be relevant in determining the conditions of probation or supervised release (*e.g.*, the appropriate hours of home detention).~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); November 1, 2004 (amendment 674).~~

~~§5H1.6. Family Ties and Responsibilities (Policy Statement)~~

~~In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.~~

~~In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.~~

~~Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.~~

~~**Commentary**~~

~~**Application Note:**~~

~~1. **Circumstances to Consider.**—~~

~~(A) **In General.**—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:~~

~~(i) The seriousness of the offense.~~

~~(ii) The involvement in the offense, if any, of members of the defendant's family.~~

~~(iii) The danger, if any, to members of the defendant's family as a result of the offense.~~

~~(B) **Departures Based on Loss of Caretaking or Financial Support.**—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:~~

~~(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.~~

~~(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.~~

~~(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.~~

~~(iv) The departure effectively will address the loss of caretaking or financial support.~~

~~**Background:** Section 401(b)(4) of Public Law 108-21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective November 1, 1991 (amendment 386); April 30, 2003 (amendment 649); October 27, 2003 (amendment 651); November 1, 2004 (amendment 674).~~

~~§5H1.7. Role in the Offense (Policy Statement)~~

~~A defendant's role in the offense is relevant in determining the applicable guideline range (*see* Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (*see* subsection (d) of §5K2.0 (Grounds for Departures)).~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective October 27, 2003 (amendment 651).~~

~~§5H1.8. Criminal History (Policy Statement)~~

~~A defendant's criminal history is relevant in determining the applicable criminal history category. *See* Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective October 27, 2003 (amendment 651).~~

~~§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)~~

~~The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. *See* Chapter Four, Part B (Career Offenders and Criminal Livelihood).~~

~~*Historical Note*~~	~~Effective November 1, 1987.~~

~~§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)~~

~~These factors are not relevant in the determination of a sentence.~~

~~*Historical Note*~~	~~Effective November 1, 1987.~~

§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

Historical Note	Effective November 1, 1991 (amendment 386). Amended effective November 1, 2004 (amendment 674); November 1, 2010 (amendment 739).

§5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.

Historical Note	Effective November 1, 1992 (amendment 466). Amended effective November 1, 2004 (amendment 674).

§§5H1.1 – 5H1.12 [Deleted]

Historical Note	Sections 5H1.1 (Age (Policy Statement)), 5H1.2 (Education and Vocational Skills (Policy Statement)), 5H1.3 (Mental and Emotional Conditions (Policy Statement)), 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)), 5H1.5 (Employment Record (Policy Statement)), 5H1.6 (Family Ties and Responsibilities (Policy Statement)), 5H1.7 (Role in the Offense (Policy Statement)), 5H1.8 (Criminal History (Policy Statement)), 5H1.9 (Dependence upon Criminal Activity for a Livelihood (Policy Statement)), 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)), 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)), and 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)), effective November 1, 1987, were deleted effective November 1, 2025 (amendment ---).

PART I — [NOT USED]

PART J — RELIEF FROM DISABILITY

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 55).

§5J1.1. Relief from Disability Pertaining to Convicted Persons Prohibited from Holding Certain Positions (Policy Statement)

A collateral consequence of conviction of certain crimes described in 29 U.S.C. §§ 504 and 1111 is the prohibition of convicted persons from service and employment with labor unions, employer associations, employee pension and welfare benefit plans, and as labor relations consultants in the private sector. A convicted person's prohibited service or employment in such capacities without having been granted one of the following three statutory procedures of administrative or judicial relief is subject to criminal prosecution. First, a disqualified person whose citizenship rights have been fully restored to him or her in the jurisdiction of conviction, following the revocation of such rights as a result of the disqualifying conviction, is relieved of the disability. Second, a disqualified person convicted after October 12, 1984, may petition the sentencing court to reduce the statutory length of disability (thirteen years after date of sentencing or release from imprisonment, whichever is later) to a lesser period (not less than three years after date of conviction or release from imprisonment, whichever is later). Third, a disqualified person may petition either the United States Parole Commission or a United States District Court judge to exempt his or her service or employment in a particular prohibited capacity pursuant to the procedures set forth in 29 U.S.C. §§ 504(a)(B) and 1111(a)(B). In the case of a person convicted of a disqualifying crime committed before November 1, 1987, the United States Parole Commission will continue to process such exemption applications.

In the case of a person convicted of a disqualifying crime committed on or after November 1, 1987, however, a petition for exemption from disability must be directed to a United States District Court. If the petitioner was convicted of a disqualifying federal offense, the petition is directed to the sentencing judge. If the petitioner was convicted of a disqualifying state or local offense, the petition is directed to the United States District Court for the district in which the offense was committed. In such cases, relief shall not be given to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he or she has been rehabilitated since commission of the disqualifying crime and can therefore be trusted not to endanger the organization in the position for which he or she seeks relief from disability.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 56).

PART K — ~~DEPARTURES~~ASSISTANCE TO AUTHORITIES

~~1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES~~

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, ~~the court may depart from the guidelines~~ a sentence that is below the otherwise applicable guideline range may be appropriate.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. **Sentence Below Statutorily Required Minimum Sentence.**—Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. **Interaction with Acceptance of Responsibility Reduction.**—The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. **Government's Evaluation of Extent of Defendant's Assistance.**—Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 290); November 1, 2024 (amendment 831).

§5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 291).

* * * * *

~~2. OTHER GROUNDS FOR DEPARTURE~~

~~*Historical Note*~~	~~Effective November 1, 1987. Amended effective November 1, 1990 (amendment 358).~~

~~§5K2.0. Grounds for Departure (Policy Statement)~~

~~(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.~~

~~(1) IN GENERAL. The sentencing court may depart from the applicable guideline range if~~

~~(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or~~

~~(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,~~

~~of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.~~

~~(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—~~

~~(A) IDENTIFIED CIRCUMSTANCES. This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (*e.g.*, as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.~~

~~(B) UNIDENTIFIED CIRCUMSTANCES. A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.~~

~~(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION. A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.~~

~~(4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES. An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.~~

~~(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES. Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—~~

~~(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;~~

~~(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and~~

~~(3) should result in a sentence different from that described.~~

~~The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.~~

~~(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—~~

~~(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and~~

~~(2) each such offender characteristic or other circumstance is—~~

~~(A) present to a substantial degree; and~~

~~(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.~~

~~(d) PROHIBITED DEPARTURES.—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:~~

~~(1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Cir-~~

~~cumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and the last sentence of 5K2.12 (Coercion and Duress).~~

~~(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).~~

~~(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.~~

~~(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreement).~~

~~(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).~~

~~(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.~~

~~(c) REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE. If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.~~

~~**Commentary**~~

~~**Application Notes:**~~

~~1. **Definitions.** For purposes of this policy statement:~~

~~"***Circumstance***" includes, as appropriate, an offender characteristic or any other offense factor.~~

~~"***Depart***", "***departure***", "***downward departure***", and "***upward departure***" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).~~

2. **Scope of this Policy Statement.**

(A) **Departures Covered by this Policy Statement.** This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. *See* 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) **Departures Covered by Other Guidelines.** This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (*see* Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (*see* §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (*see* §5K3.1 (Early Disposition Programs)).

3. **Kinds and Expected Frequency of Departures under Subsection (a).** As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) **Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.** Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) **Identified Circumstances.** This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) **Unidentified Circumstances.** A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) **Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—**

(i) **In General.**—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) **Examples.**—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) **Departures Based on Circumstances Identified as Not Ordinarily Relevant.**—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see, e.g.*, Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (e). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subparagraph shall be stated with specificity in the statement of reasons form.

4. **Downward Departures in Child Crimes and Sexual Offenses.—**

(A) **Definition.**—For purposes of this policy statement, the term "***child crimes and sexual offenses***" means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) **Standard for Departure.—**

(i) **Requirement of Affirmative and Specific Identification of Departure Ground.**—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in

that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.*, Chapter Five, Part K).

(ii) **Application of Subsection (b)(2).** The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. **Departures Based on Plea Agreements.** Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the statement of reasons form, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (*See* Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

> "(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
>
> (2) promulgate, pursuant to section 994 of title 28, United States Code—
>
> (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
>
> (B) a policy statement authorizing a departure pursuant to an early disposition program; and
>
> (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0".

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 57); November 1, 1990 (amendment 358); November 1, 1994 (amendment 508); November 1, 1997 (amendment 561); November 1, 1998 (amendment 585); April 30, 2003 (amendment 649); October 27, 2003 (amendment 651); November 1, 2008 (amendment 725); November 1, 2010 (amendment 739); November 1, 2011 (amendment 757); November 1, 2012 (amendment 770); November 1, 2024 (amendment 831).

§5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of

~~personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.~~

~~*Historical Note*~~	~~Effective November 1, 1987.~~

~~§5K2.2. Physical Injury (Policy Statement)~~

~~If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.~~

~~*Historical Note*~~	~~Effective November 1, 1987.~~

~~§5K2.3. Extreme Psychological Injury (Policy Statement)~~

~~If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.~~

~~Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.~~

~~*Historical Note*~~	~~Effective November 1, 1987.~~

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

Historical Note	Effective November 1, 1987.

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

Historical Note	Effective November 1, 1987.

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

Historical Note	Effective November 1, 1987.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily

would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

Historical Note	Effective November 1, 1987.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Historical Note	Effective November 1, 1987.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

Historical Note	Effective November 1, 1987.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Historical Note	Effective November 1, 1987. Amended effective October 27, 2003 (amendment 651).

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

Historical Note	Effective November 1, 1987.

§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

Historical Note	Effective November 1, 1987. Amended effective October 27, 2003 (amendment 651); November 1, 2004 (amendment 674).

§5K2.13. Diminished Capacity (Policy Statement)

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement –

"***Significantly reduced mental capacity***" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1998 (amendment 583); April 30, 2003 (amendment 649); October 27, 2003 (amendment 651); November 1, 2004 (amendment 674).

§5K2.14. Public Welfare (Policy Statement)

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2004 (amendment 674).

§5K2.15. [Deleted]

Historical Note	Section 5K2.15 (Terrorism (Policy Statement)), effective November 1, 1989 (amendment 292), was deleted effective November 1, 1995 (amendment 526).

§5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

Historical Note	Effective November 1, 1991 (amendment 420). Amended effective November 1, 2004 (amendment 674).

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note:

1. "***Crime of violence***" and "***controlled substance offense***" are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

Historical Note	Effective November 1, 1995 (amendment 531). Amended effective November 1, 2006 (amendment 691); November 1, 2010 (amendment 746).

§5K2.18. Violent Street Gangs (Policy Statement)

If the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. § 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

Historical Note	Effective November 1, 1995 (amendment 532).

§5K2.19. [Deleted]

Historical Note	Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement), effective November 1, 2000 (amendment 602), was deleted effective November 1, 2012 (amendment 768).

§5K2.20. Aberrant Behavior (Policy Statement)

(a) In General.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) Requirements.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) Prohibitions Based on the Presence of Certain Circumstances.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this policy statement:

"***Dangerous weapon***," "***firearm***," "***otherwise used***," and "***serious bodily injury***" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"***Serious drug trafficking offense***" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. **Repetitious or Significant, Planned Behavior.**—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. **Other Circumstances to Consider.**—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003.

Historical Note	Effective November 1, 2000 (amendment 603). Amended effective April 30, 2003 (amendment 649); October 27, 2003 (amendment 651).

§5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

Historical Note	Effective November 1, 2000 (amendment 604). Amended effective November 1, 2004 (amendment 674).

§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.

Historical Note	Effective April 30, 2003 (amendment 649). Amended effective November 1, 2004 (amendment 674).

§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Historical Note	Effective November 1, 2003 (amendment 660). Amended effective November 1, 2004 (amendment 674); November 1, 2014 (amendment 787).

§5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716, an upward departure may be warranted.

Commentary

Application Note:

1. **Definition.** For purposes of this policy statement, "***official insignia or uniform***" has the meaning given that term in 18 U.S.C. § 716(e)(3).

Historical Note	Effective November 1, 2007 (amendment 700).

* * * * *

§§5K2.0 – 5K2.24 [Deleted]

Historical Note	Sections 5K2.0 (Grounds for Departure (Policy Statement)), 5K2.1 (Death (Policy Statement)), 5K2.2 (Physical Injury (Policy Statement)), 5K2.3 (Extreme Psychological Injury (Policy Statement)), 5K2.4 (Abduction or Unlawful Restraint (Policy Statement)), 5K2.5 (Property Damage or Loss (Policy Statement)), 5K2.6 (Weapons and

	Dangerous Instrumentalities (Policy Statement)), 5K2.7 (Disruption of Governmental Function (Policy Statement)), 5K2.8 (Extreme Conduct (Policy Statement)), 5K2.9 (Criminal Purpose (Policy Statement)), 5K2.10 (Victim's Conduct (Policy Statement)), 5K2.11 (Lesser Harms (Policy Statement)), 5K2.12 (Coercion and Duress (Policy Statement)), 5K2.13 (Diminished Capacity (Policy Statement)), 5K2.14 (Public Welfare (Policy Statement)), 5K2.16 (Voluntary Disclosure of Offense (Policy Statement)), 5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), 5K2.18 (Violent Street Gangs (Policy Statement)), 5K2.20 (Aberrant Behavior (Policy Statement)), 5K2.21 (Dismissed and Uncharged Conduct (Policy Statement)), 5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)), 5K2.23 (Discharged Terms of Imprisonment (Policy Statement)), and 5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)), effective November 1, 1987, were deleted effective November 1, 2025 (amendment ---).

~~3. EARLY DISPOSITION PROGRAMS~~

~~*Historical Note*~~	~~Effective October 27, 2003 (amendment 651).~~

~~§5K3.1. Early Disposition Programs (Policy Statement)~~

~~Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.~~

~~Commentary~~

~~**Background:** This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21).~~

~~*Historical Note*~~	~~Effective October 27, 2003 (amendment 651).~~

§§5K3.1 [Deleted]

Historical Note	Section 5K2.0 (Early Disposition Programs (Policy Statement)), effective October 27, 2003, was deleted effective November 1, 2025 (amendment ---).

CHAPTER SIX

SENTENCING PROCEDURES, PLEA AGREEMENTS, AND CRIME VICTIMS' RIGHTS

Historical Note	Effective November 1, 1987. Amended effective November 1, 2006 (amendment 694).

PART A — SENTENCING PROCEDURES

Introductory Commentary

This part addresses sentencing procedures that are applicable in all cases, including those in which guilty or *nolo contendere* pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2023 (amendment 824).

§6A1.1. Presentence Report (Policy Statement)

(a) The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless—

(1) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(2) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

Rule 32(c)(1)(A), Fed. R. Crim. P.

(b) The defendant may not waive preparation of the presentence report.

Commentary

A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing. Rule 32(c)(1)(A) permits the judge to dispense with a presentence report in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in

the record to enable it to exercise its statutory sentencing authority meaningfully and explains its finding on the record.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 58); November 1, 1989 (amendment 293); November 1, 1997 (amendment 574); November 1, 2004 (amendment 674).

§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

(a) 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. Rule 32(e)(2), Fed. R. Crim. P.

(b) 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. An objecting party must provide a copy of its objections to the opposing party and to the probation officer. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report accordingly. Rule 32(f), Fed. R. Crim. P.

(c) 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. Rule 32(g), Fed. R. Crim. P.

Commentary

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. *See* Rule 32(f), Fed. R. Crim. P.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 59); November 1, 1991 (amendment 425); November 1, 1997 (amendment 574); November 1, 2004 (amendment 674).

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Commentary

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. *See, e.g.*, *United States v. Ibanez*, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See, e.g.*, *United States v. Jimenez Martinez*, 83 F.3d 488, 494–95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); *United States v. Roberts*, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); *see also*, *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; *Witte v. United States,* 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute); *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. *Witte*, 515 U.S. at 399–401; *Nichols*, 511 U.S. at 748; *United States v. Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Sciarrino*, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993); *see also United States v. Young*, 981 F.2d 180 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* §1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 294); November 1, 1991 (amendment 387); November 1, 1997 (amendment 574); November 1, 1998 (amendment 586); November 1, 2004 (amendment 674); November 1, 2024 (amendment 826).

~~§6A1.4. Notice of Possible Departure (Policy Statement)~~

~~Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.~~

~~**Commentary**~~

~~**Background:** The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns v. United States*, 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.~~

~~*Historical Note*~~	~~Effective November 1, 2004 (amendment 674).~~

§6A1.4. [Deleted]

Historical Note	Section 6A1.4 (Notice of Possible Departure (Policy Statement)), effective November 1, 2004 (amendment 674), was deleted effective November 1, 2025 (amendment ---).

§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. **Definition.**—For purposes of this policy statement, "***crime victim***" has the meaning given that term in 18 U.S.C. § 3771(e).

Historical Note	Effective November 1, 2006 (amendment 694). Amended effective November 1, 2024 (amendment 831).

PART B — PLEA AGREEMENTS

Introductory Commentary

Policy statements governing the acceptance of plea agreements under Rule 11(c), Fed. R. Crim. P., are intended to ensure that plea negotiation practices: (1) promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a); and (2) do not perpetuate unwarranted sentencing disparity.

These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge. ~~The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.~~

Historical Note	Effective November 1, 1987. Amended effective November 1, 2004 (amendment 674).

§6B1.1. Plea Agreement Procedure (Policy Statement)

(a) The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. Rule 11(c)(2), Fed. R. Crim. P.

(b) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. Rule 11(c)(3)(B), Fed. R. Crim. P.

(c) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Rule 11(c)(3)(A), Fed. R. Crim. P.

Commentary

This provision parallels the procedural requirements of Rule 11(c), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision regarding whether to accept or reject the plea agreement. Rule 11(c)(3)(A) gives the court discretion to accept or reject the plea agreement immediately or defer a decision pending consideration of the presentence report. Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2004 (amendment 674).

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

(a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

However, a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

(b) In the case of a plea agreement that includes a nonbinding recommendation (Rule 11(c)(1)(B)), the court may accept the recommendation if the court is satisfied either that:

(1) the recommended sentence is within the applicable guideline range; or

(2) (A) the recommended sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.

(c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:

(1) the agreed sentence is within the applicable guideline range; or

(2) (A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity in the statement of reasons form.

Commentary

The court may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed. R. Crim. P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea

agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.

Similarly, the court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence is outside the applicable guideline range for justifiable reasons and those reasons are set forth with specificity in the statement of reasons form. *See* 18 U.S.C. § 3553(c). ~~As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.~~

A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct). ~~Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.~~

The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or *nolo contendere* under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 295); November 1, 1992 (amendment 467); November 1, 1993 (amendment 495); November 1, 2000 (amendment 604); October 27, 2003 (amendment 651); November 1, 2011 (amendment 757).

§6B1.3. Procedure Upon Rejection of a Plea Agreement (Policy Statement)

If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera)—

(a) inform the parties that the court rejects the plea agreement;

(b) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(c) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Rule 11(c)(5), Fed. R. Crim. P.

Commentary

This provision implements the requirements of Rule 11(c)(5). It assures the defendant an opportunity to withdraw his plea when the court has rejected a plea agreement.

Historical Note	Effective November 1, 1987. Amended effective November 1, 2004 (amendment 674).

§6B1.4. Stipulations (Policy Statement)

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

(1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;

(2) not contain misleading facts; and

(3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulation shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.

Commentary

This provision requires that when a plea agreement includes a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the determination of sentence. This provision does not obligate the parties to reach agreement on issues that remain in dispute or to present the court with an appearance of agreement in areas where agreement does not exist. Rather, the overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties. The stipulation should identify all areas of agreement, disagreement and uncertainty that may be relevant to the determination of sentence. Similarly, it is not appropriate for the parties to

stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.

Because of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to pay particular attention to this aspect of the plea agreement procedure as experience under the guidelines develops. *See* Commentary to §6A1.2 (Disclosure of Presentence Report; Issues in Dispute).

Section 6B1.4(d) makes clear that the court is not obliged to accept the stipulation of the parties. Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.

Historical Note	Effective November 1, 1987.

CHAPTER SEVEN

VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A — INTRODUCTION TO CHAPTER SEVEN

1. Authority

Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.

2. Background

(a) Probation.

Prior to the implementation of the federal sentencing guidelines, a court could stay the imposition or execution of sentence and place a defendant on probation. When a court found that a defendant violated a condition of probation, the court could continue probation, with or without extending the term or modifying the conditions, or revoke probation and either impose the term of imprisonment previously stayed, or, where no term of imprisonment had originally been imposed, impose any term of imprisonment that was available at the initial sentencing.

The statutory authority to "suspend" the imposition or execution of sentence in order to impose a term of probation was abolished upon implementation of the sentencing guidelines. Instead, the Sentencing Reform Act recognized probation as a sentence in itself. 18 U.S.C. § 3561. Under current law, if the court finds that a defendant violated a condition of probation, the court may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. § 3565. For certain violations, revocation is required by statute.

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of

initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional "special parole term" previously authorized for certain drug offenses.

The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.) When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

3. Resolution of Major Issues

(a) Guidelines versus Policy Statements.

At the outset, the Commission faced a choice between promulgating guidelines or issuing advisory policy statements for the revocation of probation and supervised release. After considered debate and input from judges, probation officers, and prosecuting and defense attorneys, the Commission decided, for a variety of reasons, initially to issue policy statements. Not only was the policy statement option expressly authorized by statute, but this approach provided greater flexibility to both the Commission and the courts. Unlike guidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to consider complex issues relating to revocation guidelines provided by the policy statement option.

Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself represent recent changes in federal sentencing practices. After an adequate period of evaluation, the Commission intends to promulgate revocation guidelines.

(b) Choice Between Theories.

The Commission debated two different approaches to sanctioning violations of probation and supervised release.

The first option considered a violation resulting from a defendant's failure to follow the court-imposed conditions of probation or supervised release as a "breach of trust." While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct

would not be the primary goal of a revocation sentence. Instead, the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.

The second option considered by the Commission sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct. Under this approach, offense guidelines in Chapters Two and Three of the Guidelines Manual would be applied to any criminal conduct that formed the basis of the violation, after which the criminal history in Chapter Four of the Guidelines Manual would be recalculated to determine the appropriate revocation sentence. This option would also address a violation not constituting a criminal offense.

After lengthy consideration, the Commission adopted an approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

The Commission adopted this approach for a variety of reasons. First, although the Commission found desirable several aspects of the second option that provided for a detailed revocation guideline system similar to that applied at the initial sentencing, extensive testing proved it to be impractical. In particular, with regard to new criminal conduct that constituted a violation of state or local law, working groups expert in the functioning of federal criminal law noted that it would be difficult in many instances for the court or the parties to obtain the information necessary to apply properly the guidelines to this new conduct. The potential unavailability of information and witnesses necessary for a determination of specific offense characteristics or other guideline adjustments could create questions about the accuracy of factual findings concerning the existence of those factors.

In addition, the Commission rejected the second option because that option was inconsistent with its views that the court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct, and that, as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct. In contrast, the second option would have the revocation court substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct and would provide for the punishment imposed upon revocation to run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct.

Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense

characteristics, the Commission felt that it was undesirable at this time to develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation. Indeed, with the relatively low ceilings set by statute, revocation policy statements that attempted to delineate with great particularity the gradations of conduct leading to revocation would frequently result in a sentence at the statutory maximum penalty.

Accordingly, the Commission determined that revocation policy statements that provided for three broad grades of violations would permit proportionally longer terms for more serious violations and thereby would address adequately concerns about proportionality, without creating the problems inherent in the second option.

4. The Basic Approach

The revocation policy statements categorize violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations. The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, fix the applicable sentencing range.

The Commission has elected to develop a single set of policy statements for revocation of both probation and supervised release. In reviewing the relevant literature, the Commission determined that the purpose of supervision for probation and supervised release should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Although there was considerable debate as to whether the sanction imposed upon revocation of probation should be different from that imposed upon revocation of supervised release, the Commission has initially concluded that a single set of policy statements is appropriate.

5. A Concluding Note

The Commission views these policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission expects to issue revocation guidelines after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements.

In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.

Historical Note	Effective November 1, 1990 (amendment 362). Amended effective November 1, 2002 (amendment 646); November 1, 2009 (amendment 733); November 1, 2023 (amendment 824).

§§7A1.1 – 7A1.4 [Deleted]

Historical Note	Sections 7A1.1 (Reporting of Violations of Probation and Supervised Release), 7A1.2 (Revocation of Probation), 7A1.3 (Revocation of Supervised Release), and 7A1.4 (No Credit for Time Under Supervision), effective November 1, 1987, were deleted as part of an overall revision of this chapter effective November 1, 1990 (amendment 362).

PART B — PROBATION AND SUPERVISED RELEASE VIOLATIONS

Introductory Commentary

The policy statements in this chapter seek to prescribe penalties only for the violation of the judicial order imposing supervision. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.

Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.

Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.

This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.

Historical Note	Effective November 1, 1990 (amendment 362).

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) GRADE A VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) GRADE B VIOLATIONS — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) GRADE C VIOLATIONS — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

(b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §§ 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. "***Crime of violence***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

3. "***Controlled substance offense***" is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.

4. A "***firearm or destructive device of a type described in 26 U.S.C. § 5845(a)***" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is under supervision in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

Historical Note	Effective November 1, 1990 (amendment 362). Amended effective November 1, 1992 (amendment 473); November 1, 1997 (amendment 568); November 1, 2002 (amendment 646).

§7B1.2. Reporting of Violations of Probation and Supervised Release (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is

minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

Historical Note	Effective November 1, 1990 (amendment 362).

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.

(2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.

(b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).

(c) In the case of a Grade B or C violation—

(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and

(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e),

provided that at least one-half of the minimum term is satisfied by imprisonment.

(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

(g) (1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Commentary

Application Notes:

1. Revocation of probation or supervised release generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on supervision after a finding of violation, again violates the conditions of his supervision.

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding. **Example**: A defendant, who was in pretrial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4–10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.

4. Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.

5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(10). Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).

Historical Note	Effective November 1, 1990 (amendment 362). Amended effective November 1, 1991 (amendment 427); November 1, 1995 (amendment 533); November 1, 2002 (amendment 646); November 1, 2004 (amendment 664); November 1, 2009 (amendment 733).

§7B1.4. Term of Imprisonment (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table
(in months of imprisonment)

Grade of Violation	Criminal History Category* I	II	III	IV	V	VI
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A	**(1)** Except as provided in subdivision (2) below:					
	12–18	15–21	18–24	24–30	30–37	33–41
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
	24–30	27–33	30–37	37–46	46–57	51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

(b) *Provided*, that—

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence—

(A) is not greater than the maximum term of imprisonment authorized by statute; and

(B) is not less than any minimum term of imprisonment required by statute.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

~~2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.~~

~~3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.~~

~~4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.~~

~~5~~2. Upon a finding that a defendant violated a condition of probation or supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation or supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).

~~6~~3. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).

Historical Note	Effective November 1, 1990 (amendment 362); November 1, 1995 (amendment 533); November 1, 2010 (amendment 747).

§7B1.5. No Credit for Time Under Supervision (Policy Statement)

(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

(c) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.

Historical Note	Effective November 1, 1990 (amendment 362).

CHAPTER EIGHT

SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673).

PART A — GENERAL APPLICATION PRINCIPLES

§8A1.1. Applicability of Chapter Eight

This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor offenses.

Commentary

Application Notes:

1. "***Organization***" means "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

2. The fine guidelines in §§8C2.2 through 8C2.9 apply only to specified types of offenses. The other provisions of this chapter apply to the sentencing of all organizations for all felony and Class A misdemeanor offenses. For example, the restitution and probation provisions in Parts B and D of this chapter apply to the sentencing of an organization, even if the fine guidelines in §§8C2.2 through 8C2.9 do not apply.

Historical Note	Effective November 1, 1991 (amendment 422).

§8A1.2. Application Instructions — Organizations

(a) Determine from Part B, Subpart 1 (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.

(b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

(1) If the organization operated primarily for a criminal purpose or primarily by criminal means, apply §8C1.1 (Determining the Fine — Criminal Purpose Organizations).

(2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

(A) Refer to §8C2.2 (Preliminary Determination of Inability to Pay Fine) to determine whether an abbreviated determination of the guideline fine range may be warranted.

(B) Apply §8C2.3 (Offense Level) to determine the offense level from Chapter Two (Offense Conduct) and Chapter Three, Part D (Multiple Counts).

(C) Apply §8C2.4 (Base Fine) to determine the base fine.

(D) Apply §8C2.5 (Culpability Score) to determine the culpability score. To determine whether the organization had an effective compliance and ethics program for purposes of §8C2.5(f), apply §8B2.1 (Effective Compliance and Ethics Program).

(E) Apply §8C2.6 (Minimum and Maximum Multipliers) to determine the minimum and maximum multipliers corresponding to the culpability score.

(F) Apply §8C2.7 (Guideline Fine Range — Organizations) to determine the minimum and maximum of the guideline fine range.

(G) Refer to §8C2.8 (Determining the Fine Within the Range) to determine the amount of the fine within the applicable guideline range.

(H) Apply §8C2.9 (Disgorgement) to determine whether an increase to the fine is required.

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), apply §8C2.10 (Determining the Fine for Other Counts).

(3) Apply the provisions relating to the implementation of the sentence of a fine in Part C, Subpart 3 (Implementing the Sentence of a Fine).

(4) ~~For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range).~~ Determine whether a sentence below the otherwise applicable guideline range is appropriate upon motion of the government pursuant to §8C4.1 (Substantial Assistance to Authorities — Organizations (Policy Statement)).

(5) Consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a).

(c) Determine from Part D (Organizational Probation) the sentencing requirements and options relating to probation.

(d) Determine from Part E (Special Assessments, Forfeitures, and Costs) the sentencing requirements relating to special assessments, forfeitures, and costs.

Commentary

Application Notes:

1. Determinations under this chapter are to be based upon the facts and information specified in the applicable guideline. Determinations that reference other chapters are to be made under the standards applicable to determinations under those chapters.

2. The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), ~~and~~ E (Acceptance of Responsibility), and F (Early Disposition Program) do not apply. The provisions of Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; *e.g.*, the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.

3. The following are definitions of terms used frequently in this chapter:

   (A) "***Offense***" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "***instant***" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, an offense before a state court involving the same underlying conduct).

   (B) "***High-level personnel of the organization***" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. "***High-level personnel of a unit of the organization***" is defined in the Commentary to §8C2.5 (Culpability Score).

   (C) "***Substantial authority personnel***" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (*e.g.*, a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (*e.g.*, an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

   (D) "***Agent***" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

   (E) An individual "***condoned***" an offense if the individual knew of the offense and did not take reasonable steps to prevent or terminate the offense.

(F) "***Similar misconduct***" means prior conduct that is similar in nature to the conduct underlying the instant offense, without regard to whether or not such conduct violated the same statutory provision. For example, prior Medicare fraud would be misconduct similar to an instant offense involving another type of fraud.

(G) "***Criminal adjudication***" means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.

(H) "***Pecuniary gain***" is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings. For example, an offense involving odometer tampering can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the automobiles appeared to have less mileage, *i.e.*, the difference between the price received or expected for the automobiles with the apparent mileage and the fair market value of the automobiles with the actual mileage. An offense involving defense procurement fraud related to defective product testing can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved because the product was not tested in the required manner.

(I) "***Pecuniary loss***" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). *See* §2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1, and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).

(J) An individual was "***willfully ignorant of the offense***" if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1997 (amendment 546); November 1, 2001 (amendment 617); November 1, 2004 (amendment 673); November 1, 2010 (amendment 747); November 1, 2011 (amendment 758); November 1, 2023 (amendment 824); November 1, 2024 (amendment 827).

PART B — REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673).

1. REMEDYING HARM FROM CRIMINAL CONDUCT

Historical Note	Effective November 1, 2004 (amendment 673).

Introductory Commentary

As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense.

Historical Note	Effective November 1, 1991 (amendment 422).

§8B1.1. Restitution — Organizations

(a) In the case of an identifiable victim, the court shall—

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution

imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. *See* 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §8B1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Background: Section 3553(a)(7) of title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1997 (amendment 571); November 1, 2023 (amendment 824).

§8B1.2. Remedial Orders — Organizations (Policy Statement)

(a) To the extent not addressed under §8B1.1 (Restitution — Organizations), a remedial order imposed as a condition of probation may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

(b) If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm.

Commentary

Background: The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense, *e.g.*, a product recall for a food and drug violation or a clean-up order for an environmental violation. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency, *e.g.*, the Environmental Protection Agency or the Food and Drug Administration, may have authority to order remedial measures. In such cases, a remedial order by the court may not be necessary. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

Historical Note	Effective November 1, 1991 (amendment 422).

§8B1.3. Community Service — Organizations (Policy Statement)

Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.

Commentary

Background: An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Historical Note	Effective November 1, 1991 (amendment 422).

§8B1.4. Order of Notice to Victims — Organizations

Apply §5F1.4 (Order of Notice to Victims).

Historical Note	Effective November 1, 1991 (amendment 422).

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2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note	Effective November 1, 2004 (amendment 673).

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation — Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the

implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. **Definitions.**—For purposes of this guideline:

"***Compliance and ethics program***" means a program designed to prevent and detect criminal conduct.

"***Governing authority***" means (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"***High-level personnel of the organization***" and "***substantial authority personnel***" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions — Organizations).

"***Standards and procedures***" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. **Factors to Consider in Meeting Requirements of this Guideline.—**

(A) **In General.**—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) **Applicable Governmental Regulation and Industry Practice.**—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) **The Size of the Organization.**—

(i) **In General.**—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) **Large Organizations.**—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) **Small Organizations.**—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) **Recurrence of Similar Misconduct.**—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subparagraph, "***similar misconduct***" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions — Organizations).

3. **Application of Subsection (b)(2).**—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually,

give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. **Application of Subsection (b)(3).—**

(A) **Consistency with Other Law.—**Nothing in subsection (b)(3) is intended to require conduct inconsistent with any federal, state, or local law, including any law governing employment or hiring practices.

(B) **Implementation.—**In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (*i.e.*, other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. **Application of Subsection (b)(6).—**Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

6. **Application of Subsection (b)(7).—**Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications.

7. **Application of Subsection (c).—**To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that criminal conduct will occur, including assessing the following:

(i) The nature and seriousness of such criminal conduct.

(ii) The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For

example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.

(iii) The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subparagraph (A) of this note as most serious, and most likely, to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(5) of the Sarbanes–Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

Historical Note	Effective November 1, 2004 (amendment 673). Amended effective November 1, 2010 (amendment 744); November 1, 2011 (amendment 758); November 1, 2013 (amendment 778); November 1, 2023 (amendment 824); November 1, 2024 (amendment 831).

PART C — FINES

1. DETERMINING THE FINE — CRIMINAL PURPOSE ORGANIZATIONS

§8C1.1. Determining the Fine — Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets. When this section applies, Subpart 2 (Determining the Fine — Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply.

Commentary

Application Note:

1. "***Net assets***," as used in this section, means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.

Background: This guideline addresses the case in which the court, based upon an examination of the nature and circumstances of the offense and the history and characteristics of the organization, determines that the organization was operated primarily for a criminal purpose (*e.g.*, a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance) or operated primarily by criminal means (*e.g.*, a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste). In such a case, the fine shall be set at an amount sufficient to remove all of the organization's net assets. If the extent of the assets of the organization is unknown, the maximum fine authorized by statute should be imposed, absent innocent bona fide creditors.

Historical Note	Effective November 1, 1991 (amendment 422).

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2. DETERMINING THE FINE — OTHER ORGANIZATIONS

§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

(a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2;
§§2D1.7, 2D3.1, 2D3.2;

§§2E3.1, 2E4.1, 2E5.1, 2E5.3;
§2G3.1;
§§2K1.1, 2K2.1;
§2L1.1;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1; or

(b) §§2E1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, with respect to cases in which the offense level for the underlying offense is determined under one of the guideline sections listed in subsection (a) above.

Commentary

Application Notes:

1. If the Chapter Two offense guideline for a count is listed in subsection (a) or (b) above, and the applicable guideline results in the determination of the offense level by use of one of the listed guidelines, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, §§8C2.2 through 8C2.9 apply to an offense under §2K2.1 (an offense guideline listed in subsection (a)), unless the cross reference in that guideline requires the offense level to be determined under an offense guideline section not listed in subsection (a).

2. If the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) above, but the applicable guideline results in the determination of the offense level by use of a listed guideline, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2N2.1 (an offense guideline not listed in subsection (a)) establishes §2B1.1 (Theft, Property Destruction, and Fraud) as the applicable offense guideline (an offense guideline listed in subsection (a)), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The fine guidelines of this subpart apply only to offenses covered by the guideline sections set forth in subsection (a) above. For example, the provisions of §§8C2.2 through 8C2.9 do not apply to counts for which the applicable guideline offense level is determined under Chapter Two, Part Q (Offenses Involving the Environment). For such cases, §8C2.10 (Determining the Fine for Other Counts) is applicable.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1992 (amendment 453); November 1, 1993 (amendment 496); November 1, 2001 (amendments 617, 619, and 634); November 1, 2005 (amendment 679); November 1, 2018 (amendment 813).

§8C2.2. Preliminary Determination of Inability to Pay Fine

(a) Where it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1 (Restitution — Organizations), a determination of

the guideline fine range is unnecessary because, pursuant to §8C3.3(a), no fine would be imposed.

(b) Where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range (*see* §§8C2.3 through 8C2.7) that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay).

Commentary

Application Notes:

1. In a case of a determination under subsection (a), a statement that "the guideline fine range was not determined because it is readily ascertainable that the defendant cannot and is not likely to become able to pay restitution" is recommended.

2. In a case of a determination under subsection (b), a statement that "no precise determination of the guideline fine range is required because it is readily ascertainable that the defendant cannot and is not likely to become able to pay the minimum of the guideline fine range" is recommended.

Background: Many organizational defendants lack the ability to pay restitution. In addition, many organizational defendants who may be able to pay restitution lack the ability to pay the minimum fine called for by §8C2.7(a). In such cases, a complete determination of the guideline fine range may be a needless exercise. This section provides for an abbreviated determination of the guideline fine range that can be applied where it is readily ascertainable that the fine within the guideline fine range determined under §8C2.7 (Guideline Fine Range — Organizations) would be reduced under §8C3.3 (Reduction of Fine Based on Inability to Pay).

Historical Note	Effective November 1, 1991 (amendment 422).

§8C2.3. Offense Level

(a) For each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline.

(b) Where there is more than one such count, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level.

Commentary

Application Notes:

1. In determining the offense level under this section, "***defendant***," as used in Chapter Two, includes any agent of the organization for whose conduct the organization is criminally responsible.

2. In determining the offense level under this section, apply the provisions of §§1B1.2 through 1B1.8. Do not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction and Related Adjustments), ~~and~~ E (Acceptance of Responsibility), and F (Early Disposition Program).

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2011 (amendment 758).

§8C2.4. Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.

(c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, *i.e.*, gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) OFFENSE LEVEL FINE TABLE

Offense Level	Amount
6 or less	$8,500
7	$15,000
8	$15,000
9	$25,000
10	$35,000
11	$50,000
12	$70,000
13	$100,000

14	$150,000
15	$200,000
16	$300,000
17	$450,000
18	$600,000
19	$850,000
20	$1,000,000
21	$1,500,000
22	$2,000,000
23	$3,000,000
24	$3,500,000
25	$5,000,000
26	$6,500,000
27	$8,500,000
28	$10,000,000
29	$15,000,000
30	$20,000,000
31	$25,000,000
32	$30,000,000
33	$40,000,000
34	$50,000,000
35	$65,000,000
36	$80,000,000
37	$100,000,000
38 or more	$150,000,000.

(e) Special Instruction

(1) For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than the offense level fine table set forth in subsection (d) above.

Commentary

Application Notes:

1. "***Pecuniary gain***," "***pecuniary loss***," and "***offense***" are defined in the Commentary to §8A1.2 (Application Instructions — Organizations). Note that subsections (a)(2) and (a)(3) contain certain limitations as to the use of pecuniary gain and pecuniary loss in determining the base fine. Under subsection (a)(2), the pecuniary gain used to determine the base fine is the pecuniary gain to the organization from the offense. Under subsection (a)(3), the pecuniary loss used to determine the base fine is the pecuniary loss from the offense caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly.

2. Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. *See* Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.

3. In a case of an attempted offense or a conspiracy to commit an offense, pecuniary loss and pecuniary gain are to be determined in accordance with the principles stated in §2X1.1 (Attempt, Solicitation, or Conspiracy).

4. In a case involving multiple participants (*i.e.*, multiple organizations, or the organization and individual(s) unassociated with the organization), the applicable offense level is to be determined without regard to apportionment of the gain from or loss caused by the offense. *See* §1B1.3 (Relevant Conduct). However, if the base fine is determined under subsections (a)(2) or (a)(3), the court may, as appropriate, apportion gain or loss considering the defendant's relative culpability and other pertinent factors. Note also that under §2R1.1(d)(1), the volume of commerce, which is used in determining a proxy for loss under §8C2.4(a)(3), is limited to the volume of commerce attributable to the defendant.

5. Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); and 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, *e.g.*, price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 2001 (amendment 634); November 1, 2004 (amendments 666 and 673); November 1, 2015 (amendment 791).

§8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) INVOLVEMENT IN OR TOLERANCE OF CRIMINAL ACTIVITY

If more than one applies, use the greatest:

(1) If—

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If—

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If—

(A) the organization had 200 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) PRIOR HISTORY

If more than one applies, use the greater:

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a crim-

inal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) VIOLATION OF AN ORDER

If more than one applies, use the greater:

(1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, *i.e.*, misconduct similar to that for which it was placed on probation, add **2** points; or

(2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) OBSTRUCTION OF JUSTICE

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel

of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

(C) Subparagraphs (A) and (B) shall not apply if—

(i) the individual or individuals with operational responsibility for the compliance and ethics program (*see* §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (*e.g.*, an audit committee of the board of directors);

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) SELF-REPORTING, COOPERATION, AND ACCEPTANCE OF RESPONSIBILITY

If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

Commentary

Application Notes:

1. **Definitions.—**For purposes of this guideline, "***condoned***", "***criminal adjudication***", "***similar misconduct***", "***substantial authority personnel***", and "***willfully ignorant of the offense***" have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions — Organizations).

   "***Small Organization***", for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.

2. For purposes of subsection (b), "***unit of the organization***" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."

3. "***High-level personnel of the organization***" is defined in the Commentary to §8A1.2 (Application Instructions — Organizations). With respect to a unit with 200 or more employees, "***high-level personnel of a unit of the organization***" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).

4. Pervasiveness under subsection (b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if an offense were committed in an organization with 1,000 employees but the tolerance of the offense was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the offense was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the offense, four points (rather than three) would be added under subsection (b)(2).

5. A "***separately managed line of business***," as used in subsections (c) and (d), is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business. Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or criminal record of the separately managed line of business involved in the

instant offense is to be used. Under subsection (d), in the context of an organization with separately managed lines of business, in making the determination whether a violation of a condition of probation involved engaging in similar misconduct, only the prior misconduct of the separately managed line of business involved in the instant offense is to be considered.

6. Under subsection (c), in determining the prior history of an organization or separately managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization shall not be attributed to the acquiring organization.

7. Under subsections (c)(1)(B) and (c)(2)(B), the civil or administrative adjudication(s) must have occurred within the specified period (ten or five years) of the instant offense.

8. Adjust the culpability score for the factors listed in subsection (e) whether or not the offense guideline incorporates that factor, or that factor is inherent in the offense.

9. Subsection (e) applies where the obstruction is committed on behalf of the organization; it does not apply where an individual or individuals have attempted to conceal their misconduct from the organization. The Commentary to §3C1.1 (Obstructing or Impeding the Administration of Justice) provides guidance regarding the types of conduct that constitute obstruction.

10. Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.

11. For purposes of subsection (f)(3)(C)(i), an individual has "***direct reporting obligations***" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.

12. "***Appropriate governmental authorities***," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.

13. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor

law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.

14. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.

15. In making a determination with respect to subsection (g), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673); November 1, 2006 (amendment 695); November 1, 2010 (amendment 744); November 1, 2023 (amendment 824).

§8C2.6. Minimum and Maximum Multipliers

Using the culpability score from §8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM MULTIPLIER
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

Commentary

Application Note:

1. A special instruction for fines in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) sets a floor for minimum and maximum multipliers in cases covered by that guideline.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C2.7. Guideline Fine Range — Organizations

(a) The minimum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable minimum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

(b) The maximum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable maximum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

Historical Note	Effective November 1, 1991 (amendment 422).

§8C2.8. Determining the Fine Within the Range (Policy Statement)

(a) In determining the amount of the fine within the applicable guideline range, the court should consider:

(1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

(2) the organization's role in the offense;

(3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;

(4) any nonpecuniary loss caused or threatened by the offense;

(5) whether the offense involved a vulnerable victim;

(6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;

(7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c);

(8) any culpability score under §8C2.5 (Culpability Score) higher than **10** or lower than **0**;

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score);

(10) any factor listed in 18 U.S.C. § 3572(a); and

(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).

(b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score.

Commentary

Application Notes:

1. Subsection (a)(2) provides that the court, in setting the fine within the guideline fine range, should consider the organization's role in the offense. This consideration is particularly appropriate if the guideline fine range does not take the organization's role in the offense into account.

For example, the guideline fine range in an antitrust case does not take into consideration whether the organization was an organizer or leader of the conspiracy. A higher fine within the guideline fine range ordinarily will be appropriate for an organization that takes a leading role in such an offense.

2. Subsection (a)(3) provides that the court, in setting the fine within the guideline fine range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. As a general rule, collateral consequences that merely make victims whole provide no basis for reducing the fine within the guideline range. If criminal and civil sanctions are unlikely to make victims whole, this may provide a basis for a higher fine within the guideline fine range. If punitive collateral sanctions have been or will be imposed on the organization, this may provide a basis for a lower fine within the guideline fine range.

3. Subsection (a)(4) provides that the court, in setting the fine within the guideline fine range, should consider any nonpecuniary loss caused or threatened by the offense. To the extent that nonpecuniary loss caused or threatened (*e.g.*, loss of or threat to human life; psychological injury; threat to national security) by the offense is not adequately considered in setting the guideline fine range, this factor provides a basis for a higher fine within the range. This factor is more likely to be applicable where the guideline fine range is determined by pecuniary loss or gain, rather than by offense level, because the Chapter Two offense levels frequently take actual or threatened nonpecuniary loss into account.

4. Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or within high-level personnel of a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization.

5. Subsection (a)(7) provides that the court, in setting the fine within the guideline fine range, should consider any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c). The civil and criminal misconduct counted under §8C2.5(c) increases the guideline fine range. Civil or criminal misconduct other than that counted under §8C2.5(c) may provide a basis for a higher fine within the range. ~~In a case involving a pattern of illegality, an upward departure may be warranted.~~

6. Subsection (a)(8) provides that the court, in setting the fine within the guideline fine range, should consider any culpability score higher than ten or lower than zero. As the culpability score increases above ten, this may provide a basis for a higher fine within the range. Similarly, as the culpability score decreases below zero, this may provide a basis for a lower fine within the range.

7. Under subsection (b), the court, in determining the fine within the range, may consider any factor that it considered in determining the range. This allows for courts to differentiate between cases that have the same offense level but differ in seriousness (*e.g.*, two fraud cases at offense level 12, one resulting in a loss of $21,000, the other $40,000). Similarly, this allows for courts to differentiate between two cases that have the same aggravating factors, but in which those factors vary in their intensity (*e.g.*, two cases with upward adjustments to the culpability score under §8C2.5(c)(2) (prior criminal adjudications within 5 years of the commencement of the instant offense, one involving a single conviction, the other involving two or more convictions)).

Background: Subsection (a) includes factors that the court is required to consider under 18 U.S.C. §§ 3553(a) and 3572(a) as well as additional factors that the Commission has determined may be relevant in a particular case. A number of factors required for consideration under 18 U.S.C. § 3572(a)

(*e.g.*, pecuniary loss, the size of the organization) are used under the fine guidelines in this subpart to determine the fine range, and therefore are not specifically set out again in subsection (a) of this guideline. ~~In unusual cases, factors listed in this section may provide a basis for departure~~.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673); November 1, 2015 (amendment 797).

§8C2.9. Disgorgement

The court shall add to the fine determined under §8C2.8 (Determining the Fine Within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.

Commentary

Application Note:

1. This section is designed to ensure that the amount of any gain that has not and will not be taken from the organization for remedial purposes will be added to the fine. This section typically will apply in cases in which the organization has received gain from an offense but restitution or remedial efforts will not be required because the offense did not result in harm to identifiable victims, *e.g.*, money laundering, obscenity, and regulatory reporting offenses. Money spent or to be spent to remedy the adverse effects of the offense, *e.g.*, the cost to retrofit defective products, should be considered as disgorged gain. If the cost of remedial efforts made or to be made by the organization equals or exceeds the gain from the offense, this section will not apply.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C2.10. Determining the Fine for Other Counts

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 (Determining the Fine Within the Range) and §8C2.9 (Disgorgement).

Commentary

Background: The Commission has not promulgated guidelines governing the setting of fines for counts not covered by §8C2.1 (Applicability of Fine Guidelines). For such counts, the court should determine the appropriate fine based on the general statutory provisions governing sentencing. In cases that have a count or counts not covered by the guidelines in addition to a count or counts covered by the guidelines, the court shall apply the fine guidelines for the count(s) covered by the guidelines, and add any additional amount to the fine, as appropriate, for the count(s) not covered by the guidelines.

Historical Note	Effective November 1, 1991 (amendment 422).

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3. IMPLEMENTING THE SENTENCE OF A FINE

§8C3.1. Imposing a Fine

(a) Except to the extent restricted by the maximum fine authorized by statute or any minimum fine required by statute, the fine or fine range shall be that determined under §8C1.1 (Determining the Fine — Criminal Purpose Organizations); §8C2.7 (Guideline Fine Range — Organizations) and §8C2.9 (Disgorgement); or §8C2.10 (Determining the Fine for Other Counts), as appropriate.

(b) Where the minimum guideline fine is greater than the maximum fine authorized by statute, the maximum fine authorized by statute shall be the guideline fine.

(c) Where the maximum guideline fine is less than a minimum fine required by statute, the minimum fine required by statute shall be the guideline fine.

Commentary

Background: This section sets forth the interaction of the fines or fine ranges determined under this chapter with the maximum fine authorized by statute and any minimum fine required by statute for the count or counts of conviction. The general statutory provisions governing a sentence of a fine are set forth in 18 U.S.C. § 3571.

When the organization is convicted of multiple counts, the maximum fine authorized by statute may increase. For example, in the case of an organization convicted of three felony counts related to a $200,000 fraud, the maximum fine authorized by statute will be $500,000 on each count, for an aggregate maximum authorized fine of $1,500,000.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C3.2. Payment of the Fine — Organizations

(a) If the defendant operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine shall be required.

(b) In any other case, immediate payment of the fine shall be required unless the court finds that the organization is financially unable to make immediate payment or that such payment would pose an undue burden on the organization. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, either by requiring payment on a date certain or by establishing an installment schedule.

Commentary

Application Note:

1. When the court permits other than immediate payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made. 18 U.S.C. § 3572(d).

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2023 (amendment 824).

§8C3.3. Reduction of Fine Based on Inability to Pay

(a) The court shall reduce the fine below that otherwise required by §8C1.1 (Determining the Fine — Criminal Purpose Organizations), or §8C2.7 (Guideline Fine Range — Organizations) and §8C2.9 (Disgorgement), to the extent that imposition of such fine would impair the ability of the organization to make restitution to victims.

(b) The court may impose a fine below that otherwise required by §8C2.7 (Guideline Fine Range — Organizations) and §8C2.9 (Disgorgement) if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by §8C2.7 (Guideline Fine Range — Organizations) and §8C2.9 (Disgorgement).

Provided, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Commentary

Application Note:

1. For purposes of this section, an organization is not able to pay the minimum fine if, even with an installment schedule under §8C3.2 (Payment of the Fine — Organizations), the payment of that fine would substantially jeopardize the continued existence of the organization.

Background: Subsection (a) carries out the requirement in 18 U.S.C. § 3572(b) that the court impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the organization to make restitution for the offense; however, this section does not authorize a criminal purpose organization to remain in business in order to pay restitution.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2023 (amendment 824).

§8C3.4. Fines Paid by Owners of Closely Held Organizations

The court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct for which the organization is being sentenced. The amount of such offset shall not exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals' total percentage interest in the organization.

Commentary

Application Notes:

1. For purposes of this section, an organization is closely held, regardless of its size, when relatively few individuals own it. In order for an organization to be closely held, ownership and management need not completely overlap.

2. This section does not apply to a fine imposed upon an individual that arises out of offense conduct different from that for which the organization is being sentenced.

Background: For practical purposes, most closely held organizations are the alter egos of their owner-managers. In the case of criminal conduct by a closely held corporation, the organization and the culpable individual(s) both may be convicted. As a general rule in such cases, appropriate punishment may be achieved by offsetting the fine imposed upon the organization by an amount that reflects the percentage ownership interest of the sentenced individuals and the magnitude of the fines imposed upon those individuals. For example, an organization is owned by five individuals, each of whom has a twenty percent interest; three of the individuals are convicted; and the combined fines imposed on those three equals $100,000. In this example, the fine imposed upon the organization may be offset by up to 60 percent of their combined fine amounts, *i.e.*, by $60,000.

Historical Note	Effective November 1, 1991 (amendment 422).

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4. ~~DEPARTURES FROM THE GUIDELINE FINE RANGE~~SUBSTANTIAL ASSISTANCE TO AUTHORITIES

~~Introductory Commentary~~

~~The statutory provisions governing departures are set forth in 18 U.S.C. § 3553(b). Departure may be warranted 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." This subpart sets~~

~~forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.~~

~~To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.~~

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§8C4.1. Substantial Assistance to Authorities — Organizations (Policy Statement)

(a) Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant who has committed an offense, ~~the court may depart from the guidelines~~a fine that is below the otherwise applicable guideline fine range may be appropriate.

(b) The appropriate reduction shall be determined by the court for reasons stated on the record that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the organization's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the nature and extent of the organization's assistance; and

(3) the timeliness of the organization's assistance.

Commentary

Application Note:

1. ~~Departure~~ Fine reduction under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C4.2. Risk of Death or Bodily Injury (Policy Statement)

~~If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.~~

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§8C4.3. Threat to National Security (Policy Statement)

~~If the offense constituted a threat to national security, an upward departure may be warranted.~~

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§8C4.4. Threat to the Environment (Policy Statement)

~~If the offense presented a threat to the environment, an upward departure may be warranted.~~

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§8C4.5. Threat to a Market (Policy Statement)

~~If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (*e.g.*, a financial market, a commodities market, or a market for consumer goods) and public markets (*e.g.*, government contracting).~~

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§8C4.6. Official Corruption (Policy Statement)

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C4.7. Public Entity (Policy Statement)

If the organization is a public entity, a downward departure may be warranted.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C4.8. Members or Beneficiaries of the Organization as Victims (Policy Statement)

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C4.9. Remedial Costs that Greatly Exceed Gain (Policy Statement)

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within

high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

Historical Note	Effective November 1, 1991 (amendment 422).

§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization's culpability score is reduced under §8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673).

§8C4.11. Exceptional Organizational Culpability (Policy Statement)

If the organization's culpability score is greater than **10**, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under §8C2.4(a)(1), §8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under §8C2.4(a)(2).

~~*Historical Note*~~	~~Effective November 1, 1991 (amendment 422).~~

§§8C4.2 – 8C4.11 [Deleted]

Historical Note	Sections 8C4.2 (Risk of Death or Bodily Injury (Policy Statement)), 8C4.3 (Threat to National Security (Policy Statement)), 8C4.4 (Threat to the Environment (Policy Statement)), 8C4.5 (Threat to a Market (Policy Statement)), 8C4.6 (Official Corruption (Policy Statement)), 8C4.7 (Public Entity (Policy Statement)), 8C4.8 (Members or Beneficiaries of the Organization as Victims (Policy Statement)), 8C4.9 (Remedial Costs that Greatly Exceed Gain (Policy Statement)), 8C4.10 (Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)), and 8C4.11 (Exceptional Organizational Culpability (Policy Statement)), effective November 1, 1991 (amendment 422), were deleted effective November 1, 2025 (amendment ---).

PART D — ORGANIZATIONAL PROBATION

Introductory Commentary

Section 8D1.1 sets forth the circumstances under which a sentence to a term of probation is required. Sections 8D1.2 through 8D1.4, and 8F1.1, address the length of the probation term, conditions of probation, and violations of probation conditions.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673).

§8D1.1. Imposition of Probation — Organizations

(a) The court shall order a term of probation:

(1) if such sentence is necessary to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3);

(2) if the organization is sentenced to pay a monetary penalty (*e.g.*, restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;

(4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) if the sentence imposed upon the organization does not include a fine; or

(8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Commentary

Background: Under 18 U.S.C. § 3561(a), an organization may be sentenced to a term of probation. Under 18 U.S.C. § 3551(c), imposition of a term of probation is required if the sentence imposed upon the organization does not include a fine.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673).

§8D1.2. Term of Probation — Organizations

(a) When a sentence of probation is imposed—

(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.

(2) In any other case, the term of probation shall be not more than five years.

Commentary

Application Note:

1. Within the limits set by the guidelines, the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation. The terms of probation set forth in this section are those provided in 18 U.S.C. § 3561(c).

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2013 (amendment 778).

§8D1.3. Conditions of Probation — Organizations

(a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation.

(b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one

of the following: (1) restitution or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1997 (amendment 569); November 1, 2009 (amendment 733).

§8D1.4. Recommended Conditions of Probation — Organizations (Policy Statement)

(a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

(b) If probation is imposed under §8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in paragraph (1). Among other things, reports under subparagraph (B) shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(5) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(6) The organization shall make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

Commentary

Application Note:

1. In determining the conditions to be imposed when probation is ordered under §8D1.1, the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.

   Periodic reports submitted in accordance with subsection (b)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 2004 (amendment 673); November 1, 2010 (amendment 744).

§8D1.5. [Deleted]

Historical Note	Section 8D1.5 (Violations of Conditions of Probation – Organizations (Policy Statement)), effective November 1, 1991 (amendment 422), was moved to §8F1.1 effective November 1, 2004 (amendment 673).

PART E — SPECIAL ASSESSMENTS, FORFEITURES, AND COSTS

§8E1.1. Special Assessments — Organizations

A special assessment must be imposed on an organization in the amount prescribed by statute.

Commentary

Application Notes:

1. This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. *See* §5E1.3 for special assessments applicable to individuals.

2. The following special assessments are provided by statute (*see* 18 U.S.C. § 3013):

FOR OFFENSES COMMITTED BY ORGANIZATIONS ON OR AFTER APRIL 24, 1996:	
(A)	$400, if convicted of a felony;
(B)	$125, if convicted of a Class A misdemeanor;
(C)	$50, if convicted of a Class B misdemeanor; or
(D)	$25, if convicted of a Class C misdemeanor or an infraction.

FOR OFFENSES COMMITTED BY ORGANIZATIONS ON OR AFTER NOVEMBER 18, 1988 BUT PRIOR TO APRIL 24, 1996:	
(E)	$200, if convicted of a felony;
(F)	$125, if convicted of a Class A misdemeanor;
(G)	$50, if convicted of a Class B misdemeanor; or
(H)	$25, if convicted of a Class C misdemeanor or an infraction.

FOR OFFENSES COMMITTED BY ORGANIZATIONS PRIOR TO NOVEMBER 18, 1988:	
(I)	$200, if convicted of a felony;
(J)	$100, if convicted of a misdemeanor.

3. A special assessment is required by statute for each count of conviction.

Background: Section 3013 of title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

Historical Note	Effective November 1, 1991 (amendment 422). Amended effective November 1, 1997 (amendment 573); November 1, 2023 (amendment 824).

§8E1.2. Forfeiture — Organizations

Apply §5E1.4 (Forfeiture).

Historical Note	Effective November 1, 1991 (amendment 422).

§8E1.3. Assessment of Costs — Organizations

As provided in 28 U.S.C. § 1918, the court may order the organization to pay the costs of prosecution. In addition, specific statutory provisions mandate assessment of costs.

Historical Note	Effective November 1, 1991 (amendment 422).

PART F — VIOLATIONS OF PROBATION — ORGANIZATIONS

Historical Note	Effective November 1, 2004 (amendment 673).

§8F1.1. Violations of Conditions of Probation — Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. **Appointment of Master or Trustee.**—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

2. **Conditions of Probation.**—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation — Organizations) and 8D1.4 (Recommended Conditions of Probation — Organizations).

Historical Note	Effective November 1, 2004 (amendment 673).

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STATUTORY INDEX

INTRODUCTION

This index specifies the offense guideline section(s) in Chapter Two (Offense Conduct) applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted. For the rules governing the determination of the offense guideline section(s) from Chapter Two, and for any exceptions to those rules, *see* §1B1.2 (Applicable Guidelines).

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 296 and 297); November 1, 1993 (amendment 496); November 1, 2000 (amendment 591); November 1, 2014 (amendment 781).

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18 U.S.C. § 113(a)(2)	2A2.2, 2A3.2, 2A3.3, 2A3.4
18 U.S.C. § 113(a)(3)	2A2.2
18 U.S.C. § 113(a)(4)	2A2.3
18 U.S.C. § 113(a)(5) (Class A misdemeanor provisions only)	2A2.3
18 U.S.C. § 113(a)(6)	2A2.2
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18 U.S.C. § 113(a)(8)	2A2.2
18 U.S.C. § 113(b)	2A2.2 (for offenses committed prior to September 13, 1994)
18 U.S.C. § 113(c)	2A2.2 (for offenses committed prior to September 13, 1994)
18 U.S.C. § 113(f)	2A2.2 (for offenses committed prior to September 13, 1994)
18 U.S.C. § 114	2A2.2
18 U.S.C. § 115(a)	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A6.1, 2X1.1
18 U.S.C. § 115(b)(1)	2A2.1, 2A2.2, 2A2.3
18 U.S.C. § 115(b)(2)	2A4.1, 2X1.1
18 U.S.C. § 115(b)(3)	2A1.1, 2A1.2, 2A2.1, 2X1.1
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18 U.S.C. § 175	2M6.1
18 U.S.C. § 175b	2M6.1
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18 U.S.C. § 201(b)(1)	2C1.1
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18 U.S.C. § 204	2C1.3
18 U.S.C. § 205	2C1.3
18 U.S.C. § 207	2C1.3
18 U.S.C. § 208	2C1.3
18 U.S.C. § 209	2C1.3
18 U.S.C. § 210	2C1.5
18 U.S.C. § 211	2C1.5
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18 U.S.C. § 440	2C1.3
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18 U.S.C. § 646	2B1.1
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18 U.S.C. § 922(x)(1)	2K2.1
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18 U.S.C. § 924(a)	2K2.1
18 U.S.C. § 924(b)	2K2.1
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18 U.S.C. § 930	2K2.5
18 U.S.C. § 931	2K2.6
18 U.S.C. § 932	2K2.1
18 U.S.C. § 933	2K2.1
18 U.S.C. § 956	2A1.5, 2X1.1
18 U.S.C. § 970(a)	2B1.1, 2K1.4
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18 U.S.C. § 1018	2B1.1
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18 U.S.C. § 1030(a)(3)	2B2.3
18 U.S.C. § 1030(a)(4)	2B1.1
18 U.S.C. § 1030(a)(5)	2B1.1
18 U.S.C. § 1030(a)(6)	2B1.1
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18 U.S.C. § 1035	2B1.1
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18 U.S.C. § 1037	2B1.1
18 U.S.C. § 1038	2A6.1
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18 U.S.C. § 1040	2B1.1
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18 U.S.C. § 1072	2X3.1
18 U.S.C. § 1073	2J1.5, 2J1.6
18 U.S.C. § 1082	2E3.1
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18 U.S.C. § 1170	2B1.5
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18 U.S.C. § 1361	2B1.1, 2B1.5
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18 U.S.C. § 1365(c)	2N1.2
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21 U.S.C. § 846	2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2
21 U.S.C. § 848(a)	2D1.5
21 U.S.C. § 848(b)	2D1.5
21 U.S.C. § 848(e)	2A1.1
21 U.S.C. § 849	2D1.2
21 U.S.C. § 854	2S1.1
21 U.S.C. § 856	2D1.8
21 U.S.C. § 857	2D1.7
21 U.S.C. § 858	2D1.10
21 U.S.C. § 859	2D1.2
21 U.S.C. § 860	2D1.2
21 U.S.C. § 860a	2D1.1
21 U.S.C. § 861	2D1.2
21 U.S.C. § 863	2D1.7
21 U.S.C. § 864	2D1.12
21 U.S.C. § 865	2D1.1, 2D1.11
21 U.S.C. § 952	2D1.1
21 U.S.C. § 953	2D1.1
21 U.S.C. § 954	2D3.2
21 U.S.C. § 955	2D1.1
21 U.S.C. § 955a(a)–(d)	2D1.1
21 U.S.C. § 959	2D1.1, 2D1.11
21 U.S.C. § 960(a),(b)	2D1.1
21 U.S.C. § 960(d)(1),(2)	2D1.11
21 U.S.C. § 960(d)(3),(4)	2D1.11
21 U.S.C. § 960(d)(5)	2D1.13
21 U.S.C. § 960(d)(6)	2D3.1
21 U.S.C. § 960(d)(7)	2D1.11
21 U.S.C. § 960a	2D1.14
21 U.S.C. § 961	2D3.2
21 U.S.C. § 963	2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2
22 U.S.C. § 1980(g)	2B1.1
22 U.S.C. § 2197(n)	2B1.1
22 U.S.C. § 2778	2M5.2
22 U.S.C. § 2780	2M5.2
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22 U.S.C. § 4221	2B1.1
22 U.S.C. § 8512	2M5.1, 2M5.2, 2M5.3
25 U.S.C. § 5306	2B1.1
26 U.S.C. § 5148(1)	2T2.1

26 U.S.C. § 5214(a)(1)	2T2.1
26 U.S.C. § 5273(b)(2)	2T2.1
26 U.S.C. § 5273(c)	2T2.1
26 U.S.C. § 5291(a)	2T2.1, 2T2.2
26 U.S.C. § 5601(a)	2T2.1, 2T2.2
26 U.S.C. § 5602	2T2.1
26 U.S.C. § 5603	2T2.1, 2T2.2
26 U.S.C. § 5604(a)	2T2.1, 2T2.2
26 U.S.C. § 5605	2T2.1, 2T2.2
26 U.S.C. § 5607	2T2.1
26 U.S.C. § 5608	2T2.1
26 U.S.C. § 5661	2T2.1, 2T2.2
26 U.S.C. § 5662	2T2.2
26 U.S.C. § 5671	2T2.1, 2T2.2
26 U.S.C. § 5684	2T2.1
26 U.S.C. § 5685	2K1.3, 2K2.1
26 U.S.C. § 5691(a)	2T2.1
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26 U.S.C. § 5762(a)(1),(2),(4),(5),(6)	2T2.2
26 U.S.C. § 5762(a)(3)	2T2.1
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26 U.S.C. § 7207	2T1.1
26 U.S.C. § 7208	2B1.1
26 U.S.C. § 7210	2J1.1, 2J1.5
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26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1
26 U.S.C. § 7213(a)(1)	2H3.1
26 U.S.C. § 7213(a)(2)	2H3.1
26 U.S.C. § 7213(a)(3)	2H3.1
26 U.S.C. § 7213(a)(5)	2H3.1
26 U.S.C. § 7213(d)	2H3.1
26 U.S.C. § 7213A	2H3.1
26 U.S.C. § 7214	2B1.1, 2C1.1, 2C1.2
26 U.S.C. § 7215	2T1.7
26 U.S.C. § 7216	2H3.1
26 U.S.C. § 7232	2B1.1
26 U.S.C. § 7512(b)	2T1.7
26 U.S.C. § 9012(e)	2B4.1
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28 U.S.C. § 1826(c)	2P1.1
28 U.S.C. § 2902(e)	2P1.1

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29 U.S.C. § 186	2E5.1
29 U.S.C. § 431	2E5.3
29 U.S.C. § 432	2E5.3
29 U.S.C. § 433	2E5.3
29 U.S.C. § 439	2E5.3
29 U.S.C. § 461	2E5.3
29 U.S.C. § 501(c)	2B1.1
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29 U.S.C. § 1851	2H4.2
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30 U.S.C. § 1463	2A2.4
31 U.S.C. § 5311 note (section 329 of the USA PATRIOT Act of 2001)	2C1.1
31 U.S.C. § 5313	2S1.3
31 U.S.C. § 5314	2S1.3
31 U.S.C. § 5316	2S1.3
31 U.S.C. § 5318	2S1.3
31 U.S.C. § 5318A(b)	2S1.3
31 U.S.C. § 5322	2S1.3
31 U.S.C. § 5324	2S1.3
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33 U.S.C. § 403	2Q1.3
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33 U.S.C. § 1319(c)(3)	2Q1.1
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38 U.S.C. § 787	2B1.1
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41 U.S.C. § 2102	2B1.1, 2C1.1
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42 U.S.C. § 261(a)	2D1.1
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42 U.S.C. § 300h-2	2Q1.2
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42 U.S.C. § 1395nn(b)(1)	2B4.1
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42 U.S.C. § 1396h(a)	2B1.1
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42 U.S.C. § 2273	2M6.2
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42 U.S.C. § 2275	2M3.1
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42 U.S.C. § 5157(a)	2B1.1
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42 U.S.C. § 7413(c)(5)	2Q1.1
42 U.S.C. § 9151(2),(3),(4),(5)	2A2.4
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42 U.S.C. § 9603(b)	2Q1.2
42 U.S.C. § 9603(c)	2Q1.2
42 U.S.C. § 9603(d)	2Q1.2
42 U.S.C. § 14905	2B1.1
43 U.S.C. § 1350	2Q1.2
43 U.S.C. § 1733(a) (43 C.F.R. 4140.1(b)(1)(i))	2B2.3
43 U.S.C. § 1816(a)	2Q1.2
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44 U.S.C. § 3572	2H3.1
45 U.S.C. § 359(a)	2B1.1
46 U.S.C. § 1276	2B1.1
46 U.S.C. § 3718(b)	2Q1.2
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46 U.S.C. § 70036(b)	2A2.4
46 U.S.C. App. § 1707a(f)(2)	2B1.1
46 U.S.C. App. § 1903(a)	2D1.1
46 U.S.C. App. § 1903(g)	2D1.1
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47 U.S.C. § 223(a)(1)(C)	2A6.1
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47 U.S.C. § 605	2B5.3, 2H3.1
49 U.S.C. § 121	2B1.1 (for offenses committed prior to July 5, 1994)
49 U.S.C. § 1809(b)	2Q1.2 (for offenses committed prior to July 5, 1994)
49 U.S.C. § 5124	2Q1.2
49 U.S.C. § 11902	2B4.1
49 U.S.C. § 11903	2B1.1
49 U.S.C. § 11904	2B1.1 (2B4.1 for offenses committed prior to January 1, 1996)
49 U.S.C. § 11907(a)	2B4.1 (for offenses committed prior to January 1, 1996)
49 U.S.C. § 11907(b)	2B4.1 (for offenses committed prior to January 1, 1996)
49 U.S.C. § 14103(b)	2B1.1
49 U.S.C. § 14905(b)	2B1.1
49 U.S.C. § 14909	2J1.1, 2J1.5
49 U.S.C. § 14912	2B1.1
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49 U.S.C. § 16102	2B1.1
49 U.S.C. § 16104	2J1.1, 2J1.5
49 U.S.C. § 30170	2B1.1

49 U.S.C. § 31310	2X5.2
49 U.S.C. § 32703	2N3.1
49 U.S.C. § 32704	2N3.1
49 U.S.C. § 32705	2N3.1
49 U.S.C. § 32709(b)	2N3.1
49 U.S.C. § 46308	2A5.2
49 U.S.C. § 46312	2Q1.2
49 U.S.C. § 46317(a)	2B1.1
49 U.S.C. § 46317(b)	2D1.1
49 U.S.C. § 46502(a),(b)	2A5.1, 2X1.1
49 U.S.C. § 46503	2A5.2
49 U.S.C. § 46504	2A5.2
49 U.S.C. § 46505	2K1.5
49 U.S.C. § 46506	2A5.3
49 U.S.C. § 46507	2A6.1
49 U.S.C. § 60123(b)	2B1.1, 2K1.4, 2M2.1, 2M2.3
49 U.S.C. § 60123(d)	2B1.1
49 U.S.C. § 80116	2B1.1
49 U.S.C. § 80501	2B1.1
49 U.S.C. App. § 1687(g)	2B1.1 (for offenses committed prior to July 5, 1994)
50 U.S.C. § 783	2M3.3
50 U.S.C. § 1705	2M5.1, 2M5.2, 2M5.3
50 U.S.C. § 3121	2M3.9
50 U.S.C. § 3811	2M4.1
50 U.S.C. § 3937(e)	2X5.2
50 U.S.C. § 4819	2M5.1
52 U.S.C. § 10307(c)	2H2.1
52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1
52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1
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52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8
52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
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52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 60 and 61); June 15, 1988 (amendments 62 and 63); October 15, 1988 (amendments 64 and 65); November 1, 1989 (amendments 297–301); November 1, 1990 (amendment 359); November 1, 1991 (amendment 421); November 1, 1992 (amendment 468); November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 1996 (amendment 540); November 1, 1997 (amendment 575); November 1, 1998 (amendment 589); November 1, 2000 (amendment 592); May 1, 2001 (amendment 612); November 1, 2001 (amendments 617, 622, 626, 627, 628, 633, and 634); November 1, 2002 (amendments 637, 638, 639, and 646); January 25, 2003 (amendments 647 and 648); November 1, 2003 (amendments 653, 654, 655, 656, 658, and 661); November 1, 2004 (amendments 664, 665, 666, 667, 669, and 674); October 24, 2005 (amendments 675 and 676); November 1, 2005 (amendments 677, 679, and 680); November 1, 2006 (amendments 685, 686, 687, 689, and 690); May 1, 2007 (amendment 697); November 1, 2007 (amendments 699, 700, 701, 703, 704, 705, 707, 708, and 711); February 6, 2008 (amendment 714); November 1, 2008 (amendments 718, 720, 721, 724 and 725); November 1, 2009 (amendments 727, 728, 729, 730, 731, 733, 736, and 737); November 1, 2010 (amendments 743, 745, and 746); November 1, 2011 (amendments 749, 753, and 757); November 1, 2012 (amendments 765 and 769); November 1, 2013 (amendments 772, 773, and 777); November 1, 2014 (amendment 781); November 1, 2015 (amendment 796); November 1, 2016 (amendments 800 and 804); November 1, 2018 (amendments 806, 812, and 813); November 1, 2023 (amendments 815, 816, 819, and 824); November 1, 2024 (amendment 830).

COMMITTEE ON CRIMINAL LAW
of the
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February 3, 2025

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer comment on the proposed Guideline amendments for the 2024-2025 amendment cycle.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues related to the administration of criminal law. The Committee provides comments about amendments proposed by the Sentencing Commission as part of its monitoring role over the workload and operation of probation offices and as part of its ongoing role in examining the fair administration of criminal law. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing

guidelines, including proposals that would increase the flexibility of the Guidelines." [1] The Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible." [2] In the past, the Committee has presented testimony and submitted comments supporting Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments address each of the four categories of amendments proposed by the Commission: Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification of the Three-Step Process.

Discussion

I. Career Offender

The proposed Career Offender amendment seeks to resolve the extensive challenges caused by the current "categorical approach" used to determine whether a prior conviction is a crime of violence or controlled substance offense under §4B1.1.

The Committee supports the Commission's efforts to clarify this guideline. Although any change to the established system would introduce some measure of uncertainty and the potential for new litigation, the proposed amendment appears to provide a workable alternative to the current categorical approach. On crimes of violence, the amendment is consistent with the Committee's previously expressed position to "allow judges to have greater flexibility to most effectively determine, based on the underlying facts, whether a prior state offense is a crime of violence."[3] By asking whether the defendant "engaged in" the use of physical force (among other things) under proposed §4B1.1(b)(1)(A), courts will assess facts rather than parse statutes into often arcane categories.

For controlled substance offenses, the Committee recognizes that the categorical approach has presented many of the same interpretive difficulties in the drug-offense context, too. *See, e.g.*, *United States v. Townsend*, 897 F.3d 66, 72-74 (2d Cir. 2018) (assessing state drug law for divisibility and comparing list of drugs in state law to federal Controlled Substances Act); *see also United States v. Ruth*, 966 F.3d 642, 653-654 (7th Cir. 2020) (describing circuit split on whether to apply categorical approach to controlled substance offenses). There also is inherent difficulty in trying to define controlled substance offenses in a way that uniformly and readily covers

[1] JCUS-SEP 1990, p.69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] Letter from Comm. on Crim. Law of the Jud. Conf. of the U.S. to U.S. Sent'g Comm'n (March 13, 2023), available here.

similar conduct across various state statutes. Also, the Commission's multi-year study of career-offender sentencing showed that defendants who qualified as career offenders based only on drug-trafficking offenses recidivated at a similar rate of *non*-career-offender defendants.[4] The Committee thus does not oppose the proposal to limit the provision to certain federal drug offenses. Judges can continue to account for repeat state drug convictions as part of the evaluation of criminal history category and under the 18 U.S.C. § 3553(a) factors, where appropriate.

Sources of Information. The proposed amendment lists "Sources of Information" (§4B1.2(b)(4)) on which the government may rely for its prima facie showing that an offense is a crime of violence. The Committee understands that the list was drawn from language in *Shepard v. United States*, 544 U.S. 13 (2005), and its progeny. However, two of the proposed sources of information appear to overlap, rendering the narrower one unnecessary. Section 4B1.2(b)(4)(F) says that one source would be "[a]ny explicit factual finding by the trial judge to which the defendant assented." Proposed Section 4B1.2(b)(4)(D) would cover the "judge's formal rulings of law or findings of fact." Generally, any finding of fact that might be covered by subsection (F) would be covered by subsection (D) and should not in any event require a showing of a defendant's assent. For those reasons, the Committee suggests eliminating subsection (F). The Committee also suggests striking the word "formal" from subsection (D). Adding the term "formal" within the context of rulings of law or findings of fact may lead to unnecessary litigation over whether a particular factual finding is "formal" enough to qualify as a source of information.

Minimum Sentence Lengths of Prior Offenses. The proposed amendment presents three options (each containing sub-options) that would limit predicate offenses based on sentence length (either indirectly, by referencing the number of criminal history points under §4A1.1, or directly, by specifying minimum qualifying terms of imprisonment). Given §4B1.1's goal of punishing the most serious recidivists, it is sensible to exclude convictions for which the sentencing judge imposed a relatively light sentence (or no prison sentence at all). Absent additional data on recidivism, the Committee believes that Option 1 best supports the goals of clarity and fairness, because it is straightforward and maintains consistency with the rest of Chapter Four. By tying the qualifying offenses to criminal history categories, Option 1 incorporates the preexisting value of criminal history categories in reflecting both risk of recidivism and level of culpability.

As for whether only §4A1.1(a) sentences should qualify, or instead §4A1.1(b) sentences should also qualify, the Committee encourages the Commission to analyze, if feasible, whether career offenders who had predicate sentences of 13-plus months recidivated at higher rates than offenders who qualified with an under-13-month sentence. Indeed, with regard to Option 2, the Committee suggests that the Commission consider studying whether sentence length for career-offender predicate offenses is predictive of risk of recidivism. If a future study shows that a particular sentence length (whether it is one year, three years, five years, or something else) provides a sound dividing line between little or no increased risk of recidivism and a substantial increased risk, then some form of Option 2 would be advisable.[5] Though not quite on point,

[4] Report to the Congress: Career Offender Sentencing Enhancements at 40–41 (Aug. 2016).

[5] The Commission's 2022 study, *Length of Incarceration and Recidivism*, suggests that sentences for

because the issue examined was the impact on recidivism of federal, rather than state, sentence length, the Commission's 2022 study, *Length of Incarceration and Recidivism*, suggests that a longer sentence results in a lower risk of recidivism.[6]

Option 3, which is based on the "time served" rather than the sentence imposed, poses serious workability concerns. Probation officers often have difficulty obtaining the records necessary to assess how much time was served on a particular sentence. Even when the records are available, calculating the precise time served can be complex where the defendant is serving sentences for multiple offenses or where revocation sentences are involved. Additionally, Option 3 could lead to litigation over what forms of custody count toward the time served. For example, would time at a pre-release center or halfway house count toward time served? Would federal courts need to look to state law to determine custody status?[7] Introducing a new concept of "time served" into the criminal history chapter would likely lead to substantial litigation over factual and legal questions, and there does not seem to be a significant countervailing policy benefit.

II. Firearms Offenses

The Committee appreciates the Commission's efforts in Part A of the proposed amendment to address the proliferation of machinegun conversion devices, which convert semi-automatic firearms into fully automatic machineguns. Given the seriousness of the dangers posed by machinegun converters, expanding specific offense characteristics to cover those devices (Option 2 of the proposed amendment) is consistent with imposing a sentence based on the seriousness of the offense.

Part B of the proposed amendment marks a reversal of the policy reflected in the guidelines since their adoption. Specifically, Part B would add a *mens rea* requirement to §2K2.1(b)(4), in contrast to the long-standing policy of applying enhancements for guns that are stolen or have obliterated serial numbers on a strict liability basis. The Commission, in explaining the enhancement for stolen guns when the guidelines were originally adopted, took note of "independent studies" showing that "stolen firearms are used disproportionately in the commission of crimes," 1987 Guidelines Manual §2K2.1 commentary, and then later increased the enhancement "to better reflect the seriousness of this conduct," *see, e.g.,* USSG App. C, Amd. 189 (Nov. 1, 1989). Although that background commentary has since been removed from the guidelines, a recent multi-year study from California shows that stolen guns are still much more likely to be used in crimes than legally acquired ones. *Sonia L. Robinson et al.*, Purchaser, firearm, and retailer characteristics associated with crime gun recovery: a longitudinal analysis of firearms sold in California from 1996 to 2021, 11 Injury Epidemiology, art. no. 8 at 6-7, 12 (2024) (finding that stolen guns are 8.93 times more likely to be used in a crime than if not stolen). For a sense of the overall scope of the stolen firearm issue, we note the ATF reports that over 1,000,000 firearms were reported stolen from 2017 to 2021. National Firearms Commerce

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defendant-cohorts who received sentences of 60 months or longer generally resulted in a lower risk of recidivism. U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* at 19-20 (June 2022). The study is not directly on point, however, because it examines the *federal* sentence's impact on recidivism rather than that of prior state sentences, and the study was not limited to career offenders.

[6] U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* (June 2022).

[7] The Committee has the same concerns over the bracketed time-served language in Sub-options 2A and 2B.

and Trafficking Assessment: Crime Guns—Volume Two, Part V at 2, 12, 19, 23.

Moreover, the Committee is concerned that the addition of a proposed *mens rea* requirement to §2K2.1(b)(4) will result in additional litigation for no particular policy benefit. In the Issue for Comment, the Commission asked whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. The Committee believes this requirement would add significant challenges, unduly complicating application of (b)(4). Determining whether a firearm is stolen is a relatively straightforward proof issue. Determining whether someone knew a gun was stolen or was willfully blind or consciously avoided that knowledge is obviously a more complex undertaking. In the Committee's overall experience, the government does not offer specific evidence showing that the defendant knew that the firearm was stolen (even though that would be a fact in aggravation under § 3553(a)). This suggests that there would be very, very few times when the enhancement would apply. Given the prevalence and seriousness of gun crimes, and the need to combat the availability of stolen firearms, adding the knowledge requirement would diminish the seriousness of the offense.

With regard to adding a knowledge requirement for the modified serial number enhancement, it is likely true that the evidentiary challenges are not as difficult as those in the stolen firearm context. It may be easier to draw inferences one way or the other, because a person possessing a firearm had the opportunity to observe the results of any actual or attempted defacement of the serial number; or if the serial number is in a difficult-to-see location on the firearm, then the opposite inference can be drawn. But again, unless there is a basis to change course, the added knowledge requirement would seem to diminish the seriousness of the offense. In sum, the Committee opposes the addition of a knowledge requirement for these two specific offense characteristics.

III. Circuit Conflicts

Part A of the proposed Circuit Conflicts amendment seeks to address a circuit split over whether using a firearm to restrain movement, without physical measures, constitutes "physical restraint" under §2B3.1(b)(4)(B). Broadly, the Committee supports any resolution of this split, as the current divide results in disparate application of the guidelines. The Committee supports Option 1, which would place gunpoint restraint on equal footing with other physical measures of restraint, as a matter of fairness. On that point, the Committee's view is that a reasonable victim may find being restrained at gunpoint just as distressing—or even more so—than other forms of physical restraint.

Part B of the proposed Circuit Conflicts amendment seeks to address a circuit split over whether a traffic stop constitutes an "intervening arrest" for purposes of §4A1.2(a)(2). The Commission states that it intends to resolve that circuit conflict by excluding traffic stops from the definition of "intervening arrest." The amendment would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest … requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." The Committee is generally supportive of removing traffic stops from the definition of intervening arrest. At the same time, however, the Committee is concerned that the definition proposed in the amendment language could be read to exclude more serious charges

from intervening arrests. Even serious charges where the defendant appears by summons or otherwise by agreement, without ever being formally arrested, could be excluded from the proposed definition of intervening arrest. For example, the proposed definition could be read to exclude "waive and file" cases in federal court and similar procedures in many state courts like direct indictments and summons arraignments. To avoid excluding serious crimes, the Committee suggests adding to the definition: "An intervening arrest also includes appearance on a court-issued summons requiring a person to appear on a felony criminal charge, even if the person is not formally placed into police custody."

IV. Simplification of the Three-Step Process

Overall, the Committee supports the proposed Simplification amendment, which would remove departures and policy statements relating to certain personal characteristics. It is true that some judges look to the departure step of the current framework to provide structure to the sentencing process. Formal departures require transparency due to the notice requirements and arguably enhance uniformity—at least at the departure stage—due to the detailed considerations in each departure provision. But this additional step no longer aligns with the sentencing practices of many courts. More importantly, the Section 3553(a) goals and factors control the ultimate sentence, so whatever happens at the departure stage can be negated by a sentencing judge's modification of (or disagreement with) the departure-based policy.

The current proposal addresses many of the concerns the Committee raised regarding the previous simplification proposal during the 2023-2024 cycle.[8] It is a much cleaner excision of departures from the guidelines. It also appropriately retains revised provisions for substantial assistance to authorities and early disposition programs, which are based on statutes and must be preserved in some form.[9]

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed amendments for the 2024-25 amendment cycle. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,

Edmond E. Chang

Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

[8] Letter from Comm. on Crim. Law of the Jud. Conf. of the U.S. to U.S. Sent'g Comm'n (Feb. 22, 2024), available here.

[9] The Committee notes that proposed §5B1.1, comment (n. 3(B)), might have an extra clause at the end of the sentence. It appears that the clause "may be appropriate" should be stricken from the end of the sentence.

UNITED STATES COURT OF APPEALS
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DAVID J. BARRON
CHIEF JUDGE

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February 3, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Comment, Proposed Career-Offender Amendment to the Federal Sentencing Guidelines

Dear Chair Judge Reeves, Vice Chairs, and Commissioners:

Thank you for the opportunity to comment (solely for myself and not in my role as Chief Judge) on these important proposed changes to the United States Sentencing Guidelines. I write with concerns about the proposed shift to a conduct-based definition of "crime of violence" in the Career Offender guideline (and concomitant changes to related guidelines) and urge the Commission to consider more fully the merits of the categorical approach -- and the potential costs of departing from it now -- before making such a shift.

It is my understanding that the statute requiring the Commission to have some version of the Career Offender guideline is 28 U.S.C. § 994(h). That provision directs the Commission to create a guideline adjustment specifically as to individuals who have been "convicted" of "crime[s] of violence" or controlled substance offenses. Given that the word "convictions" elsewhere in the Armed Career Criminal Act (ACCA) repeatedly has been construed by the Supreme Court of the United States to mandate the categorical approach,[1] I cannot see how the word "convicted" in § 994(h) could be construed differently. Thus, the Career Offender guideline that Congress itself contemplated was one that would be defined by the categorical approach.

Of course, there is no statutory bar to the Commission adopting a Career Offender guideline that is broader than the one required by § 994(h). Because a shift to a conduct-based approach would, in and of itself, not appear to leave out any offenders encompassed by the statutory directive in § 994(h), I see no statutory reason why the Commission may not make such a shift. But the legal authority to exercise policymaking discretion is not itself a reason to exercise that discretion,[2]

[1] See Mathis v. United States, 579 U.S. 500, 511 (2016) (explaining that the focus on a defendant's "previous convictions" in ACCA favors the categorical approach).

[2] See United States v. Vaquerano, 81 F.4th 86, 93 (1st Cir. 2023) (citing the proposition that "the Sentencing Commission's 'legal authority to adopt' a guideline can come from both a Congressional directive or the Sentencing Commission's general statutory authority 'to develop guidelines . . . that reflect the seriousness of the offense at issue'") (quoting United States v. Ferrarini, 219 F.3d 145, 159-60 (2d Cir. 2000)); id. (holding that a guideline

and so I raise a note of concern about the proposal for the Commission to undertake such an exercise.

First, there are potentially substantial costs -- not mentioned in the proposal -- with now switching to a new approach, as any new approach will raise a host of novel disputes for which we have no settled precedent. I note that, for all the criticism that the categorical approach has received over the years, we have been living with it for quite some time. In my own -- admittedly smaller -- circuit, I have noticed a stark drop-off in cases requiring its application, because so many of the challenging questions raised under it are now matters of settled circuit precedent. My impression from discussions with colleagues in other circuits is that this experience is not unique.

Second, the costs of disruption would be of less concern if, on the merits, there was nothing to be said for the categorical approach. But that is not the case,[3] notwithstanding that the need to protect a defendant's Sixth Amendment rights under Apprendi v. New Jersey, 530 U.S. 466 (2000), does not arise in the discretionary sentencing context.

To start, one of the primary benefits of the categorical approach has been that it allows courts to avoid "minitrials" to relitigate conduct underlying past convictions years after the fact.[4] If I read the Proposed Amendment correctly, it seems to address this concern by requiring the government to make a prima facie case that a previous conviction was for a "crime of violence" based only on a limited class of documents from the defendant's prior case.[5] However, as I have noted in the past, relying on these documents presents fair notice concerns. For example, it strikes me as problematic to rely, years later, on facts adduced at a plea colloquy, when the defendant at the time likely had no reason to apprehend the potentially serious consequences of not contesting the government's characterization of their conduct. In a case where the defendant seeks to plead guilty to a crime that would cover their conduct whether violent or not, the defendant typically has no real incentive to contest a state's characterization of the conduct as violent, given that, even if such a characterization were false, it would have no bearing on their guilt or innocence. For a first-time offender, the relevance of this characterization will not be apparent until after the subsequent offense has been committed. Relying on such a description of the defendant's conduct

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enacted pursuant to the Commission's general statutory authority, rather than a specific Congressional directive, "is valid so long as it is not 'at odds with the [C]ongressional directive'") (quoting United States v. Ramsey, 237 F.3d 853, 857 (7th Cir. 2001)). But see United States v. Soileau, 309 F.3d 877, 880 (5th Cir. 2002) (suggesting that, in order to invoke its discretionary authority to sweep more broadly than a particular Congressional directive, the Commission must make clear that it is exercising its discretion to do so, rather than merely misreading the directive it purports to be implementing).

[3] See United States v. Faust, 853 F.3d 39, 62-66 (1st Cir. 2017) (Barron, J., concurring) (discussing the benefits of the categorical approach over a conduct-based analysis, including fairness to litigants, respect for federalism, avoidance of constitutional concerns under Apprendi v. New Jersey, 530 U.S. 466 (2000), and faithfulness to the text of statutes enacted by Congress); see also, e.g., Moncrieffe v. Holder, 569 U.S. 184, 200-01 (2013) ("The categorical approach serves 'practical' purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.") (quoting Chambers v. United States, 555 U.S. 122, 125 (2009)); Mathis, 579 U.S. at 511 (explaining that a conduct-based approach would give rise to Sixth Amendment concerns under Apprendi); United States v. Morris, 61 F.4th 311, 321-22 (2d Cir. 2023) (Lohier, J., concurring) (noting that the categorical approach, among other benefits, conserves the limited time and resources of immigration and sentencing judges and "is more protective of defendants at sentencing").

[4] Moncrieffe, 569 U.S. at 200-01.

[5] Proposed Amendment: Career Offender at 6 (limiting the sources the government can use to the charging document; jury instructions and accompanying verdict form; plea agreement or transcript of colloquy between the judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant; formal rulings of law or findings of fact; judgment of conviction; any explicit factual finding by the trial judge to which the defendant assented; or comparable judicial records of the same).

adduced during a plea colloquy "could raise serious due process concerns if the [sentencing judge -- at the time of considering the Career Offender guideline's application -- does] not also give the defendant an opportunity to contest that description of the conduct."[6] But allowing the defendant to contest those facts at the time of the possible application of the Career Offender guideline would give rise to the type of mini-trials that the categorical approach presently ensures sentencing judges may avoid.

Significant concerns remain even if defendants and their attorneys eventually adjust to the possibility of a conduct-based analysis in sentencing for some future offense a defendant might later commit. There is then the risk of distorting the state criminal process in a way that encroaches on the principles of federalism that Congress had front of mind when drafting ACCA (and presumably when directing the Commission to create a guideline reflecting ACCA's aims). Many states, in defining serious offenses to cover a broad swath of violent and nonviolent conduct -- the exact offenses that critics often cite as evidence of the absurdity of the categorical approach -- may have done so "precisely because [the state] did not want the criminal proceedings [for that offense] to focus on whether the conduct in which the defendant engaged was violent or not."[7] By incentivizing defendants and their attorneys to prioritize ensuring that the record reflects the defendant did not commit the offense violently, even where that determination is irrelevant to their guilt or innocence, a shift to a conduct-based approach would risk seriously disrupting the dynamics and efficiencies of the state criminal proceeding. After all, the state's "only concern" appears to be "the guilt or innocence of the defendant for the crime for which the defendant was then being prosecuted."[8] Respect for the primacy of state criminal law seems to have animated Congress's choice to draft ACCA as it did.[9] It thus strikes me that the Commission should take this federalism concern similarly seriously in implementing the ACCA-related directive from Congress that gave rise to the Career Offender guideline.

Given the possible benefits of the categorical approach relative to a conduct-based approach, it seems to me that the Commission should be confident, based on its own experience and expertise, that it is worth the costs of abandoning the categorical approach before proceeding. This is especially so because Congress, in keying § 994(h) to a defendant's prior "convict[ion]," apparently felt the categorical approach would be sufficient for the Career Offender guideline.

Thus, in my view, the Commission should proceed not only after having heard the reaction to its proposal, which rests on a cataloging of the criticisms of the categorical approach, but also after having formulated its reasons for thinking that sweeping more broadly than Congress directed is otherwise necessary. I am not sure that the current justifications provided by the Proposed Amendment meet this bar.

As I read the Proposed Amendment, the primary reason animating this switch is the oft-repeated criticism of the categorical approach as a "legal fiction" that produces "odd" or "arbitrary" results, continues to result in "substantial litigation," and is "complex[]" to administer.[10] However, Congress was fine with these tradeoffs in the statutory context, and it is not clear to me that they are any more salient in the context of the Guidelines.

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[6] Faust, 853 F.3d at 64 (Barron, J., concurring).
[7] Id. at 65.
[8] Id.
[9] Id. (explaining that Congress rejected at least one alternative formulation of ACCA based on concerns that "the federal government would displace the state criminal process")
[10] Proposed Amendment: Career Offender at 2.

For example, reliance on years-old plea colloquies invites its own form of arbitrariness. Further, I am not sure how much force the concerns over complexity and volume of litigation carry today, considering, as noted above, that many of the challenging questions that once made the categorical approach so difficult to apply are now resolved, and answering the few questions that remain is ever easier based on the volume of guidance courts have provided. My instinct that these concerns should not carry much weight is especially strong because of the new litigation this proposed change would itself spawn, including over the meaning of the enumerated-offenses portion of the proposed new guideline.

Moreover, even if the oft-lodged criticisms of the categorical approach remained particularly salient in the Guidelines context, it would still strike me as unwise to make the proposed change without any affirmative data to support adding extra time to the sentences of offenders whose prior conduct was violent but whose prior convictions are not currently reached by the categorical approach. The Commission has been admirably focused since its inception on evidence-based policymaking. Absent some findings that the current categorical approach has failed to pick up offenders who have gone on to cause the types of harm that led Congress to enact the directive to the Commission set forth in § 994(h), I do not believe that the oft-repeated criticisms of the categorical approach provide sufficient policy reasons to apply this upward adjustment to a class of defendants whom Congress does not seem to have had in mind when it directed the promulgation of a Career Offender guideline. Any such findings, in my view, would have to be particularly robust before departing from the text of § 994(h). The best expression of how far Congress thought this guideline should go seems to me to be the text of the authorizing statute it enacted. Before electing to make a departure -- as the Proposed Amendment would -- I urge the Commission to consider whether the rationales underlying this proposal are worth the costs its adoption would impose on the criminal adjudication process.

Of course, other aspects of the Proposed Amendment concern narrowing the current Career Offender guideline by removing certain types of offenders from its ambit -- such as state drug offenders -- that Congress did not itself have in view when it directed the Commission to create such a guideline. It seems to me that the calculus for the Commission deciding not to exercise its discretion to go beyond a statutory directive to promulgate a guideline is quite different from the calculus that should inform a decision by the Commission to enhance guideline sentencing ranges for offenders whom Congress has not itself directed be subject to those enhanced ranges.

Thus, if the Commission is of the view that state drug offenders should not be within the ambit of the Career Offender guideline, I see no reason why that portion of the Proposed Amendment could not be adopted independently. It does not seem to me that there is any logical connection between the choice to shift from the categorical approach to a conduct-based one and the choice to include or exclude state drug offenders from the guideline.

I very much appreciate the Commission's willingness to reconsider this important guideline and the thoughtful process that it has implemented for consideration of the merits of amending it. I would be happy to provide any further thoughts if they would be of use.

Sincerely,

David J. Barron
Chief Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

WILLIAM J. KAYATTA, JR.
U.S. CIRCUIT JUDGE

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February 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, DC 20002-8002

Re: Comment, Proposed Career-Offender Amendment to the Federal Sentencing Guidelines

Dear Chair Judge Reeves, Vice Chairs, and Commissioners:

Thank you for soliciting comments on the proposed changes to the United States Sentencing Guidelines.

I reviewed the proposed changes while traveling. I will not be back in my chambers in time to meet the deadline for sending any responses to your solicitation. I instead called our Circuit's Chief Judge (David Barron) to convey my concerns with abandoning the categorical approach, and to see if anyone was preparing to respond in detail. As it turned out, Chief Judge Barron shared my concerns and was already preparing a letter to you explaining the basis for those concerns.

Having now read that letter, I write to second its observations. While it is fair to say that the use of the categorical approach demanded a great amount of difficult work for litigants and the courts, that work has been done. I fear that changing now to a conduct based approach will result in a new round of difficult questions to be answered. Even when those new questions are answered, the conduct-based approach may burden the district courts with a great deal more work in trying to assess prior conduct.

Very truly yours,

Judge Kayatta /eu

William J. Kayatta, Jr.

WJK/eu

cc: Hon. David J. Barron

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February 3, 2025

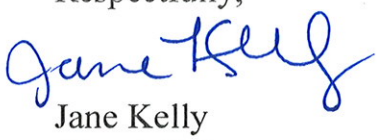
The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Comment, Proposed Career-Offender Amendment to the Federal Sentencing Guidelines

Dear Chair Judge Reeves, Vice Chairs, and Commissioners:

Thank you for the opportunity to comment on the proposed changes to the United States Sentencing Guidelines. I share the concerns expressed by Chief Judge Barron in his letter about the proposed shift to a conduct-based definition of "crime of violence" in the Career Offender and related guideline provisions. I too urge the Commission to give serious consideration to the benefits of the categorical approach in this context before adopting this proposal.

Respectfully,



Jane Kelly
Circuit Judge

cc: Chief Judge David J. Barron

JK/tk

UNITED STATES COURT OF APPEALS
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CHAMBERS OF
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February 3, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, DC 20002-8002

RE: Comment, Proposed Career-Offender Amendment to the Federal Sentencing Guidelines

Dear Chair Judge Reeves, Vice Chairs, and Commissioners:

Thank you for the opportunity to comment on the proposed changes to the United States Sentencing Guidelines. I fully share the concerns expressed by Chief Judge Barron in his letter about the proposed shift to a conduct-based definition of "crime of violence" in the Career Offender guideline. I have nothing to add to his excellent letter explaining why the proposal should be rejected. I also join Chief Judge Barron in strongly urging the Commission, as it considers the proposal, to seriously consider the benefits of the categorical approach and the likely costs of departing from it now.

Respectfully,

Raymond J. Lohier, Jr.
Circuit Judge

cc: Chief Judge David J. Barron

To: United States Sentencing Commission
From: Iain D. Johnston & Michael R. Snyders
Date: February 3, 2025
Re: Response to Request for Comments Regarding Machinegun Conversion Devices

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INTRODUCTION

We thank the United States Sentencing Commission for addressing the void in the Guidelines Manual as it relates to machinegun conversion devices (MCDs).[1] The Data Briefing's finding that the possession of a firearm with an MCD affixed currently results in only two more months of incarceration compared to a firearm without a MCD is alarming. The Guidelines Manual is a constant work in progress not only as new information becomes available but also as technology and offenders' use of that technology adapts. We appreciate the iterative process that goes into the Guidelines Manual and the opportunity to respond to the request for comments.

So as to not bury the lead, we believe either proposed option will significantly improve the current Guidelines Manual provisions, although we think more needs to be done. Specifically, we believe the Guidelines Manual should account for the most significant concern about MCDs, which is their use in conjunction with other firearm components, namely extended magazines and drums. The combination of a handgun with an affixed MCD and an extended magazine or drum is beyond terrifying. The use of this combination results in uncontrollable lethality by offenders. In the wrong hands—literally and figuratively—this combination has unleashed devastation in our country. As the interim Chief of the St. Louis Metropolitan Police Department stated, "If you are shooting someone with a 50 round drum, you may not be accurate but instead of hitting them two or three times you hit them 12 times."

In determining the appropriate offense level, we believe the Guidelines Manual should reflect that reality. In combination, the whole of a firearm plus an MCD plus an extended magazine/drum is exponentially more unlawful than the sum of its parts.

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[1] Our response takes no position on whether MCDs are protected by the Second Amendment of the United States Constitution. Most courts have found that the Second Amendment offers no quarter to the possession of MCDs. *United States v. Jones-Lusk*, No. CR-24-428, 2025 U.S. Dist. LEXIS 2586 (W.D. Ok. Jan. 7, 2025); *United States v. Mitchell*, 734 F. Supp. 3d 202 (N.D. Ohio 2024); *United States v. Lane*, 689 F. Supp. 3d 232 (E.D. Va. 2023). But at least one court has found that MCDs are protected by the Second Amendment. *United States v. Morgan*, No. 23-10047, 2024 U.S. Dist. LEXIS 149550 (D. Kan. Aug. 21, 2024).

WHO WE ARE

Mike Snyders has worked in law enforcement for nearly four decades. After retiring with the rank of Colonel and finishing his career with the Illinois State Police as deputy director of operations, Mike has worked for nearly fifteen years with the federally funded High Intensity Drug Trafficking Area (HIDTA) program. In that capacity, he facilitates criminal intelligence information sharing between state, local, tribal, territorial, and federal law enforcement. He is recognized as one of the country's preeminent experts on interdiction issues.

Iain Johnston is currently a United States District Court Judge for the Northern District of Illinois, Western Division. Previously, he was the Magistrate Judge for the same court. Iain has been a federal judicial officer for over a decade. During that time, he has presided over all aspects of criminal proceedings, from pre-indictment applications through post-conviction requests for relief. He also authored the order in *United States v. Hixson*, 624 F. Supp. 3d 930 (N.D. Ill. 2022), which identified the void in the Guidelines Manual relating to MCDs.

BACKGROUND INFORMATION AND DATA ABOUT MACHINEGUN CONVERSION DEVICES

The Commission's Public Data Briefing provides significant information regarding MCDs. This information is very helpful in formulating thoughtful comments. But additional information—much of which may not be captured by the Commission—might be helpful, too.

We know that MCDs impact law enforcement officer safety. And MCDs lead to an increase in stray bullet shooting incidents. Further, MCDs are used in mass shooting events, including possibly the Kansas City Super Bowl parade shooting. What's more, death tolls increase in mass shooting incidents when MCDs are used. Fugitives are also known to have used MCDs. Moreover, domestic terrorists appear to be possessing and using MCDs at an increasing rate. We have also seen an increased use of MCDs by drug traffickers. Additionally, firearms with MCDs affixed were used more often in previous shooting incidents than firearms that were not affixed with MCDs.

None of these findings should be surprising based upon the significant increase in the proliferation of MCDs. Data establishes that the possession and use of MCDs is on the rise. Data from the Department of Alcohol, Tobacco, Firearms, and Explosives (ATF) shows that between 2019 and 2023 the number of MCDs that law enforcement recovered in crimes and subsequently traced by the ATF increased more than 784%. In 2020, the St. Louis Metropolitan Police Department located 1 MCD; in 2021, it located 4; and in 2022, it located 22. Moreover, recently released

data shows that in 2024 U.S. Customs and Border Protection officers stationed in just Chicago seized 473 shipments containing a total of 1,507 MCDs.

Anecdotal data not captured by the Commission evidence an increase in MCDs. For example, in Illinois state court—specifically, the Seventeenth Judicial Circuit—the number of cases involving MCDs has significantly increased in the last three years. Even more alarming is that in the Juvenile Division of the same court, the number of cases involving juveniles possessing MCDs has significantly increased. Indeed, from 2022 to 2024, the number doubled. And calendar year 2025 is already on a record setting pace, looking like it will far surpass previous years. Illinois courts' experience with juveniles possessing, using, and trafficking MCDs is consistent with information we have obtained from law enforcement in other states.

With this information, the information provided by the Commission, and our experiences, we will provide our responses to the request for comments.

RESPONSES TO REQUEST FOR COMMENTS

1. The question presented is whether the proposed amendments sufficiently address the dangers presented by MCDs. We believe the proposed amendments are an excellent start but don't sufficiently address the dangers caused by MCDs. As stated in the Background section, one of our largest concerns relating to MCDs is when they are affixed to firearms and the firearms also possess a large capacity magazine. This combination is the most unlawful and most dangerous. We address that concern by proposing new base offense levels when these facts are present. We would use existing base levels in Section 2K2.1(a) as guides. Essentially, we propose base levels three levels higher than those in Section 2K2.1(a)(1), (3), and (4)(B) when the firearm both affixes an MCD and is capable of accepting a large capacity magazine.

   We propose the following new base offense levels and then re-numbering existing base offense levels based upon these additional offense levels.

   (a)(1) **29**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; and (ii) that firearm has affixed a firearm that is described in 26 U.S.C. Section 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

(a)(3) **25**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; and (ii) that firearm has affixed a firearm that is described in 26 U.S.C. Section 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

(a)(6) **23**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; and (ii) that firearm has affixed a firearm that is described in 26 U.S.C. Section 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; (ii) is convicted under 18 U.S.C. Section 922(d), Section 932, or Section 933; or (iii) is convicted under 18 U.S.C. Section 922(a)(6) or Section 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm as described in 18 U.S.C. Section 921(a)(3) or 26 U.S.C. Section 5845(a) or ammunition to a prohibited person.

2. We will comment on requests 2 and 3 together. We don't believe MCDs should uniformly be given the same weight as other firearms. Indeed, we think they should receive more weight in some circumstances and less weight in other circumstances. This position might seem counterintuitive but we'll try to explain our thinking.

   MCDs are difficult to characterize. On the one hand, they are nearly always illegal, unlike other firearms. Not all firearms are illegal, but basically all MCDs are illegal, except for those MCDs authorized by ATF—which are insignificant in number. But, alone, MCDs aren't dangerous. MCDs are still illegal, so there should be a reflection of that fact. But their danger truly manifests when affixed to a firearm. So, when that occurs not only does the previously non-dangerous MCD transform into something dangerous, but also a dangerous object—by this modification—becomes exponentially more dangerous. We believe the Guidelines Manual should reflect that reality. Therefore, an MCD should still count as a firearm. However, the offense level should be adjusted depending on whether (a) an MCD is affixed to a firearm and the offense involves other non-affixed MCDs and (b) when the offense involves only MCDs, none of which are affixed to a firearm.

   To reflect this concept, we propose that the specific offense characteristics in the table in Section 2K2.1(b)(1) be modified, resulting in three separate tables—two new tables and the existing table. The first table would remain the same as it currently exists (with the proposed amendment adding the reference to 26 U.S.C. Section 5845(a)). This table would be used when no MCD is involved in the offense. The two new tables would be used, first,

when an MCD or more than one were involved in the offense, and second, when an MCD was affixed to a firearm. The two new tables would look like this:

(i) If the offense involved (A) at least one firearm as described in 18 U.S.C. Section 921(a)(3); (B) that firearm had a firearm described in 26 U.S.C. Section 5845(a) affixed, and (C) the offense involved one or more additional firearms described in either 18 U.S.C. Section 921(a)(3) or 26 U.S.C. 5845(a), increase as follows:

Number of Firearms	Increase in Level
1-5	add 3
6-24	add 5
25-99	add 7
100-199	add 9
200 or more	add 11

(ii) If the offense involved three or more devices used in converting a weapon into a machinegun, increase as follows:

Number of firearms	Increase in Level
3-7	add 1
8-24	add 3
25-99	add 5
100-199	add 7
200 or more	add 9

3. See response above.

4. We believe a nuanced approach is better than simply adopting the definition across the section. For example, we believe adding MCDs to Section 2l2.1(b)(4)(c) or (b)(7) provides no value. MCDs don't have serial numbers. And we don't think incorporating MCDs into Section 2K2.1(b)(6)(A) is of much value. However, we do believe incorporating MCDs into Section 2K2.1(b)(6)(B) is appropriate and valuable.

5. We have no information in this regard.

6. We believe that moving the definition from the Commentary to the guideline itself might cause confusion with our proposals. Indeed, under our proposals the Commentary would be a good location to address the distinctions we are making.

From: [redacted]
To:
Subject: Re: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, January 29, 2025 5:11:49 PM

Dear Judge:

With due respect to justices who have supported categorical approach I applaud your revisions abandoning this rather absurd theory. Thanks.
Michael Baylson
Sent from my iPhone

From: David Counts [redacted]
Sent: Monday, February 3, 2025 8:20 AM
To: Chair [redacted]
Cc: Reeves, Carlton [redacted]
Subject: Comments on February 3rd Proposals

Chairman Reeves,

As requested, find attached comments on the proposed amendments to the Sentencing Guidelines. These comments relate only to the February 3rd deadline. Comment for the March deadline Guidelines will be forthcoming. I appreciate the opportunity to comment. I'm grateful for the work the Commission does and am mindful that the proposals are made after thorough research and deliberation, considering all available data and trends. My comments are the result of consultation and collaboration with my local U.S. Probation Office in the Midland/Odessa and Pecos Divisions of the WDTX. In no way do my comments represent anyone's views but my own. If I have misunderstood any proposal, please forgive me. Any errors in my responses are mine.

All the best!

David

Career Offender

The proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) in several ways.

- **First**, the proposed amendment would move the definition of "controlled substance offense" from subsection (b) to subsection (a). It would also revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes.

- **Second**, the proposed amendment would place all provisions related to "crime of violence" in subsection (b). It would define the term "crime of violence" based on the defendant's own offense conduct which, consistent with subsection (a)(1)(A) of §1B1.3 (Relevant Conduct), is the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. It provides a list of types of qualifying conduct that includes a "force clause" at §4B1.2(b)(1)(A) (which closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person") and provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such as forcible sex offenses, robbery, arson, and extortion. The proposed amendment would also include a provision at subsection (b)(2) that would allow certain inchoate offenses to still qualify as "crimes of violence." In addition, the proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" by using only a specific list of sources of information from the record.

- **Third**, the proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense."

    - **Option 1** would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a) [or (b)].
    - **Option 2** would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Option 2 brackets the possibility of including a provision that provides that a conviction shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [three years] [two years][six months] in prison.

- **Option 3** would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted separately under §4A1.1(a) [or (b)].

  All three options include two suboptions.
  - Suboption A in each option would set the minimum sentence length requirement for purposes of both "crime of violence" and "controlled substance offense."
  - Suboption B in each option would set the minimum sentence length requirement for purposes of "crime of violence" only.

- The current definitions of "crime of violence" and "controlled substance" at §4B1.2 are incorporated by reference in several other guidelines in the Guidelines Manual. Changes to those definitions impact the following guidelines:

  §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials),
  §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)
  §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity)
  §4A1.2 (Definitions and Instructions for Computing Criminal History),
  §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement))
  §7B1.1 (Classification of Violations (Policy Statement)).

Issues for Comment:

1. **As explained above, courts use the "categorical approach" and the "modified categorical approach," as set forth in Supreme Court jurisprudence, to determine whether a conviction is a "crime of violence" or a "controlled substance offense" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions.**

   The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approach provided above, that permits the court to consider the defendant's conduct underlying the offense of conviction for purposes of the "crime of violence" definition. What are the advantages and disadvantages of the "categorical approach" as opposed to the approach set forth in the proposed amendment above?

Response

I fully support the first two prongs of this amendment which eliminates the categorical approach/modified categorical approach. Its application is exceedingly difficult for probation officers, the courts and attorneys. I also support the Commission's approach of redefining a "crime of violence" based on the defendant's conduct and redefining a "controlled substance offense" to exclude state drug offenses by referencing specific federal statutes. The amendment also lists approved documents that the court should consult when making the determination. This list mirrors *Shepard* documents the court is already accustomed to using. Limiting the documents the court can consider in its determination will bring consistency to the process.

I **do not** support the third prong of this amendment which sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." A defendant convicted of a predicate offense in Lubbock, Texas, may be sentenced to 10 years' confinement. A defendant sentenced in Houston, Texas, for the exact same offense, may be sentenced to 5 years' probation. In that scenario and under the proposed amendment's third prong, it's likely one defendant would be a career offender while the other may not, even though they have the same conviction. By tying it to a sentence length requirement, we are creating inequity, the very thing the guidelines are intended to eliminate.

2. **The proposed amendment provides that courts may consider the full scope of the defendant's conduct under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct) (i.e., "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense") for purposes of the "crime of violence" definition. Should the focus of the inquiry be limited to the conduct that formed the basis of the conviction? If not, should the Commission limit the consideration of the defendant's conduct in some other way? If so, how should the Commission set forth such limitation? Should the Commission limit the consideration of the defendant's conduct only to such acts and omissions that occurred "during the commission of the offense of conviction" and exclude conduct "in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" or make any other changes?**

Response

From an application standpoint, I support limiting the scope of the analysis to the defendant's conduct that formed the basis of the conviction. The amendment includes a list of documents the court can consider when making its determination (charging document, jury instructions, plea agreement, transcript of colloquy between the judge and the

defendant, formal rulings, judgment of conviction, and any explicit factual findings by the trial judge.) How would any of those documents support a relevant conduct finding beyond the conduct that formed the basis of the conviction? I think at that point, we've replaced the categorical approach with an entirely new process that will prove just as complicated. In my experience, most states do not address relevant conduct (conduct beyond that which formed the basis of the conviction). I can't imagine why then we should require that in our analysis.

3. **The proposed amendment would revise the definition of "controlled substance offense" in §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). Are there federal drug offenses that are covered by the proposed amendment but should not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?**

   Response

   No, to both questions.

   The Commission also seeks comment on whether, instead of excluding state drug offenses, it should limit the definition of "controlled substance offense" in some other way. For example, should the Commission keep the current definition of "controlled substance offense" and limit qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served? If so, how should the Commission set that limit and why?

   Response

   Eliminating state drug offenses from the definition is likely the best approach. By using federal drug statutes, it's consistent across the board. Statutes vary wildly from state to state, especially with controlled substances. I don't know how the Commission could possibly limit the definition of "controlled substance offense" while still considering state offenses. If the Commission decides to include state drug offenses and somehow limits that definition, I do not support limiting it by tying it back to the length of the sentence. Tying the predicate to the length of sentence creates a disparity.

4. **The definition of "crime of violence" set forth in the proposed amendment above includes a "force clause" proposed at §4B1.2(b)(1)(A). The provision closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person." The Commission seeks comment on whether this definition is appropriate.**

The definition of "crime of violence" also includes provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such forcible sex offenses, robbery, arson, and extortion. The Commission seeks comment on whether the force clause set forth in proposed §4B1.2(b)(1)(A) would be sufficient to cover the other types of conduct specifically listed in the "crime of violence" definition. Specifically, the Commission seeks comment on whether the force clause would cover conduct constituting robbery and extortion offenses.

Response

The proposed "physical force" definition is sufficient, and it would cover conduct constituting robbery and extortion offenses.

5. **The definition of "crime of violence" includes a provision relating to forcible sexual acts at proposed §4B1.2(b)(1)(B). The Commission seeks comment generally on whether the scope of this provision for purposes of the "crime of violence" definition is appropriate.**

Response

The proposed amendment states a crime of violence includes:

A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

In my opinion, the scope of the definition is sufficient. It doesn't deviate from the current definition, at least not enough for it to concern me.

6. **The "crime of violence" definition includes a provision that would cover conduct constituting an arson offense at proposed §4B1.2(b)(1)(E). The Commission seeks comment generally on whether the proposed provision is appropriate.**

Response

The definition is rather straightforward. Not having expert knowledge of state statutes regarding arson, this definition at least limits the offense to "willful or malicious," excluding any potential "recklessness" mens rea.

7. **The Commission seeks comment on whether the definition of "crime of violence" should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?**

   Response

   Yes. The Commission should still address the offenses of attempting to commit and conspiracy, as is currently defined in the guidelines. I see no reason to remove these offenses or even impose additional requirements/guidance. If there's a circuit split on this issue, I'm not aware of it.

8. **The proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" only by using a specific list of sources of information from the record. The sources of information that do not appear within brackets in the proposed amendment are specifically identified in *Shepard v. United States*, 544 U.S. 13 (2005), for use in the modified categorical approach. The sources of information listed within brackets are comparable judicial documents identified in subsequent case law for the same purpose.**

   The Commission seeks comment on whether it should limit the sources of information that the government needs to make a prima facie showing that an offense of conviction is a "crime of violence." Should the Commission list specific sources or types of sources that courts may consider in addition to the sources listed in the proposed amendment? If so, what documents or types of information should be included in this list? Are there any documents or types of information that should be excluded?

   Response

   Realistically, what's the likelihood of the government obtaining documents that aren't listed in the proposed amendment? *Shepard* documents are the standard across the board and are typically the records that are easy to obtain (using the term "easy" loosely). I think the list of documents in the proposed amendment is sufficient. As is the current practice with the modified categorical approach, police reports/narratives should continue to be excluded. Information the court considers should be restricted to the findings of the court, plea agreements, factual findings, etc., all of which *Shepard* documents do. I see no need to expand that list to include additional documents.

9. **The proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense." The Commission seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a "crime of violence" or "controlled substance offense" is consistent with the Commission's authority under 28 U.S.C. § 994(h). The Commission also seeks comment on each of these options and suboptions. Should the Commission differentiate between "crimes of violence" and "controlled substance offenses" in setting a minimum sentence length requirement?**

   Response

   I do not support a "sentence imposed" or "sentence served" requirement. No, I do not believe such a requirement is supported by 28 USC § 994(h) in that 994(h) only requires that the defendant has been convicted of two or more felonies, which are a crime of violence or a controlled substance offense. It does not require, most importantly, that the conviction resulted in a specific sentence, or that the defendant served a certain length of sentence. Such a requirement encourages disparity, and I do not believe that to be consistent with § 994(h).

10. **As indicated above, several guidelines use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. See Commentary to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), §4A1.2 (Definitions and Instructions for Computing Criminal History), §4B1.4 (Armed Career Criminal), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).**

    The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The Commission seeks comment on whether this is the appropriate approach or, in the alternative, whether any or all of these guidelines should continue to define the terms "crime of violence" and "controlled substance offense" by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the definitions contained in §4B1.2. Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

Response

Continuing to define the terms by making specific references to §4B1.2 is sufficient. I do not see a benefit to moving those definitions from the commentary to the guidelines themselves. Perhaps this change, if determined to be needed during further study, can be made in future amendment cycles.

Overall Impression of the proposed Career Offender Amendment

I support the amendment, in most part. There will continue to be debate and circuit splits, but I think it at least points us in the right direction if we truly want to part ways with the categorical approach. It does a great job of simplifying the analysis.

I do not support, however, including a "sentence imposed" or "time served" requirement. Doing so creates disparity as I have repeatedly stated.

Firearms

The proposed amendment contains two parts (Part A and Part B) addressing offenses involving firearms. The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

- **Part A** of the proposed amendment addresses the application of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to machinegun conversion devices (MCDs), which are designed to convert weapons to fully automatic firearms. Issues for comment are also provided.

- **Part B** of the proposed amendment establishes a mens rea requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. An issue for comment is also provided.

Part A - MCDs

Section 2K2.1 employs, for different purposes, two distinct definitions of the term "firearm" drawn from separate statutory sources: 21 U.S.C. § 921(a)(3) ("Gun Control Act (GCA) definition of firearm") and 26 U.S.C. § 5845(a) ("National Firearms Act (NFA) definition of firearm"). One difference between the definitions is the inclusion of machinegun conversion devices (MCDs). Commonly referred to as "Glock switches" or "auto sears," MCDs are devices designed to convert weapons into fully automatic firearms. The NFA definition of firearm includes "machineguns," 26 U.S.C. § 5845(a), and the definition of "machinegun" includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun," 26 U.S.C. § 5845(b). Therefore, MCDs fall within the NFA definition of firearm. However, the GCA definition of firearm does not encompass MCDs.

Section 2K2.1 uses the NFA definition of firearm for certain enhanced base offense levels. Therefore, those enhanced base offense levels apply to offenses involving MCDs. However, the remainder of §2K2.1, including the specific offense characteristics and the cross reference, uses the GCA definition of firearm. Therefore, MCDs do not trigger §2K2.1's specific offense characteristics or the cross reference.

For example, an individual convicted under 18 U.S.C. § 922(o) for possessing five MCDs would receive an enhanced base offense level because the offense involved a firearm described in 26 U.S.C. § 5845(a). However, this individual would not receive an enhancement under §2K2.1(b)(1) for the number of firearms involved in the offense because the MCDs are not firearms under the GCA definition. See USSG §2K2.1(b)(1).

Commenters have expressed concern that §2K2.1 insufficiently addresses offenses involving MCDs. Commenters have described a significant recent proliferation of MCDs and pointed out the increased danger to bystanders and law enforcement officials when a weapon is equipped with an MCD because those weapons can fire more quickly and are more difficult to control.

Part A of the proposed amendment would amend §2K2.1 to address these concerns. The proposed amendment provides two options to amend §2K2.1.

- **Option 1** would amend the definition of "firearm" applicable to §2K2.1 to include any firearm described in 18 U.S.C. § 921(a)(3) (i.e., the GCA definition of firearm) or 26 U.S.C. § 5845(a) (i.e., the NFA definition of firearm). It would move the definition from the Commentary to the guideline itself in newly created subsection (d).

- **Option 2** would expand the application of the following subsections, which now apply only to GCA firearms, so that those subsections would also apply to NFA firearms:
  - Subsection (b)(1), which provides an enhancement based on the number of firearms involved in the offense;
  - Subsection (b)(4), which provides an enhancement for offenses involving firearms that were stolen, had a modified serial number, or were not marked with a serial number;
  - Subsection (b)(5), which provides an enhancement for certain offenses involving the transport, transfer, sale, or other disposition of a firearm to another person;
  - Subsection (b)(6), which provides an enhancement for offenses involving transportation of a firearm outside the United States or the possession of a firearm in connection with another felony;
  - Subsection (b)(7), which provides an enhancement for recordkeeping offenses that reflect an effort to conceal a substantive offense involving firearms or ammunition; and
  - Subsection (c), which cross references other guidelines for cases in which the defendant used or possessed any firearm cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense.

    Option 2, if applied to all of the listed subsections, **would produce an equivalent result to Option 1**, but Option 2 highlights the policy question as to whether expansion of the definition of "firearm" should apply to all relevant provisions.

Issues for Comment:

1. **Part A of the proposed amendment seeks to respond to concerns that §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) insufficiently addresses the dangers presented by machinegun conversion devices (MCDs). The Commission seeks comment on whether the proposed amendment appropriately addresses those concerns. Should the Commission address those concerns in another way? If so, how?**

   Response

   I, too, share the concern that §2K2.1 insufficiently addresses offenses involving MCDs. There is an increased danger to bystanders and law enforcement officials when a weapon is equipped with an MCD because those weapons can fire more quickly and are more difficult to control. An amendment is needed to address this very real concern. Under the current version of the guidelines, the SOCs would not apply to MCDs simply due to a different definition being applied to those SOCs than is applied to the base offense level. It doesn't address this increased danger with MCDs.

   Of the two options, Option 2 is preferable simply because it makes clear that both definitions apply to all relevant provisions. The result is the same as Option 1, but it removes any debate if both definitions apply to all provisions.

   An alternative to amending 2K2.1 would be to create an entirely new section specifically addressing MCDs, because they are different than firearms. The Commission is not presenting that option during this amendment cycle, and it would certainly require additional study to implement. In the absence of further study, this proposed amendment goes a long way in addressing MCD concerns now.

   Ultimately, I support treating MCDs differently than firearms. See question 2. While I do believe immediate action is needed to address the concerns with MCDs, I'm of the opinion they should not be treated the same as firearms. But if required to choose between Options 1 and 2 above, I prefer Option 2.

2. **Under Options 1 and 2 of Part A of the proposed amendment, an MCD would be treated as a firearm for purposes of §2K2.1. The Commission seeks comment on whether it is appropriate for MCDs to be given the same weight as other firearms. Should MCDs be treated differently from other firearms? If so, how?**

   Response

   I do not support treating MCDs as firearms. Though MCDs present a serious risk to public safety, etc., treating them the same as firearms may overestimate the harm they represent. I would prefer to see an SOC, or maybe two, to address MCDs specifically. For example, if the offense involved an MCD (providing the appropriate definition of an MCD) which was attached to a

firearm, increase by +4 levels. And add an SOC to address the number of MCDs involved, similar to the SOC under (b)(1) which already addresses the number of firearms involved in the offense.

3. **Section 2K2.1(b)(1) and (b)(5)(C) provide enhancements based, in whole or in part, on the number of "firearms" involved in the offense. Under Options 1 and 2, an MCD would be considered a firearm. MCDs are designed to be affixed to another firearm.**

   The Commission seeks comment on how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C). Should the calculation depend on whether the MCD was affixed to another firearm? If an MCD is affixed to a semi-automatic firearm, should the resulting weapon be counted as one firearm or two firearms?

   Response

   I do not think the application of (b)(1) should depend on whether the MCD was affixed to a firearm. Instead, I would prefer the Commission create a new SOC which increases the offense level if an MCD were attached to a firearm. Additionally, there should be a new SOC that addresses the number of MCDs involved in the offense. As to (b)(5)(C), there should be separate level increases if the offense involved the transport, transfer, sell, etc. of an MCD, and a separate increase if those MCDs were attached to a firearm.

   In short, I think an offense that involves MCDs alone should be treated differently and perhaps not as harshly, as offenses that also involve firearms. I think there is an increased risk when that MCD is actually attached to a firearm, and the guidelines should make that distinction between the risk with MCDs alone, and the risk of MCDs attached to a firearm.

4. **Section 2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c) currently apply to firearms defined in 18 U.S.C. 921(a)(3) (the GCA definition of firearm). Under Options 1 and 2, the term "firearm," as used in those provisions, would also include any firearm described in 26 U.S.C. § 5845(a) (the NFA definition of firearm), such as an MCD. The Commission seeks comment on whether this change should apply to all of the listed provisions. Should one or more of these provisions be excluded from the change? For example, should the Commission make an exception to §2K2.1(b)(4)(C), as redesignated, which provides an enhancement for certain cases involving firearms that were not marked with a serial number, for MCDs, which are often privately made and not marked with a serial number?**

   Response

   The following should be excluded from this change:

   (b)(2) – if the defendant possessed the ammunition/firearm for lawful sporting purposes, decrease to level 6.

   Serious question: When would an MCD be used for lawful sporting purposes? Are there sporting events where such devices are used? If not, there is no need to extend the definition of a firearm

under the NFA to this SOC. I own numerous firearms and am a firearms enthusiast, but I'm unfamiliar with a sporting event or sporting purpose that would encompass such use. Perhaps something like this exists and I'm merely unaware. Even if it does exist, surely it is a rare occurrence. I worry that the inclusion of this provision is ripe for abuse.

(b)(4)(C) – should be excluded. As mentioned in the issues for comment, MCDs are often privately made and to my knowledge don't always have a serial number. Otherwise, this would apply in every MCD case. I think any societal concern with MCDs not having a serial number is likely already taken into consideration in the base offense level which uses the NFA definition.

5. **With few exceptions (e.g., MCDs), a weapon that meets the NFA definition of firearm also meets the GCA definition of firearm. Apart from MCDs, the Commission seeks comment on whether there are any exceptions (i.e., weapons that meet the NFA definition of firearm but not the GCA definition) that should not be treated as firearms for purposes of §2K2.1. If so, what types of weapons should be excluded? In Option 2 of Part A of the proposed amendment, should the Commission expand the application of subsection (b)(1), (b)(4), (b)(5), (b)(6), (b)(7), or (c) to include machineguns (as defined in 26 U.S.C. § 5845(b)), rather than all NFA firearms?**

   Response

   I am not aware of any firearm that should be excluded for purposes of §2K2.1 if both definitions are applied to the guideline.

   Expanding (b)(1), (b)(4), (b)(5), (b)(6), (b)(7), or (c) to include machineguns under 5845(b) would encompass MCDs, but I'm not sure it's necessary to be so specific as opposed to simply adopting the NFA definition (in addition to the GCA definition) of a firearm to the SOCs. The only reason to make this distinction would be if the Commission is trying to avoid a specific firearm defined in the NFA which it feels should not be included. Again, I am not aware of any firearm under the NFA that should be excluded.

6. **In addition to amending the definition of "firearm" for purposes of §2K2.1, Option 1 of Part A of the amendment would move the definition from the Commentary to the guideline itself. However, the option would not move any other §2K2.1 definitions from the Commentary to the guideline. The Commission seeks comment on whether leaving some definitions in the Commentary will lead to inconsistent application of those definitions. Should the Commission move other definitions from the Commentary to §2K2.1 to the guideline itself? If so, which ones?**

   Response

   No. I see no need to move any of the other definitions from the Commentary to the guideline.

Part B – *Mens Rea* Requirement

The enhancements for stolen firearms and modified serial numbers impose no requirement of the defendant's knowledge or other mental state. USSG §2K2.1(b)(4)(A) and (B)(i). The Commentary to §2K2.1 states that these enhancements apply "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." USSG §2K2.1, comment. (n.8(B)). However, subsection (b)(4)(B)(ii) for firearms not marked with a serial number applies only "if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact."

Accordingly, in its current form, §2K2.1(b)(4) imposes a mental state requirement when the enhancement applies based on a firearm not marked with a serial number but includes no such requirement when it applies based on a stolen firearm or firearm with a modified serial number.

Part B of the proposed amendment would apply the current mental state requirement from §2K2.1(b)(4)(B)(ii) to all of subsection (b)(4).

Under the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm was stolen." Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B)(i) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The proposed amendment would also make conforming changes to Application Note 8 of the Commentary to §2K2.1.

Issues for Comment

1. **Under Part B of the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that" a firearm was stolen. Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The Commission seeks comment on whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. Are there changes the Commission should make to the proposed amendment to address potential evidentiary issues? If so, what changes should the Commission make?**

Response

Adding the mens rea requirement to the entirety of (b)(4) would obviously result in the less frequent application of this section simply due to the difficulty in proving the defendant's mental state. This is not information typically collected by case agents in the field. How do you prove a defendant's mental state? How do you prove a defendant was willfully blind to or consciously avoided knowledge of? I foresee this resulting in great difficulties for the courts, leading to the decrease in its application. If this is the Commission's intention, then it will certainly achieve that purpose.

Circuit Splits

This proposed amendment addresses two circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

- **Part A** addresses a circuit conflict concerning whether the "physically restrained" enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to §1B1.1 (Application Instructions). Three options are presented. Issues for comment are also included.

- **Part B** addresses a circuit conflict concerning whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("singlesentence rule"). See USSG §4A1.2(a)(2).

Part A – Physically Restrained (by gunpoint?)

Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." For purposes of §2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1(L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up."

A circuit conflict has arisen concerning whether the enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those outlined in the Commentary to §1B1.1 (i.e., "being tied, bound, or locked up").

The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits largely agree that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify.

Part A of the proposed amendment presents three options for responding to this circuit conflict by amending the enhancement at §2B3.1(b)(4)(B).

- **Option 1** would generally adopt the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures. It would amend the language of §2B3.1(b)(4)(B) to specify that the increase applies to cases in which "any person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape." Option 1 also includes conforming changes to the Commentary to §2B3.1.

- **Option 2** would generally adopt the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that physical measures must be used for the enhancement to apply. It would amend the language of §2B3.1(b)(4)(B) to clarify that the increase applies only in cases in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." Option 2 also includes conforming changes to the Commentary to §2B3.1.

- **Option 3** would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at §2B3.1(b)(4)(B). The new enhancement would provide for a 2-level enhancement for offenses in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." It would also add a 1-level enhancement for offenses in which "any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape." Option 3 includes conforming changes to the Commentary to §2B3.1.

Issues for Comment

1. **Part A of the proposed amendment sets forth three options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?**

   Response

   Option 1, which adopts the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures, is the only option that makes sense. The argument that a victim held at gun point is any less restrained than someone tied to a chair is illogical. The Commission should adopt Option 1. I respectfully **do not** support Option 2, which is the approach adopted by the 5th Circuit, nor do I support Option 3 that assesses only 1 level for those restrained at gun point.

2. **The term "physically restrained," as used in §2B3.1 (Robbery), is defined in Application Note 1(L) of the Commentary to §1B1.1 (Application Instructions). Other guidelines also use the term "physically restrained" and define such term by reference to the Commentary to §1B1.1. See §§2B3.2(b)(5)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 2E2.1(b)(3)(B) ("[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."), 3A1.3 ("If a victim was physically restrained in the course of the offense, increase by 2 levels.").**

If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend any or all of these other guidelines to mirror the proposed approach for §2B3.1? Instead of amending §2B3.1 or the other guidelines, should the Commission amend Application Note 1(L) of the Commentary to §1B1.1 to mirror the proposed approach for §2B3.1?

Response

The Commission should amend 1B1.1 to mirror the approach for §2B3.1. The conclusion does not change depending on the guideline. A person held at gun point is physically restrained, regardless of which guideline applies. This common sense approach should be adopted throughout the guidelines.

Part B – Intervening Arrest

Subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History) outlines whether multiple prior sentences should be "counted separately or treated as a single sentence" for purposes of assigning criminal history points ("single-sentence rule"). Prior sentences should be "counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." USSG §4A1.2(a)(2) (emphasis added). If "there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day."

There is a circuit split over the meaning of "intervening arrest." The Third, Sixth, Ninth, and Eleventh Circuits have held that a formal, custodial arrest is required, and that a citation or summons following a traffic stop does not qualify. By contrast, the Seventh Circuit has adopted a broad view of the term, holding that a traffic stop amounts to an intervening arrest.

Part B of the proposed amendment responds to this circuit conflict. It would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest . . . requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." It would also specify that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest."

Issues for Comment

There are no issues for comment for this amendment.

I do not foresee this amendment having significant impact on criminal history calculations. Although several local jurisdictions across the country have adopted the practice of issuing citations for low-level offenses (such as misdemeanor Possession of Marijuana), the rules in §4B1.2 still allow for the

scoring of offenses when there is no intervening arrest unless **(1)** those charges were listed in the same charging instrument, or **(2)** sentenced on the same day.

I have no issue with this amendment and do not foresee any significant changes.

Simplification of Three-Step Process

Section 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the Guidelines Manual. Post-*Booker*, the Commission incorporated a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (subsections (a) through (c)).

The three-step process can be summarized as follows:

1. The court calculates the applicable guideline range;

   The first step in the three-step process, as set forth in §1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), and Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

2. The court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and

   The second step in the three-step process, as set forth in §1B1.1(b), requires the court to consider "Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence."

3. The court considers the applicable factors in 18 U.S.C. § 3553(a) in imposing a sentence that is sufficient, but not greater than necessary (whether within or outside the applicable guideline range).

   The third step in the three-step process, as set forth in §1B1.1(c), requires the court to "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Specifically, section 3553(a).

The proposed amendment contains two parts.

- **Part A** contains issues for comment on whether any changes should be made to the Guidelines Manual relating to the three-step process set forth in §1B1.1 and the use of departures and policy statements relating to specific personal characteristics.

- **Part B** contains a proposed amendment that would restructure the Guidelines Manual to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the Guidelines Manual regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

Part A – Issues for Comments

See below.

Part B – Restructure of the Three-Step Process

Part B of the proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the Guidelines Manual in the wake of Booker and subsequent decisions.

Part B of the proposed amendment would revise Chapter One in multiple ways.

- First, it would delete the "Original Introduction to the Guidelines Manual" currently contained in Chapter One, Part A. This introduction would be published as a historical background in an Appendix of the Guidelines Manual.

- Second, Part B of the proposed amendment would revise the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. Part B of the proposed amendment sets forth the calculation of guideline range and determination of sentencing requirements and options under the Guidelines Manual as the first step of the sentencing process in §1B1.1(a). The court's consideration of the section 3553(a) factors is set forth as the second and final step of the sentencing process in §1B1.1(b). As revised, §1B1.1(b) expressly lists the factors courts must consider pursuant to 18 U.S.C. § 3553(a). Additionally, the definition of "departures" is removed from the application notes to §1B1.1, and the Background Commentary is revised accordingly.

- Third, Part B of the proposed amendment seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a).

Consistent with the revised approach, Part B of the proposed amendment would delete most "departures" currently provided throughout the Guidelines Manual. Changes would be made throughout the Guidelines Manual by deleting the departure provisions currently contained in commentary to various guidelines. Part B of the proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter's purpose in the introductory commentary noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, all provisions in Chapter Five, Part K (Departures), with the exception of those pertaining to substantial assistance to the authorities and early disposition programs, would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

Finally, Chapter Five is also amended by revising the Commentary to §5B1.1 (Imposition of a Term of Probation) and §5D1.1 (Imposition of a Term of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation or supervised release. The commentary is further revised to retain factors the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

Issues for Comment (Part A – informed by proposed amendments in Part B)

1. **Part B of the proposed amendment would remove the second step in the three-step process, as set forth in subsection (b) of §1B1.1 (Application Instructions), requiring the court to consider the departure provisions set forth throughout the Guidelines Manual and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.**

   The Commission invites general comment on whether reconceptualizing the three-step process in this manner streamlines the application of the Guidelines Manual and better reflects the interaction between 18 U.S.C. § 3553(a) and the guidelines. Does the approach set forth in Part B of the proposed amendment better achieve these goals than the proposed amendment published in December 2023, which would have retained current departure provisions in more generalized language and reclassified them as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a)? Are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

   Response

   Yes. Yes. Yes. Remove all departures from the guidelines and simplify the three-step process to a two-step process. For several years now, courts have pulled away from departures, opting for variances under §3553(a). It's typically more difficult to justify departures than a variance under §3553, which in my opinion is why courts move away from departures. And yes, this amendment better reflects the interaction between 3553 and the guidelines. Much simpler. Long overdue. I fully endorse.

2. **The Commission seeks comment on whether revising the three-step process, either in general or as implemented in Part B of the proposed amendment, is consistent with the Commission's authority under 28 U.S.C. §§ 994 and 995 and all other provisions of federal law. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission, such as the restrictions on the Commission's authority to promulgate further reasons for downward departures set forth in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108–21, 117 Stat. 649 (2003).**

Response

Yes, the amendment revising the three-step process is consistent with the Commission's authority and consistent with Congressional directives to the Commission. The issues addressed by departures can, and in many cases are, addressed by the 3553(a) factors. Departures needlessly complicate the process. Step two of the proposed two-step process expressly lists the factors courts must consider pursuant to 18 U.S.C. § 3553(a). No need to complicate the process. Deleted "departures" would be accounted for through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a).

3. **The Guidelines Manual currently contains more than two hundred departure provisions in Chapter Five, Part K (Departures), and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H contains twelve policy statements addressing the relevance of certain specific personal characteristics in sentencing. Such provisions were either included by the original Commission or through subsequent guideline amendments to provide guidance to courts in identifying "aggravating or mitigating circumstance(s) 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." See 18 U.S.C. § 3553(b).**

The proposed amendment contained in Part B would delete most "departures" currently provided throughout the Guidelines Manual. Only the provisions pertaining to substantial assistance to authorities (currently provided for in Chapter Five, Part K, Subpart 1) and early disposition programs (currently provided for in §5K3.1 (Early Disposition Programs (Policy Statement)) would be retained in the Manual, while other deleted "departures" would be accounted for through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a). If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to expressly account for any "departure provisions" in the Guidelines Manual beside substantial assistance and Early Disposition Programs? If so, which provisions should be retained and how? Alternatively, should the Commission remove the departures contained in Chapter Five, Part K, and the provisions in Chapter Five, Part H, addressing the relevance of certain specific personal characteristics in sentencing, while retaining other departure provisions throughout the Guidelines Manual?

Response

No, the Commission should not expressly account for any "departure provisions" in the Manual other than Substantial Assistance and Early Disposition. Again, all deleted departures would be accounted for through the court's consideration of the applicable factors in §3553(a).

No, the Commission should not keep other departure provisions throughout the Manual while deleting those in Chapter Five, Parts K and H. Delete them all.

4. **At some places in the Guidelines Manual, commentary including a departure provision also provides background information that the Commission determined was relevant to the court's consideration. For example, in setting forth a series of departure considerations, Application Note 27 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) also provides background information regarding the nature and impact of certain controlled substances, such as synthetic cathinones and cannabinoids, that may be informative to a court's determination as to whether a departure is warranted. The Commission seeks comments on whether it should retain such type of background information even if the departure language is removed. If so, which provisions in the Guidelines Manual currently contain background information that should be retained?**

Response

There may be some benefit to retaining that background information even if the departure language is removed to assist the court in weighing the §3553(a) factors. There are numerous departures throughout the Manual. To determine which among those also contain background information will simply require a section-by-section review.

From: [redacted]
To:
Subject: RE: A Request from Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission
Date: Wednesday, January 29, 2025 5:55:13 PM

Judge Reeves,

I welcome an amendment to §4B1.2 to eliminate the use of the categorical approach by providing a definition for "crime of violence" that is based on a defendant's conduct. In my almost 15 years on the bench, the categorical approach has never been helpful, is overly complicated for everyone, does not provide consistent results, is almost always appealed, and not fair to the defendant, victims, or the communities' expectations. However, using the conduct of the defendant would be both more fair, and make it easier for counsel to correctly predict the potential sentencing range during plea negotiations.

Thank you for the opportunity to comment.

Judge Gloria M. Navarro
US District Judge , District of Nevada

TO: Judge Carlton W. Reeves, Chair, U.S. Sentencing Commission

FROM: Judge Robin L. Rosenberg, U.S. District Court for the Southern District of Florida

RE: Public Comment to December 2023 Proposed Amendments

DATE: February 3, 2025

COMMENTS

I. Proposed Amendment: Career Offender

As amended, U.S.S.G. § 4B1.2(b)(4) outlines the "Sources of Information" that the government may use to make a prima facie showing that a defendant's prior crime was a crime of violence. Subsections (A) through (C) include the charging document, the jury instructions and accompanying verdict form, and the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant. I agree that the government may use those documents to meet its burden of showing that a prior crime was a crime of violence.

I disagree with the addition of subsections (D) through (F), which would allow the government to rely on additional sources of information including the judge's formal rulings of law or findings of fact, the judgment of conviction, and any explicit factual finding by the trial judge to which the defendant assented. It is not clear whether these sources of information are to come from the prior criminal proceedings or from proceedings before the current sentencing court. Either way, I do not agree that the government should be able to use these sources of information. Allowing the government to use these ill-defined sources of information would require the sentencing court to make several unnecessary legal determinations, and, possibly, new factual determinations. For example, the court may have to decide whether a factual finding

was "explicit" and whether the defendant "assented" to that finding. The government may argue that the court may make new factual findings about a prior crime at the sentencing stage for a different offense. Such determinations would unduly burden sentencing courts and would likely result in inconsistent rulings about the evidence the government may use and how a sentencing court is to make factual determinations about a past crime. I would not include § 4B1.2(b)(4)(D)–(F) in the amended guidelines.

II. Proposed Amendment: Firearm Offenses

I agree with Option 2 of the Proposed Amendment, which would expand the definition of a firearm to include those covered by the National Firearms Act, 26 U.S.C. § 5845(a), when calculating the base offense level and adopt that definition for some, but not all, of the firearm enhancements. I would apply the NFA definition of firearm to Subsections (b)(5) (enhancement for sale of firearms) and Subsection (b)(7) (recordkeeping offenses). I would not apply the NFA's definition to the remaining enhancements in Subsection (b), or to the cross reference found in Subsection (c).

III. Proposed Amendment: Circuit Conflicts

With regard to Part A of this amendment, I agree with Option 3 which would amend § 2B3.1(b)(4)(A) to apply a 2-point enhancement for the use of "physical contact or confinement" and a 1-point enhancement for "restric[tion] through means other than physical contact or confinement."

IV. Proposed Amendment: Three-Step Process

In response to the Commission's third issue for comment, I believe the Commission should consolidate and preserve for historical purposes any delated departure provisions. An appendix to the guidelines seems sufficient. Courts and practitioners alike would benefit from

referring to this language when making or analyzing arguments under the § 3553(a) factors. The current guidelines governing departures provide useful recommendations about how courts should weigh mitigating factors such as age, mental health concerns, physical condition, and many others.

U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

February 3, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the Sentencing Commission's request for comment on its proposed amendments to the Sentencing Guidelines and issues for comment published in the Federal Register on December 19, 2024.[1] The letter also serves as the Department's written testimony for the Commission's upcoming hearing on February 12, 2025.

The Department greatly appreciates the care and attention that the Commission has shown in each of the proposed amendments. As explained further below, however, we have significant concerns about the Commission's proposed amendments to the career offender guideline, including the proposal to limit prosecutors to *Shepard* documents in proving a defendant's prior violent conduct, the elimination of state drug crimes from this guideline entirely, and the adoption of a minimum sentence length requirement. We are also concerned that, by creating definitions for the terms "controlled substance offense" and "crime of violence" that differ from those used elsewhere in the Guidelines, the current proposal undermines the goal of simplification reflected in this same set of proposed amendments.

With respect to the other amendments, the Department has concerns about the proposal to add a *mens rea* component to two longstanding enhancements in the principal firearms guideline. We are generally supportive, however, of the Commission's efforts to update that guideline to reflect the dangers posed by machinegun conversion devices and to simplify the three-step sentencing process. And we urge the Commission to resolve the circuit conflict over the enhancement for physically restraining a robbery victim by adopting the majority view that physical contact between the offender and the victim is not an absolute requirement.

[1] *Notice of request for public comment and hearing*, 90 Fed. Reg. 1, 128 (Jan. 2, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-02/pdf/2024-31279.pdf; *see also* U.S. Sent'g Comm'n., *Proposed Amendments to the Sentencing Guidelines* (December 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf.

We thank you, the other Commissioners, and Commission staff for being responsive to the Department's sentencing priorities and to the needs and responsibilities of the Executive Branch. And we look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come.

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I. Career Offender Guideline and The Categorical Approach

The Department commends the Commission's continuing efforts to address the pernicious effects of the categorical approach in federal sentencing. At its core, the current proposal would (i) modify the "crime of violence" definition in the career offender guideline to focus on the defendant's conduct, as determined from a limited set of documents available to prosecutors when making a "prima facie showing"; (ii) remove all state drug convictions from the definition of "controlled substance offense" used in the career offender guideline; (iii) potentially limit qualifying convictions based on the length of the sentence imposed on the defendant (or the time that the defendant served); and (iv) retain the definitions of the terms "controlled substance offense" and "crime of violence" from the current guidelines for all other references to those terms in the Guidelines Manual—and do so by reproducing the current definitions of those terms in the application notes of the other provisions. Although the Department agrees with certain aspects of the Commission's current proposal, we have significant concerns with other parts.

The Department's view that the "categorical approach" results in extreme and unwarranted sentencing disparities is well known, shared by countless judges, and requires little explication. Although those problems plague multiple definitions present in federal statutes and the Sentencing Guidelines, they are particularly acute with regard to the definition of a "crime of violence," where a violent offender is frequently absolved of the consequences of his actions based on the anomalous fact that a different person could have been convicted under the same statute without engaging in comparable violence. Such results defeat Congress' express intent that those who repeatedly commit violent and other aggravated offenses should be incapacitated for long terms.[2]

Furthermore, as the Department has previously explained,[3] it makes littles sense that the Sentencing Guidelines require courts to use only the categorical approach when assessing whether an offense is a "controlled substance offense" or a "crime of violence." The constitutional concern that has animated many of the Supreme Court's decisions on the categorical approach—*i.e.*, that judges cannot make factual findings that increase the applicable

[2] *See, e.g.*, *United States v. Doctor*, 842 F.3d 306, 313-15 (4th Cir. 2016) (Wilkinson, J., concurring) (presenting an extensive exegesis on the shortcomings of the approach, stating that it "can serve as a protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence," that, "too aggressively applied, eviscerates Congress' attempt to enhance penalties for violent recidivist behavior," creating "a criminal sentencing regime so frankly and explicitly at odds with reality").

[3] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 28 (Feb. 27, 2023) ("2023 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457.

statutory penalties—is not present when applying advisory guidelines.[4] Sentencing courts are instead permitted (indeed, required) to make all manner of factual determinations regarding a defendant's conduct, both current and past, so long as they rest on reliable evidence.[5]

Accordingly, were the Commission designing a guidelines system from scratch, the Department might well recommend that recidivist enhancements be based solely on the conduct that led to a defendant's prior convictions, not arid comparisons of legal definitions. But the Commission is not designing a system from scratch. It is proposing amendments to one part of a Guidelines Manual that has been in existence for decades. And that Manual is itself only one facet of a federal sentencing system that accounts for individuals' prior drug and violent-crime convictions in several statutory contexts, some of which feature language similar to the Guidelines and are likely to remain subject to the categorical approach for the foreseeable future.

Against that backdrop, the Department does not believe it sensible to jettison decades of litigation and judicial decisions determining that some offenses are categorically a "crime of violence" or a "controlled substance offense" under the current Guidelines' definitions of those terms. Rather, the Department has advocated for retaining current definitions in the Guidelines, while also allowing courts to consider whether offenders' actual conduct rendered their offense a "crime of violence" or "controlled substance offense," if the offense is not a categorical match. The Department reiterates our support for that approach below, explaining why much of the new proposed amendment is insufficient to remedy the deleterious effects of the current state of the law—and threatens to add complexity to an area that would benefit from streamlining and simplification, which is one of the Commission's own overarching goals.

A. Crime of Violence

1. The Commission's Proposal

As stated above, the Department greatly appreciates the Commission's continued efforts to shift the career offender guideline away from a strict categorical approach and to allow courts to consider the defendant's prior conduct, not just the legal definition of prior offenses, under that guideline. But the Department has significant concerns about the definitional provisions and limitations on proof set forth in the proposed amendments to the crime of violence definition.

Broadly speaking, we see three problems with the proposal: removing offenses that are categorically violent narrows the provision's scope and creates unnecessary litigation; the new language is imprecise and potentially confusing as to the scope of conduct that it intends to cover; and the tight restrictions on permissible evidence and related procedural issues will exacerbate these problems. We therefore reiterate our preference for amendments that retain (with appropriate modifications) definitions with which courts and litigants have become

[4] *Cf. Beckles v. United States*, 580 U.S. 256, 265-66 (2017).

[5] *See* §6A1.3 (Resolution of Disputed Factors); *Pepper v. United States*, 562 U.S. 476, 489-91 (2011) (citing federal statutes and guideline provisions instructing courts to consider, without limitation any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law).

familiar, while also allowing judges to consider all reliable sources of information relating to the defendant's conduct.

a. The scope of offenses

The Department believes that every offense that currently qualifies as a "crime of violence" should continue to so qualify. The Commission's proposal appears to assume that it would achieve that objective. The proposal's elimination of both the current elements clause and the enumerated list of qualifying crimes, however, raises serious questions about whether that will be true.[6]

In particular, the Commission's data analysis adds together the number of individuals who were actually sentenced under the career offender guideline in FY 22 (as adjusted by the various drug-offense and point exclusions) and the number of individuals sentenced in FY22 not under the career offender guideline but who, the Commission believes, would have been so sentenced under the proposed amendment (similarly adjusted).[7] This simple addition assumes that every defendant who would be sentenced under the current career offender guideline would still be sentenced under the amended guideline. But for the reasons explained further below, that assumption is likely incorrect. Additionally, in calculating these estimates, the Commission relied on the "label of the instant and prior offense" to identify presumptive predicates instead of applying the actual conduct analysis that would be required by courts under the proposed amendment or the categorical approach (both of which would be challenging for the Commission to undertake).[8] As a result, these estimations likely overstate the number of defendants that would qualify under the proposed actual conduct approach.[9] Accordingly, the Commission's data analysis may not accurately reflect the effect of the proposed amendment, which would

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[6] The Department here responds to Issues for Comment Nos. 1 and 8. Issue for Comment No. 4 inquires whether the addition of the definition of "physical force" as "force capable of causing physical pain or injury to another person" is appropriate. The Department does not object to that insertion, which comports with the definition stated by the Supreme Court. *Johnson v. United States*, 559 U.S. 133, 140 (2010). However, the Department has previously suggested, and continues to maintain, that the definition of force should be modified to refer to the use of force against the person "or property" of another. This modification would bring the provision in line with the clauses that appear in 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c). *See* 2023 DOJ Letter at 31.

[7] U.S. Sent. Comm'n, *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background*, Slides 15, 18, 20 (2025), 2025_Career-Offender.pdf ("§4B1.1 Data Background").

[8] U.S. Sent'g Comm'n, Public Data Briefing, 2025 Proposed Amendment Relating to Individuals Sentenced Under §4B1.1, at 16:04-20 (discussing §4B1.1 Data Background, Slides 15, 18, 20).

[9] The Commission estimates that of the 1,354 defendants sentenced as career offenders in FY2022, only 305 would remain career offenders under the proposed amendments after excluding state drug offenses and excluding predicates that earned one and two criminal history points under §4A1.1. Of the 24,703 defendants sentenced in FY2022 for an instant violent offense or federal drug offense who were *not* sentenced as career offenders, the Commission estimates that as many as 654 *could potentially* have presumptive predicates under an actual conduct analysis and, thus, *may* have qualified as career offenders under the proposed amendments. But this analysis assumes that all predicates that have a label that appears violent would qualify, and thus, may only be able to provide a rough estimate. §4B1.1 Data Background, *supra*, Slides 15, 18, 20.

move the Guidelines even further away from Congress' directive that repeat violent offenders receive a sentence "at or near the maximum term authorized."[10]

We appreciate the Commission's recognition of the many flaws in the categorical approach. For better or worse, however, courts have already done the laborious work of determining that certain offenses are a categorical match to the current elements clause or one of the current enumerated offenses. The Commission should not require courts to address, on a case-by-case basis, the conduct underlying offenses that have already been deemed a categorical match to the current "crime of violence" definition.

Unfortunately, the proposed amendments would require exactly that kind of resource-intensive litigation. Because the proposal eliminates the current list of enumerated offenses, convictions for the notoriously violent offenses of murder, voluntary manslaughter, kidnapping, and aggravated assault would all require an assessment of the defendant's (or his accomplice's) actual earlier conduct, and a comparison to the new language in the definition, even if courts have already determined that the particular state or federal offense is a categorical match to the enumerated offense under the current definition.

The proposal does retain some language from the current elements clause. One might assume that, if an offense has, "as an element," the use, attempted use, or threatened use of force under the current definition, it is necessarily true that "the defendant engaged in" a use, attempted use, or threatened use of force under the proposed definition. But, given the ambiguities discussed below, that assumption is dubious. A defendant convicted of the substantive offense of armed robbery might argue that, although the offense has, as an element, the use of force, the government has not established that the *defendant*'s conduct involved force, versus the conduct of his accomplice. Similarly, a defendant convicted of conspiracy to commit armed robbery might argue that the government has not established that he used, attempted to use, or threatened to use force during the conspiracy. These concerns are significantly compounded by the limited documents on which the government can rely to establish the defendant's conduct, as we also discuss further below.

At the very least, removing the current definitions and allowing only a case-specific analysis invites unnecessary and resource-intensive litigation. Jettisoning the existing body of case law for the career offender guideline is particularly problematic when, as explained below, the current proposal retains the elements clause and the enumerated list of qualifying crimes in other parts of the Guidelines, such that litigation over the scope of these terms will continue even if they are eliminated from the career offender guideline.

b. The scope of covered conduct

The new suggested definition of the term "crime of violence" states:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, *in which the defendant engaged in any of*

[10] 28 U.S.C. § 994(h).

> *the following conduct*: (A) The use, attempted use, or threatened use of physical force (i.e., force capable of causing physical pain or injury to another person) against the person of another; or (B) [presenting definitions of prohibited sexual acts, robbery, extortion, arson, and the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials as defined in 18 U.S.C. § 841(c)] (emphasis added).

The proposed amendment also provides that the "defendant's conduct" under the new provision may be assessed under part of the relevant conduct guideline, §1B1.3(a)(1)(A), but not §1B1.3(a)(1)(B). Finally, the proposal provides that an inchoate offense "is a 'crime of violence' if the defendant engaged in any of the conduct described in subsection (b)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense."

Although we appreciate the Commission's focus on conduct as opposed to solely the elements of an offense, we are concerned about several related aspects of this definition. First, defining a "crime of violence" by reference to the "conduct" in which "the *defendant* engaged" (versus the conduct that "the offense involved") raises the question of whether a defendant has committed a crime of violence if his or her accomplice used or threatened force, as when two individuals together commit murder, but only one pulls the trigger. We understand the reference to §1B1.3(a)(1)(A) is meant to ensure that the defendant is responsible for not just his own conduct, but also certain accomplice conduct. But the tension between the definition's reference to the *defendant's* conduct (versus "offense conduct") and §1B1.3(a)(1)(A)'s reference to accomplice conduct could create confusion and is likely to result in significant litigation.[11]

Second, we disagree with the omission of §1B1.3(a)(1)(B), which encompasses conduct of accomplices or coconspirators during jointly undertaken criminal activity. It is unclear, for example, whether a defendant would be considered to have committed a crime of violence if he is convicted of the substantive offense of murder on a *Pinkerton* theory of liability. And if the answer is no, that leads to the exceedingly odd result that a defendant with a prior murder conviction would not be considered to have committed a crime of violence. It also invites even more litigation over the basis of a prior conviction in cases where the prosecution invoked multiple theories of liability, particularly if the government is limited in the evidence it can present to the district court (as further explained below).

Third, we are concerned that the language regarding inchoate offenses, which also repeats the phrase "the defendant engaged," could render most inchoate offenses outside the scope of the new "crime of violence" definition in two ways. For one thing, it doubles down on the issue noted above about "the defendant" versus others. For another, this language—rather than "the offense involved" or the defendant "attempted or agreed to" (or both)—appears to include an

[11] The Department, in response to Issue for Comment No. 2, agrees that consideration of whether an offense constitutes a crime of violence should involve an assessment of acts "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." It would not be appropriate to limit the provision to consider only violent conduct that occurred solely "during the commission of the offense." That narrower approach would likely raise difficult questions about when the "offense" commenced and concluded.

inchoate offense only if the government proves that actual violent conduct occurred, rather than an agreement or attempt to commit such violent conduct. Such an approach stands in contradiction to the longstanding view, embodied in the Model Penal Code and most federal statutes, that when a person attempts to commit a violent crime, or enters an agreement to commit such an offense, his intent and willingness to commit the crime—as well as the heightened danger of violence—warrants additional punishment. Since their inception, the Guidelines have embraced that view. Indeed, the Commission's position has long been that "[t]he terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense."[12] And that directive now appears in the text of the Guidelines, rather than the application notes.[13] There is no sound basis to abandon this foundational aspect of criminal law.

c. Unfounded limitations on proof

Each of the above problems is compounded by the proposal to require the government to make a "prima facie" showing of qualifying conduct based only on, essentially, *Shepard* documents—that is, the charging document, jury instructions and accompanying verdict form, a plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant, and any comparable judicial record (offering as an additional option permission to consult the judge's formal rulings of law or findings of fact, the judgment of conviction, and any explicit factual finding by the trial judge to which the defendant assented).

Experience teaches that this very limited set of documents is sometimes unavailable (depending on the quality of record-keeping in the various jurisdictions) and, even when available, often reveals relatively little about the actual facts of the defendant's conduct (particularly where there was a trial as opposed to a guilty plea). A charging document might list all possibly pertinent offenses. A judgment (which is currently listed only as an optional document) might specify the particular offense of conviction but will not distinguish between theories of liability (such as aiding and abetting or *Pinkerton* liability). The documents included in the proposed list that are most likely to provide facts (such as transcribed pleas) are not necessarily available, but other reliable descriptions of the criminal conduct—such as police reports, trial transcripts or exhibits, witness statements, or affidavits in support of complaints—often are.

Restricting sentencing courts to examination of such a limited set of documents risks gutting the new proposed conduct-based approach at its inception. With the limited set of documents identified, the most the government will ordinarily be able to prove is the statute of conviction, not the facts of the defendant's conduct (or those of any accomplice or co-conspirator). When that happens, the government will be left with only the argument that the statute of conviction necessarily required proof of conduct *by the defendant* meeting the new

[12] *See* U.S.S.G. App. C, Amend. 268 at 131-32 (amending career offender guideline to provide, effective Nov. 1, 1989, that the terms "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses").

[13] U.S.S.G. §4B1.2(d).

definition. That regime would approximate the categorical approach that exists today—with the added complications regarding accomplice conduct and inchoate offenses discussed above. The result will be the same disparity and confusion that currently reigns, in which courts must dissect the pertinent statutes, and at the end of the day offenders who committed identical conduct are treated differently depending on the vagaries of the drafting of state statutes and of the quality of court record-keeping—with the added difficulty of assessing the theory of liability upon which the defendant was convicted and the conduct underlying an inchoate offense.

As the Department has repeatedly opined, the *Shepard* limitation should have no place in sentencing under an advisory guidelines system.[14] The decision establishing that limitation, *Shepard v. United States*, 544 U.S. 13, 16 (2005), involved the application of a statutory penalty enhancement and thus implicated constitutional concerns under Supreme Court case law addressing the Sixth Amendment. To address concerns that a court might make factual findings increasing a defendant's statutory maximum sentence, the Court held that sentencing judges could consult only a limited class of judicial records in identifying a prior conviction. Those concerns are inapplicable to advisory guidelines. To the contrary, courts routinely and necessarily resolve disputed facts at sentencing to calculate the advisory Guidelines range—including facts about a defendant's past conduct and history—using any reliable information.

In this area, as in all others related to Guidelines findings, the Department should be permitted to put on evidence not limited to a judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent. Under §6A1.3 (Resolution of Disputed Factors), both parties may present information to the court, and the court may consider "any information that has sufficient indicia of reliability to support its probable accuracy."

If the Commission does adopt a limited list of evidence upon which courts may rely in determining the scope of a defendant's conduct, we urge the Commission to consider a significantly broader range of evidence. First, the Commission should clarify that sentencing courts may rely on any factual finding by a judge or jury, including the findings of a court during a guilty plea, trial, or sentencing, regardless of the defendant's assent.[15] The Commission should also permit consideration of any reliable testimonial or documentary evidence presented in the case giving rise to the predicate offense. In so doing, the Commission should jettison the concept of a "prima facie showing." The term "prima facie," which appears infrequently in the Guidelines Manual, tends to refer to evidentiary burdens and is largely unhelpful at the sentencing phase, where the Federal Rules of Evidence do not apply, *see* Fed. R. Evid. 1101(d)(3). It is also unnecessary because the government, as the proponent of the career offender enhancement, bears the ultimate burden of establishing its applicability.

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[14] *See* 2023 DOJ Letter at 31; David Rybicki, U.S. Dep't of Justice, Letter to Hon. Charles R. Breyer & Hon. Danny C. Reeves, Commissioners, at 4 (Feb. 19, 2019) ("2019 DOJ Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20190219/DOJ.pdf.

[15] It is unclear what distinction the Commission intends when it contrasts "[t]he judge's formal rulings of law or findings of fact" and "[a]ny explicit factual finding by the trial judge to which the defendant assented."

2. The Department's Proposal

To address all of these considerations—the sensibility of relying on past determinations under the categorical approach, the propriety of enumerating particularly violent crimes, and the need to consider actual conduct, using any reliable information, in order to assure sensible and consistent results—the Department has advocated adoption of a "conduct-based backup" to the existing elements and enumerated clauses, with additional modifications of those clauses as necessary. *See* 2023 DOJ Letter at 27-28.[16]

The Department endorsed a proposal that the Commission published on December 20, 2018, under which a court applying the elements clause would not be limited to the elements of the offense but would also be permitted to consider any means of committing the offense identified in judicial records, "as well as the conduct that formed the basis of the offense of conviction." 2019 DOJ Letter at 2. The Department has further suggested that courts be permitted, when necessary, to consider any other reliable evidence to prove the actual conduct of the defendant. *See* 2023 DOJ Letter at 28, 31; 2015 DOJ Letter at 1-2, 13. The Department continues to advocate retention of the elements and enumerated clauses, with appropriate amendments, and the addition of language instructing sentencing courts that—if the categorical and modified categorical approaches do not suffice to show whether the defendant was convicted of qualifying offense—the court should consider the conduct leading to the defendant's prior conviction. *See* 2015 DOJ Letter at 14.

Finally, as explained further below, we have serious concerns about providing for multiple differing definitions of "controlled substance offense" and "crime of violence." If the Commission does decide to amend the career offender definitions, but not the definitions elsewhere in the Guidelines, it would be wise to retain the elements clause and enumerated offenses in the career offender definition. That is, any amendments to the career offender definition should add ways to satisfy that guideline's definition, rather than change the current ways to satisfy the definition. If nothing else, such an approach would reduce the gap between the definitions of "crime of violence" and "controlled substance offense" in different parts of the Guidelines, thereby promoting uniformity and efficiency and reducing confusion.

3. Enumerated Offenses

For the reasons stated above, the definition of "crime of violence" should continue to rest on an elements clause, and enumeration of specific violent crimes, bolstered by a conduct-based backup. In that approach, it remains important to enumerate specific crimes that are always appropriately deemed violent, such as murder, manslaughter, aggravated assault, and robbery, sparing the courts the need to conduct any further factual inquiry where a defendant has been convicted of an offense matching the accepted definition of such a crime.

[16] *See also* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Patti B. Saris, Chair, at 11-14 (Oct. 30, 2015) ("2015 DOJ Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/DOJ.pdf.

Although the proposal retains the current definitions of forcible sex offense, robbery, and extortion (and adds an unobjectionable definition of arson), it deletes (without explanation) the previous references to murder, voluntary manslaughter, kidnapping, and aggravated assault. Perhaps the assumption is that these eliminated offenses will be fully covered by the conduct-based clause. But for the reasons outlined above, that assumption is faulty. Moreover, retaining the current enumerated offenses would permit courts to efficiently apply the "crime of violence" definition to matters where it is settled that convictions for these crimes satisfied the generic definitions of these quintessentially violent acts.

The Commission should also take this opportunity to resolve anomalies that have appeared in the current definitions of robbery and extortion, which are retained in the proposal. The proposal includes a new application note stating, "the Commission anticipates that subsection (b)(1)(A) will be sufficient to include as crimes of violence conduct that would constitute most robbery and extortion offenses that involve violence. Subsections (b)(1)(C) and (b)(1)(D) are included to provide clarity and ease of application." The Department disagrees that the provisions—a conduct clause requiring proof of "physical force (*i.e.*, force capable of causing physical pain or injury to another person)," plus the provided definitions—are sufficient to capture most robbery and extortion offenses.[17]

a. Robbery

The proposed definition of robbery is materially the same as the current provision, at §4B1.2(e)(3), added effective November 1, 2023. The current version largely tracks the language of the Hobbs Act, 18 U.S.C. § 1951(b)(1), and was adopted to abrogate the decisions of a number of appellate courts that Hobbs Act robbery did not qualify as a predicate "crime of violence" under the elements clause (because the violence may be targeted at property as well as a person).

This salutary amendment, however, had the unintended consequence of likely eliminating as crimes of violence numerous state robbery statutes that previously qualified, on the grounds that those statutes allow conviction based on reckless conduct. The current definition, like that in the Hobbs Act, requires intentional conduct. But the majority rule is that violence directed at a person or property to accomplish a theft may be committed recklessly in order to amount to robbery. That is the position of the Model Penal Code, which defines robbery as occurring, in part, when, "in the course of committing a theft, [the defendant] inflicts serious bodily injury

[17] The Department here responds to Issue for Comment No. 4. Issue for Comment No. 5 inquires whether the proposed definition of forcible sexual acts is sufficient. That definition matches the current provision, and the Department offers no objection.

Issue for Comment No. 6 asks whether the newly proposed definition of arson ("The willful or malicious setting of fire to or burning of property") is sufficient. The Department believes that it is, as it is consistent with the generic definition identified by the courts. *See, e.g.*, *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (identifying "the consensus among state statutes that defines contemporary arson as involving the malicious burning of property, personal or real, without requiring that the burning threaten harm to a person."); *United States v. Delgado-Montoya*, 663 Fed. Appx. 719, 724 (10th Cir. 2016) (unpublished) (stating that other courts "have all concluded that the modern generic definition of arson is the intentional (or willful) and/or malicious burning of property," citing *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015)).

upon another."[18] No *mens rea* attaches to the infliction of injury, so the MPC's gap-filler makes recklessness the culpability standard by default.[19] That result is consistent with the common law, which required no proof of *mens rea* as to the use of force: as long as a theft was intended, any injury that resulted constituted robbery.[20] A majority of states continue to follow this rule by statute.[21]

Accordingly, the current definition of robbery should be amended, while preserving the language of the Hobbs Act, to make clear that a robbery offense committed with the reckless use of force also qualifies. Just as the Supreme Court stated in *Quarles v. United States*, 587 U.S. 645 (2019), that the ACCA should not be interpreted in a manner that would eliminate most state crimes of the same type from the generic definition selected by Congress, so too this Commission should not "enact[]a self-defeating statute," *id.* at 654, with regard to the quintessentially violent crime of robbery.

b. Extortion

The proposal suggests retaining the existing definition of "extortion" ("obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.").[22] That definition was added in Amendment 798 (Aug. 1, 2016).[23] As the Department has previously explained, *see* 2019 Letter at 9-10; 2023 DOJ Letter at 34-35, the change also had an unintended consequence of potentially eliminating the federal Hobbs Act extortion statute and most state extortion statutes as enumerated crimes of violence. That consequence should be corrected at this time and in the manner suggested in the Department's prior letters—*i.e.*, by defining extortion as obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury *to persons or property*, or (iii) threat of physical injury *to persons or property*.

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[18] *See* MPC §222.1(1)(a).

[19] *See id*., cmt.4(b), at 113-14 (citing MPC §2.02(3)).

[20] *See Stokeling v. United States*, 586 U.S. 73, 81 (2019); *United States v. Ivy*, 93 F.4th 937, 944 (6th Cir. 2024).

[21] As of 2024, a total of 35 states criminalize robbery where some form of harm is caused. Ala. Code §13A-8-41; Alaska Stat. §11.41.500; Ark. Code §5-12-103; Colo. Rev. Stat. §18-4-301; Conn. Gen. Stat. §53a-134; 11 Del. Code §832; Haw. Rev. Stat. §708-840; Idaho Stat. §19-2520B; 720 Ill. Comp. Stat. §5/18-1; Ind. Code §35-42-5-1; Iowa Code §711.2; Kan. Stat. §21-5420; Ky. Rev. Stat. §515.020; La. Rev. Stat. §14:64.4; 17-A Me. Rev. Stat. §651; Mich. Comp. Laws §750.529; Minn. Stat. §609.245; Mo. Stat. §569.020; Mont. Code §45-5-401; N.H. Rev. Stat. §636:1; N.J. Stat. §2C:15-1; N.Y. Penal Law §160.10; N.D. Cent. Code §12.1-22-01; Ohio Rev. Code §2911.01; 21 Okla. Stat. §797; Or. Rev. Stat. §164.415; 18 Pa. Cons. Stat. §3701(a)(1)(i); R.I. Gen. Laws §11-39-1; Tenn. Code §§39-13-402, 39-13-403; Tex. Penal Code §29.03; Utah Code §76-6-302; 13 Vt. Stat. §608; Wash. Rev. Code §9A.56.200; W. Va. Code §61-2-12; Wyo. Stat. §6-2-401. Of those, only nine—Colorado, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Montana, New Jersey, and New York—require more than the reckless infliction of injury.

[22] U.S.S.G. §4B1.2(e)(2).

[23] U.S.S.G. App. C, Amend. 798, at 125-32 (Supp. Aug. 2016).

B. Controlled Substances Offenses

The Commission has proposed amending the career offender guideline to eliminate state drug convictions from the definition of "controlled substance offense." Because it is quite rare that any person incurs three *federal* drug convictions that are counted separately under the Guidelines, this proposal effectively removes recidivist drug offenders from the career offender guideline. The Department opposes that aspect of the proposed amendment. We also oppose the suggested addition of a minimum sentence length requirement, whether limited to controlled substance offenses or applied to crimes of violence, too. But if the Commission were to adopt a sentence-length limitation, we favor the option that limits qualifying convictions to those addressed in §4A1.1(a) and (b) (sentence of at least sixty days) and would apply that limit only to controlled substance offenses.

1. Proposed Exclusion of State Offenses

One of the main features of the proposed amendment is to limit the term "controlled substance offense" to a list of federal convictions and thus eliminate all state drug convictions from the career offender guideline. The Department strongly objects to this aspect of the proposed amendment, which would upend years of federal sentencing practice, is not supported by the data that the Commission has publicly released, and would create unnecessary disparities between similarly situated defendants based merely on which jurisdiction (federal or state) previously prosecuted them. Such a change would also be unwise against the significant public safety threat and overdose deaths resulting from fentanyl, synthetic opioids, and other drugs.[24]

In 28 U.S.C. § 994(h), Congress directed the Commission to ensure that the Guidelines specify a sentence of imprisonment at or near the maximum term authorized for categories of defendants with two or more prior felony convictions that are each crimes of violence or drug offenses, including those "described in section 401 of the Controlled Substances Act."[25] As the Third Circuit has noted, the purpose of § 994(h) was "to impose substantial prison terms on repeat drug traffickers."[26] From the inception of the Guidelines, the career offender provision has included state drug crimes. The original application notes for the career offender guideline specifically stated that the term "controlled substance offense" included certain federal offenses and "substantially equivalent state offenses."[27] Over the following decades, Congress has never acted to amend § 994(h) to exclude state offenses or suggested that state court drug convictions should not be considered in the career offender analysis.

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[24] CDC, Nat. Center on Health Statistics, Provisional Drug Overdose Death Counts (updated Jan 15, 2025) ((over 80,000 deaths per year since 2020), at https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[25] 28 U.S.C. § 994(h)(2)(B).

[26] *United States v. Whyte*, 892 F.2d. 1170, 1174 (3d Cir. 1989) (quotation marks omitted).

[27] U.S.S.G. §4B1.2 n. 2 (1987 version), 1987 Federal Sentencing Guidelines Manual - Chapter Four - Criminal History and Criminal Livelihood.

Excluding state drug court convictions would be inconsistent with Congress' goal of providing for enhanced punishments for recidivist offenders. First, it is extremely rare that any defendant qualifies as a career offender solely because of prior federal drug offenses. According to the Commission's recidivism analysis of career offender defendants who were released from custody in 2015, only 25 defendants qualified as career offenders based solely on *federal* drug convictions.[28] That suggests that the proposed amendment would dramatically reduce drug offenses as career offender predicates, contrary to Congress' clear intent. Moreover, a federal prosecution is often an escalating result for a defendant whose criminal conduct has not been adequately addressed in the state judicial system.[29] By excluding all state convictions (regardless of the significance of the state case), the Commission will prevent the use of the career offender provision against significant drug traffickers with lengthy criminal histories and will limit the application of this provision to the much smaller universe of defendants who have been prosecuted in federal court. That would be the case even though state drug trafficking crimes are just as deleterious to public safety and health and those who repeatedly commit those offenses are just as appropriately subject to recidivist penalties as repeat federal offenders.

Although § 994 does not explicitly state that Congress intended for the career offender provisions to apply to state drug convictions, multiple courts have rejected arguments that the statute's reference to offenses "described in Section 401 of the Controlled Substances Act" and other federal statutes was intended to limit the application of recidivism penalties to those specific statutes.[30] Instead, appellate courts have found that the language in § 994(h)(b)(2) would apply to "drug trafficking conduct that could have been charged under the specified federal laws, but instead, was charged under state law."[31] That result follows from the text of § 994(h), which is not limited to individuals convicted under the enumerated statutes but instead applies to offenses "described" in those statutes.[32] The listed statutes "describe behavior commonly called 'drug trafficking'" that can be charged in federal or state court.[33] Reading the statute to apply to defendants previously convicted only of federal crimes would frustrate congressional objectives and create an illogical disparity in the sentencing treatment of repeat

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[28] U.S. Sent. Comm'n, *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background*, Slide 12 (2025), 2025_Career-Offender.pdf ("§4B1.1 Data Background").

[29] The Commission's data demonstrates that most defendants prosecuted for federal drug crimes have prior state drug offenses. *See, e.g.,* U.S. Sent. Comm'n, *The Criminal History of Federal Offenders*, Page 5 (2018) ("There were 18,820 drug trafficking offenders in fiscal year 2016. Over two-thirds of these offenders (69.3%) had at least one previous conviction. Half of those offenders (52.0%) had at least one drug possession offense in their criminal histories."); §4B1.1 Data Background, *supra*, Slide 9 (of the 1,354 defendants sentenced as career offenders in FY2022 for instant federal drug offenses, 52.6% (711) had prior drug convictions); *id.*, Slide 12 (approximately 45% (465) of career offenders released in FY2015 had prior drug offenses; of those, 94.6% (440) had at least one qualifying state predicate while 25 had only federal predicates).

[30] *See United States v. Jones*, 15 F.4th 1288, 1294-95 (10th Cir. 2021) (explaining the pertinent history and the consistent rulings of other circuits).

[31] *United States v. Consuegra*, 22 F.3d 788, 790 (8th Cir. 1994).

[32] *Cf. United States v. Johnson*, 915 F.3d 223, 229 (4th Cir. 2019).

[33] *United States v. Beasley*, 12 F.3d 280, 283 (1st Cir. 1993) (Breyer, C.J.).

drug offenders. As then-Chief Judge Breyer explained in *Beasley*, if state offenses were not covered, § 994(h) "would not require a substantial prison term for a repeat drug trafficker apprehended by state authorities and punished under state, rather than federal, law" and would create an unwarranted and "close to irrational" disparity based upon "which jurisdiction happened to punish the past criminal behavior."[34]

Given the Commission's longstanding inclusion of state drug offenses and the sound reasons for including them, a decision to *exclude* all such offenses should be backed by substantial empirical data. But the data does not support exclusion of state drug offenses. Rather, the Commission's recidivism analysis of career offender defendants who were released from custody in 2015 shows relatively minor differences in the recidivism rates for individuals classified as career offenders based (a) solely on drug offenses, (b) a mix of drug and violent offenses, and (c) solely for violent crimes. Specifically, the Commission determined that 48.8% of drug-only offenders were rearrested within five years of release, slightly below the rearrest rates for those who qualified based on a mix of drug and violent crimes (52.8%) or violent crimes only (56.8%).[35] The differences were likewise modest within the class of drug-only career offenders: the rearrest rate for those who qualified as career offenders based only on *federal* drug convictions (only 25 defendants) was 52%, just above the rate (48.8%) for the class that includes state drug convictions.[36]

Finally, the proposed elimination of state convictions also would add unnecessary confusion and inconsistency to the Guidelines. Nowhere else in the Guidelines is a defendant's sentence so dependent on the mere jurisdiction of a prior conviction. Rather, the Guidelines have treated prior convictions equally, regardless of whether they were obtained in federal or state courts.[37] Under this proposal, a defendant's state drug trafficking offense would qualify as a controlled substance offense under multiple guideline provisions (such as §2K1.3 and §4B1.4) but would not be a controlled substance offense for career offender purposes simply because the defendant was previously prosecuted in state court. That would be the case even if the defendant had, for example, previously been sentenced to 20 years' imprisonment for a significant state drug trafficking offense. To avoid such unwarranted disparities, the Commission should not remove state drug offenses from the definition of controlled substance offense under §4B1.2.

2. List of Qualifying Federal Predicates

In proposing to limit the term "controlled substance offense" to federal drug crimes for purposes of the career offender guideline, the Commission seeks comment on whether that list should mirror the statutes listed in the career offender directive, 28 U.S.C. § 994(h), or include

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[34] *Beasley*, 12 F.3d at 283.

[35] §4B1.1 Data Background, Slide 11.

[36] §4B1.1 Data Background, Slide 12.

[37] U.S.S.G. §4A1.1 (background). The Guidelines applicable to offenses involving the sexual exploitation of a minor also include prior state offenses. U.S.S.G. §2G2.2(b)(5) & n.1 ("pattern of activity"); *United States v. Cover*, 800 F.3d 275, 281 (6th Cir. 2015).

several additions. As explained below, the Department believes that both proposals are too narrow and recommends that, if the Commission were to limit the career offender provision to federal drug offenses, it should at least ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

The Commission's most narrow proposed definition would substantially limit the controlled substance offense definition to the six statutes specified in 18 U.S.C. § 994(h). Only convictions under 21 U.S.C. § 841, § 952(a), § 955, § 959, or 46 U.S.C. § 70503(a) or § 70506(b) would be qualifying convictions. That proposal would yield unusual results. For example, the definition would include crimes related to *importation* of controlled substances (21 U.S.C. § 952) but would not cover offenses related to the *exporting* of controlled substances (21 U.S.C. § 953) or registration offenses related to imports or exports of controlled substances (21 U.S.C. § 957). This would be particularly anomalous because violations of 21 U.S.C. § 955 (which applies to possession of certain drugs on vessels departing the United States) would qualify. The result would be that most federal export offenses involving controlled substances would not be considered controlled substance offenses unless they were charged under § 955. Similarly, violations of 21 U.S.C. § 825 (which applies to labelling and packaging offenses related to controlled substances) would appear to be excluded. There is no logical reason to exclude such offenses, which fall within the current definition in §4B1.2.

There may also be some offenses that currently are not within the scope of the current definition that would become qualifying convictions under the narrower proposal. The current definition only applies to an offense that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." §4B1.2(b)(1). By expanding the definition to apply to all violations of these statutes, the definition will also apply to some conduct prohibited by the enumerated statutes that involves broader conduct. For example, by expanding the definition to include all violations of 21 U.S.C. § 841, it would cover the conduct covered by 21 U.S.C. § 841(d), which prohibits certain conduct related to boobytraps on federal property.

The narrowest proposed definition also excludes conspiracy and attempt crimes under 21 U.S.C. § 846 and § 963. That would exclude a large number of significant federal drug trafficking convictions from qualifying for career offender status, resulting in incongruous situations where a defendant convicted of a relatively small distribution offense would have a qualifying conviction, but a large-scale trafficker convicted of participating in a broad international drug trafficking conspiracy would not have a qualifying conviction. Such results are inconsistent with Congress' goal of ensuring that repeat drug offenders receive more substantial sentences.[38] Removal of conspiracy and attempt crimes also would represent a significant about-face on the part of the Commission, which recently moved inchoate offenses from the guideline commentary to §4B1.2(d) when it adopted Amendment 822 (effective in 2023).

Even the broader list of statutes proposed by the Commission is too narrow and will create potential uncertainty and inconsistency. The Commission is proposing to add to the list in

[38] *Whyte*, 892 F.2d. at 1174 (internal citations omitted).

§ 994(h) only 21 U.S.C. § 843(a)(6), § 843(b), § 846, § 856, § 860, § 960, and § 963 (if the object of the § 846 or § 963 conspiracy or attempt was to commit an offense covered by this provision). That list excludes other significant drug trafficking offenses. For example, it excludes defendants convicted of operating a continuing criminal enterprise under 21 U.S.C. § 848. Although the proposal specifically lists § 860 (which provides for higher penalties for violations of § 841(a)(1) and § 856 that occur near schools and other specific locations), it does not list other similar provisions that provide for enhanced penalties for specific drug trafficking offenses, including 21 U.S.C. § 849 (drug offenses near truck stops or safety rest areas), 21 U.S.C. § 859 (distributing drugs to persons under 21), § 860a (manufacturing methamphetamine while children are present), and § 960a (drug trafficking offense in support of terrorism). Because these other statutes (like § 860) are premised on a violation of 21 U.S.C. § 841, their omission from the list may create uncertainty about whether they constitute qualifying offenses.

The proposal also would appear to exclude other significant drug offenses, including 21 U.S.C. § 858 (endangering human life while manufacturing a controlled substance) and 21 U.S.C. § 861 (employment of minors in drug operations). It further would exclude other offenses that have been found to be controlled substance offenses under the current definition, including RICO offenses under 18 U.S.C. 1962,[39] and Travel Act offenses under 18 U.S.C. § 1952.[40] All of these omissions would inappropriately narrow the definition of controlled substance offense to exclude significant drug trafficking crimes. Should the Commission elect to exclude state crimes, it should at least ensure that all felonies under Title 21 and all Title 18 offenses that involve drug trafficking qualify as controlled substance offenses.

3. Minimum Sentence Requirement

The Commission has proposed several options that would prevent prior convictions from qualifying as career offender predicates if they did not meet various threshold terms of imprisonment. The Department opposes the adoption of a minimum sentence length requirement but recommends that, if the Commission adopts one, it should exclude only one-point convictions under §4A1.1(c). That limitation also should be applied only to controlled substance offenses, not crimes of violence.

As an initial matter, the Department questions whether carving out large numbers of convicted drug traffickers or violent offenders from qualifying for career offender status is consistent with the governing congressional directive. In the language of § 994(h), Congress required the recidivist penalties to apply to individuals over 18 who had certain prior convictions. It did not suggest that convictions that fall within those parameters can or should be further cabined based upon the sentence imposed or served. As a result, the Department has concerns about whether any of the options proposed by the Commission are within the scope of its authority or consistent with congressional intent.

[39] *United States v. Williams*, 898 F.3d 323, 333-34 (3d Cir. 2018).

[40] *United States v. Morelock*, 369 Fed. Appx. 681, 685-86 (6th Cir. 2010).

The Commission's proposed amendment does not provide a substantial explanation for curtailing the career offender guideline based upon the sentence served for the defendant's prior offenses. To the extent the Commission believes the proposal responds to a concern that a large number of defendants are found to be career offenders based upon insubstantial criminal histories, the Commission's own statistics suggest otherwise. The Commission's FY 2022 datafile, for example, estimates that approximately 87 percent of career offenders with prior drug trafficking convictions had "three point" convictions (meaning that that their prior sentences were over one year and one month, *see* §4A1.1(a)), and that approximately 18 percent of defendants' prior qualifying drug convictions involved "one point" sentences of less than 60 days, *see* §4A1.1(c).[41] Moreover, sentence length can be reduced for a variety of reasons, including overcrowding situations and cooperation with authorities. The mere fact that a prior sentence was not lengthy is not necessarily an indication that the defendant's prior criminal conduct was insubstantial.

Applying any sentencing duration limitations on qualifying state career offender convictions also could exacerbate intrastate and interstate sentencing disparities. For example, it is not unusual for local prosecutors or local judges within the same state to have differing views and practices regarding sentencing. Thus, the same conduct in one county could receive a prison sentence, but a probationary sentence in another. Additionally, courts in different parts of the country may have very different views about the appropriate sentences for drug traffickers. A 200-kilogram methamphetamine case may be viewed differently on the Southwest border than in New England. By focusing on the duration of the sentence imposed or served for a state conviction, the Commission could extend these sentencing disparities into the career offender realm, causing defendants with state convictions for similar conduct to receive differing career offender statuses merely because of the location where the prior state conviction arose. A fairer approach would be to focus on the fact of the underlying conviction itself without allowing career offender status to turn on variations in local sentencing practices. This keeps the focus simply on the defendant's ongoing recidivist conduct when determining career offender status.

Should the Commission choose to proceed with any of its proposals based upon the duration of prior sentences, the Department's view is that Option One is preferable to the others—but that it should be applied *only* to "controlled substance offenses," not the definition of "crime of violence."[42] Option One would exclude "one point" convictions under §4A1.1(c), which are convictions for which a defendant's prior sentence of imprisonment was less than 60 days. Although the duration of the sentence imposed is not always a clear representation of a defendant's culpability, Option One would exclude only those sentences that are especially short, ensuring that convictions that triggered an appreciable term of imprisonment continue to carry meaningful recidivist consequences under the Guidelines.

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[41] This data is drawn from the Sentencing Commission's FY2022 Datafile (USSCFY22) and 2022 Criminal History Datafile (CRIMHIST22NID).

[42] Any concerns about supposedly minor drug offenses triggering a guideline range that the Commission may view as severe in comparison to a defendant's previous terms of imprisonment are not applicable for crimes of violence. Rather, the Department believes it appropriate and consistent with congressional intent to treat recidivist offenders with convictions for crimes that were inherently or actually violent as career offenders, regardless of the particular sentences imposed for those prior violent crimes.

The proposals that would require a defendant to have been sentenced to a specific sentence (one/three/five years), or to a term of imprisonment satisfying §4A1.1(a), sets too high a bar and would exclude significant offenses. For example, according to the Commission's recent data analysis, even six percent of defendants convicted of murder and 14 percent of defendants convicted of a forcible sex offense in FY2022 were sentenced to less than six months of imprisonment on average.[43] Additionally, the suggested limits could preclude the application of the career offender provision to a defendant who received a reduced sentence because the defendant, despite having committed a serious offense, provided substantial assistance in a previous case. If that defendant then engaged in recidivist drug trafficking activity, the previous sentencing benefit would allow the defendant to avoid career offender status.

The Commission also seeks comment on whether, if it adopts a limitation tied to the sentence imposed, that provision should exclude convictions from the career offender definition when the defendant shows that he actually served less than a specified amount of time in prison. The Department opposes the proposed carveout. The Commission's data analysis again indicates that time actually served does not necessarily reflect the seriousness of the offender's previous crime or the need for recidivist punishment.[44] In some states, defendants may be released after serving only a fraction of their sentences, not because a court has reconsidered the severity of the offense, but for reasons unrelated to the defendant's crime or rehabilitation, such as overcrowding and budget issues. Moreover, determining time actually served can present difficulties of proof in many cases, based on variations in state practices and the availability of sometimes dated state records. These record reviews can be further complicated by such factors as indeterminate sentences, suspended sentences, pretrial credit calculations, sentence revocations, and parole practices. Such additional layers of complexity run counter to the goal of simplifying the sentencing process.

4. Resolution of Circuit Conflicts

The Department maintains that, not only should the career offender guideline continue to address state drug trafficking offenses, but the Commission should also take this opportunity to resolve several circuit conflicts regarding the application of the categorical approach in this area. As a general matter, in contrast to the situation involving crimes of violence, the categorical approach as applied to the definition of "controlled substance offense" has not been as troublesome. But several topics have produced unnecessary litigation and counterfactual results. The Department addressed these at greater length in its February 2023 comment letter, but in brief:

- Courts are divided over whether the term "controlled substance" is limited to drugs regulated by the federal Controlled Substances Act or instead may be defined by state law. The Commission should resolve the conflict in favor of the majority view that

[43] §4B1.1 Data Background, *supra*, Slide 26.

[44] *See* §4B1.1 Data Background, *supra*, Slide 30 (showing that, among individuals released from state custody in 2018, 2 percent of those convicted of murder and 11 percent of those convicted of rape or other sexual assault served less than six months on average).

the term applies to a controlled substance as defined by state law as well as federal law—an approach that reflects the longstanding language of §4B1.2 and avoids nonsensical results.[45]

- The Commission should amend the definition of "controlled substance offense" to make clear that the question whether a crime involved a "controlled substance" under a federal or state law should be assessed as of the time that the defendant committed the predicate offense. The Supreme Court recently reached that result in the context of the ACCA,[46] and the Commission should apply the same approach to the Guidelines.[47]

- The Commission should amend the career offender guideline to provide that an offense involving an "offer to sell" qualifies as a "controlled substance offense," thus aligning §4B1.2(b) with the definition of "drug trafficking offense" in the illegal-reentry guideline, §2L1.2 cmt. n.2.[48] In addition, the amendments supported above—*i.e.*, defining a "controlled substance" as one scheduled by either state or federal law, as of the time of the prior offense—should be added to application note 2 to §2L1.2, without otherwise changing that application note's definition of "drug trafficking offense."[49]

C. Consistency of Definitions in the Guidelines

The Commission proposes to change the current definitions of "controlled substance offense" and "crime of violence" in the career offender guideline but leave those current definitions in several other guidelines. We do not support inconsistent definitions of "controlled substance offense" and "crime of violence." First, those terms apply far more frequently outside the career offender context. Thus, the proposal fails to address the problems of the categorical approach in most cases. Second, having competing definitions of these terms introduces unnecessary complexity and confusion.[50]

The definitions of "crime of violence" and "controlled substance offense" apply to far more defendants sentenced under other guidelines as compared to defendants sentenced under

[45] *See* 2023 DOJ Letter at 20-22.

[46] *Brown v. United States*, 602 U.S. 101 (2024).

[47] *See* 2023 DOJ Letter at 22.

[48] *See* 2023 DOJ Letter at 36-37.

[49] *See* 2023 DOJ Letter at 22.

[50] The Department here responds to the Commission's Issue for Comment No. 10. That passage also seeks comment on whether, if definitions are moved to other guidelines, they should appear in the guideline text rather than commentary. In the Department's view all substantive changes to a guideline should be incorporated in the text rather than an application note—as the Commission did last amendment cycle when moving the definition of "loss" in §2B1.1 from an application note to the text.

the career offender guideline. For example, according to Commission data for FY 2023, approximately three times as many offenders received an enhancement under the firearm provision (§2K2.1) for prior commission of a "crime of violence" or "controlled substance offense" than were subject to the career offender guideline.[51] In the Department's view, the frequency with which courts consider recidivist enhancements under other provisions makes it imperative to remedy the problems resulting from the categorical approach in all of its applications, not only in the career offender guideline.

One of the primary reasons to eliminate the categorical approach is to reduce complexity and unnecessary litigation. This proposal does the opposite. It introduces new, unclear definitions for the career offender guideline that will result in substantial new litigation, as discussed above. But it also retains the categorical approach in its most-frequent application, such that the Guidelines will continue to require the extensive litigation and absurd results that are the hallmarks of the categorical approach. As we have explained repeatedly,[52] the courts, litigants, and the public are best served by a single definition of these terms that applies throughout the Guidelines Manual. That approach best promotes ease of application and consistency.

We are aware that some references to the terms "controlled substances offense" and "crime of violence" in other guidelines are grounded in statutory directives different from those that apply to the career offender guideline. None of these directives, however, prevents the Commission from using an appropriate definition consistently across the Guidelines. Indeed, the Commission has generally recognized—correctly, in our view—the importance of consistency across guidelines definitions, even where different statutory directives apply. And we are not aware of any statutory directive that would preclude consistent application of the categorical *plus* conduct-based approach for which the Department has long advocated.

The statutory directive underpinning §2K2.1, for example, instructs the Commission to "appropriately" enhance penalties in cases in which an individual convicted under 18 U.S.C. § 922(g) has one or two prior convictions for a "violent felony" or a "serious drug offense," referencing terms used in the Armed Career Criminal Act (ACCA).[53] This directive requires that the enhancements in §2K2.1 for a "crime of violence" or "controlled substance offense" encompass any offense that would qualify as an ACCA "violent felony" or "serious drug offense." But it does not require that these terms be co-extensive with, let alone identical to, the ACCA definitions. To the contrary, the Commission has long defined the term "crime of violence" as used in §2K2.1 in ways that are both broader and narrower than the term "violent

[51] Specifically, according to the Commission's *2023 Sourcebook of Federal Sentencing Statistics*, during FY 2023, approximately 4,017 defendants received higher base offense levels under §2K2.1(a)(1), (a)(2), (a)(3), or (a)(4)(A) based on prior convictions for crimes of violence or controlled substance offenses, while approximately 1,351 defendants were sentenced under §4B1.1.

[52] *See* 2023 DOJ Letter at 34; 2015 DOJ Letter at 4 ("[T]he Department supports a standardized definition of 'crime of violence' throughout the guidelines. We believe that standardization will reduce litigation and foster more consistent decision-making and more equal and just outcomes. We urge the Commission to adopt a single definition of 'crime of violence' in the guidelines.").

[53] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 110513, 108 Stat. 1796, 2019.

felony" under ACCA. The Guidelines definition of "crime of violence," for example, has included several enumerated offenses (including murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, and robbery) that are not part of the ACCA's enumerated offense clause, as well as the "unlawful possession of a firearm described in 26 U.S.C. § 5845(a)," an offense that is not listed as an ACCA violent felony. At the same time, the ACCA includes burglary, whereas the guidelines definition of a "crime of violence" does not.

In short, although congressional directives may limit to some degree the Commission's authority to define the relevant terms, those directives do not prevent the Commission from incorporating a sensible conduct-based approach throughout the Guidelines.

II. Firearms Offenses

A. Machinegun Conversion Devices (MCDs)

1. The Department Favors Option One

The Department thanks the Commission for publishing proposed amendments to address the emerging public safety threat posed by crimes involving machinegun conversion devices (MCDs). These devices, "which are easily manufactured,"[54] are designed to be inserted into semiautomatic firearms to convert that weapon into an illegal fully automatic machinegun.[55] By so doing, MCDs substantially increase a firearm's dangerousness. MCDs are cheap to make (often on a 3D-printer), easy to disguise, and difficult to regulate. As one court has explained, the added "dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it."[56] Federal law accordingly makes the possession of an unregistered MCD, even when not affixed to a firearm, a separate, stand-alone crime.[57]

As the Commission explains, its proposal responds to concerns—expressed by the Department, federal judges, and probation officers—that the Guidelines in their current form fail to reflect the gravity of offenses involving MCDs.[58] The problem arises because, although

[54] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022).

[55] Subject to few exceptions, machineguns are illegal to possess. 18 U.S.C. § 922(o).

[56] *Hixson*, 624 F. Supp. 3d at 940.

[57] *See* 18 U.S.C. § 922(o); 26 U.S.C. § 5861(d).

[58] *See* Scott A.C. Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 3 (July 15, 2024) ("2024 DOJ Annual Letter"), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=129; *Hixson*, 624 F. Supp. 3d at 933 (noting that "[t]he Guidelines do not include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of "'firearms'"); July 12, 2024 Comment Letter of Probation Officers Advisory Group, at 7 (explaining that "there are numerous cases in which the possession of conversion devices (not connected to a firearm), is not accounted for within this guideline," and recommending that the Commission "revise the definition of a firearm or add a specific offense characteristic or language in the commentary to cover [MCDs]"),

MCDs qualify as firearms under the definition of that term in the National Firearms Act (NFA),[59] §2K2.1 as currently drafted incorporates the definition of "firearm" from a separate federal law, the Gun Control Act (GCA).[60] And unlike the NFA, the GCA does not include MCDs within its definition of the term "firearm." The consequence is that offense level enhancements tied to the word "firearm," such as common enhancements for the number of firearms possessed or exporting firearms, are inapplicable to MCDs.

The Commission's Public Data Briefing on MCDs confirms that the Guidelines are currently failing to reflect the seriousness of crimes involving MCDs. During FY 2023, approximately 8,013 defendants were sentenced under §2K2.1 for firearms offenses not involving MCDs, and these defendants were subject to an average minimum guideline range of 48 months.[61] At the same time, 380 defendants were sentenced under §2K2.1 for firearms offenses involving MCDs, and those defendants were subject to a nearly identical minimum guideline range of 50 months.[62]

The Commission has proposed two options for addressing this problematic gap in §2K2.1's coverage. Option One would amend the definition of "firearm" applicable to §2K2.1 to include any firearm described in 18 U.S.C. § 921(a)(3) (*i.e.*, the GCA definition of firearm) or 26 U.S.C. § 5845(a) (*i.e.*, the NFA definition of firearm). It would also move the definition of "firearm" from the commentary to the guideline itself in a newly created subsection. Option Two would apply the NFA definition of a firearm to several specific enhancements in §2K2.1(b) and the cross-reference in §2K2.1(c).

The Department believes that both options would be an improvement over the status quo. But consistent with the views expressed in our most recent annual report,[63] we favor Option One. That option is simpler, more straightforward, and more likely to avoid gaps in coverage going forward. We also see little risk that adopting Option One will cause problems in the application of subsections that are omitted from Option Two's coverage. For example, under Option Two, the NFA definition of "firearm" would *not* apply to §2K2.1(b)(2), which provides for a reduced offense level of 6 in certain situations where a defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection." A defendant convicted for MCD-related offenses would not be able to benefit from that provision, both because his possession will not have been "solely for lawful sporting purposes or collection" and because the provision *excludes*

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at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=200.

[59] 26 U.S.C. § 5845(b).

[60] 18 U.S.C. § 921(3).

[61] U.S. Sent'g Comm'n, Public Data Briefing, Proposed Amendment on Firearms (January 2025), at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf

[62] *Id*.

[63] 2024 DOJ Annual Letter at 3.

defendants subject to enhanced base offense levels under §2K2.1(a)—and offenses involving MCDs trigger several of those enhanced base offense levels.[64]

2. Response to the Commission's Issues for Comment

The Commission has published several Issues for Comment concerning the proposed amendment. The Department addresses each of them in turn.

a. Issue for Comment No. 1 asks whether the proposed amendment appropriately addresses the concern that §2K2.1 insufficiently accounts for the dangers presented by MCDs and/or whether the Commission should address those concerns in another way. The Department believes that the proposed amendment is an appropriate response to the relevant dangers but is insufficient to address the challenge standing alone, in part because it does not account for the cumulative threat posed by the combination of MCDs and large-capacity magazines.

Subsection (a)(4)(B) of §2K2.1 currently provides an alternative base offense level of 20 when a defendant is convicted of being a felon in possession of a firearm and the offense involves *either* a semiautomatic firearm that is capable of accepting a large capacity magazine *or* a machinegun (which includes MCDs).[65] So, if the offense already involves a semiautomatic firearm with a large capacity magazine, the presence of an MCD will not make a difference in the base offense level. According to the Commission's Public Data Briefing, that would have been true in 65.5% (249) of the 380 firearms prosecutions involving MCDs in FY 2023, where the offense involved not only an MCD, but also a semiautomatic firearm with a large capacity magazine. In other words, for most felon-in-possession defendants, the base offense level of 20 would already be triggered by the large capacity magazine, and the presence of an MCD will have no effect on the guideline range and be unaccounted for in such cases.

In our July 15 annual letter, the Department requested that the Commission make each of these aggravators cumulative, rather than apply in the alternative, given the reality that so many criminal defendants have added *both* a large capacity magazine and an MCD to their semiautomatic firearm.[66] We believe that making such a change would more fully address the dangers presented by MCDs, because when a defendant possesses an MCD it makes that defendant's conduct more threatening to public safety. Indeed, a defendant with an MCD-equipped firearm is more likely also to use a high-capacity magazine because the benefit of a high rate of fire would be diminished if used in conjunction with a standard capacity magazine. Difficult to control even for experienced users, machineguns and firearms with MCDs are unlikely to be used for hunting or sport. That too speaks in favor of a cumulative enhancement.

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[64] U.S.S.G. §§2K2.1(a)(1), (a)(3), (a)(4)(B), (a)(5) (enhanced base offense levels for offenses involving firearms as defined under the NFA).

[65] §2K2.1(a)(4) ("20, if … (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense…").

[66] 2024 DOJ Annual Letter at 3.

The Department's 2024 annual letter also identified the need to ensure that the drug trafficking guideline (§2D1.1) adequately reflects the dangers posed by MCDs in that context. The Commission has published a proposed amendment to §2D1.1 specifically to address the risks posed by an armed drug trafficker whose firearm is a machinegun or equipped with an MCD. While the Department will address this proposal at the appropriate time and appreciates this first step, we note here our concern that the proposal may not capture the cumulative problem of drug traffickers who arm themselves with machineguns *and* large capacity magazines—raising significant public safety concerns.[67]

b. Issue for Comment No. 2 asks whether it is appropriate for MCDs to be given the same weight as other firearms under the various enhancements in §2K2.1. The Department believes that such treatment is appropriate. We understand the contrary intuition—*viz.*, that because MCDs may look innocuous and are not themselves the object firing deadly projectiles, they do not warrant equivalent treatment to other items qualifying as firearms.

The Department does not share that view. As explained above, MCDs are themselves machineguns under federal law, and their unregistered transfer or possession is unlawful regardless of whether they are affixed to another gun. We therefore believe it wholly appropriate for the Guidelines to treat MCDs as full-fledged firearms for purposes of §2K2.1. That is especially true given the incremental harm caused by a defendant who traffics in devices that can render one or more additional weapons that much deadlier.

As a practical matter, moreover, we see the guideline ranges likely to result from treating MCDs as firearms under §2K2.1 as commensurate with the seriousness of the offense conduct. *United States v. Hixson*—the case cited above and in our 2024 annual letter—provides an illustrative example. The defendant there was convicted for possessing a firearm with an extended magazine and for possessing nine MCDs (Glock switches). If the MCDs were scored as firearms, the defendant's offense level would have increased from 17 to 25, and his guideline range from 30-37 months to 70-87 months.[68] A low-end sentence of 70 months is hardly disproportionate for a recidivist offender who possessed nine MCDs and showed willingness to traffic in them by selling four MCDs to a confidential informant.[69] Indeed, the district judge sentenced Hixson to 66 months as an upward variance from the range calculated without treating MCDs as firearms for purposes of §2K2.1(b).[70]

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[67] *See e.g.*, KETV NewsWatch 7, *Omaha Police Department, ATF Seeing Surge in Dangerous Machinegun Conversion Devices Kits That Make Handguns Fully Automatic* (Feb. 6, 2024), *available at* https://www.ketv.com/article/omaha-police-surge-machine-gun-conversion-kits-handguns-fully-automatic/46629040.

[68] *Hixson*, 624 F. Supp. 3d at 938.

[69] *Hixson*, 624 F. Supp. 3d at 940 ("This offense involved 9 Glock switches, some of which Mr. Hixson sold believing they would be resold to others.").

[70] *Hixson*, 624 F. Supp. 3d at 942.

c. Issue for Comment No. 3 asks how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C),[71] and whether the calculation should depend on whether the MCD was affixed to another firearm. Our answer is largely the same as for the previous issue: each MCD should count as a firearm, such that a gun equipped with an MCD should count as two firearms. The reasons for that treatment are straightforward. Each MCD *is* a firearm under the NFA and the "machinegun" definition in 18 U.S.C. § 921(a)(23); each MCD converts a firearm into a fully automatic machinegun; and a fully automatic machinegun is simply more dangerous than a firearm that does not fire automatically. Treating each MCD as a firearm gives each MCD its intended statutory weight; in contrast, failing to treat each MCD as a firearm results in the seriousness of the defendant's conduct not being appropriately reflected in the defendant's guideline range.

We do not think MCDs should be treated differently based on whether they are affixed to a firearm. The Commission's Public Data Briefing shows that 22.1% of the 380 defendants whose offense involved an MCD during FY 2023 involved a standalone MCD, 13.4% involved both affixed and standalone MCDs, and 64.2% involved MCDs affixed to a firearm. In our assessment, these numbers may be interesting descriptively, but they do not change the fact that an MCD easily transforms an ordinary firearm into a much more lethal and dangerous device. Beyond that, we do not view the two types of offense conduct as necessarily differing in seriousness.

Take, for example, two scenarios, one involving five MCDs affixed to five firearms and the other involving ten standalone MCDs in a small bag. The five firearms with attached MCDs are ready to shoot right now; on the other hand, they are bulky and may set off metal detectors. The ten MCDs in the bag are more easily concealed due to their size, will likely not set off a metal detector, and arguably enable ten different criminals to commit further crimes. Furthermore, treating unaffixed MCDs differently than affixed MCDs would invariably result in lower guideline ranges for MCD traffickers than for their customers who affix an MCD to a firearm. It is not uncommon for MCD traffickers to distribute hundreds if not thousands of MCDs, each of which presents a significant danger to the community at large.[72] Treating unaffixed MCDs—often marketed disguised as something else—as anything other than

[71] §2K2.1(b)(5)(C) applies when the defendant "transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms," *inter alia*, by a criminal or for criminal use.

[72] *See, e.g.*, *YouTuber And Auto Key Card Manufacturer Sentenced To Five Years In Prison For Transferring Unregistered Machinegun Conversion Devices*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Sept. 8, 2023) (conspiracy involved at least 6,600 individual lightning links, which can be dropped into an AR-15 to convert it to a fully automatic machinegun), https://www.justice.gov/usao-mdfl/pr/youtuber-and-auto-key-card-manufacturer-sentenced-five-years-prison-transferring; *Alabama Man Sentenced To Ten Years In Prison For Transferring Machinegun Conversion Devices And Theft Of Government Funds*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Oct. 6, 2023) (search warrant resulted in 111 3D-printed auto sears, 11 silencers, and three 3D printers), https://www.justice.gov/usao-mdfl/pr/alabama-man-sentenced-ten-years-prison-transferring-machinegun-conversion-devices-and; *Two Northern Kentucky Men Sentenced for Role in Conspiracy to Illegally Distribute Firearms*, U.S. ATTORNEY'S OFFICE, EASTERN DISTRICT OF KY. (May 20, 2024) (conspiracy involved MCDs and over 100 firearms through straw purchasers), https://www.justice.gov/usao-edky/pr/two-northern-kentucky-men-sentenced-role-conspiracy-illegally-distribute-firearms.

individual firearms would result in these traffickers receiving sentences far lighter than their conduct would otherwise merit.[73]

Finally, we believe that properly accounting for MCDs under §2K2.1(b)(5) is especially important in light of recent legislative action. In 2023, the Commission amended §2K2.1(b)(5) in response to a congressional directive included in § 12004(a)(5) of the Bipartisan Safer Communities Act, which required the Commission to provide increased penalties for defendants convicted of offenses involving the trafficking of firearms.[74] Because MCDs are often unaffixed when defendants are creating, transporting, or trafficking those devices, a proposal that treats MCDs as firearms only when they are affixed to *other* firearms would understate the seriousness of activities akin to conduct that the Commission recently recognized to be highly culpable—namely, supplying other individuals with highly dangerous weapons.[75]

d. In Issue for Comment No. 4, the Commission asks whether the proposed change should apply to all the enhancements in §2K2.1(b)(1) and (c) that currently use the GCA definition of firearm or whether one or more of the provisions should be excepted. We have already addressed treatment of MCDs under subsection (b)(1), and our view is that the change should apply to all the other listed provisions as well.

Under the first of those (§2K2.1(b)(4)), four levels would be added in certain scenarios where the offense involves one or more MCDs that are stolen, have serial numbers modified so as to render them illegible or unrecognizable to the unaided eye, or lack a serial number entirely. The issue for comment focuses on whether, because MCDs involved in federal crimes are for the most part privately made and not marked with a serial number, the enhancement would apply in nearly every case under §2K2.1(b)(4)(B)(ii).

In part because of the *mens rea* requirement in §2K2.1(b)(4)(B)(ii), it is not clear whether the enhancement would actually apply in every MCD case, as a practical matter. But even if it did, that would be no reason to carve out that enhancement. As explained above, the possession of an MCD is generally prohibited under 18 U.S.C. § 922(o), even when it is unaffixed. And the

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[73] *See, e.g.*, *YouTuber And Auto Key Card Manufacturer Sentenced To Five Years In Prison For Transferring Unregistered Machinegun Conversion Devices*, U.S. ATTORNEY'S OFFICE, MIDDLE DISTRICT OF FLA. (Sept. 8, 2023) (YouTuber sold over 6,000 MCDs etched into metal "Auto Key Cards" marketed various ways as a "pen holder," a "novelty," and a "political sculpture); *see also* U.S. Dept. of Justice, ATF Letter to Sen. Grassley, at 3 (Jan. 17, 2025) ("Chinese and other foreign-based companies utilize deceptive marketing practices, such as selling the MCDs as "dog tags" or "toy car kits" to avoid detection), ATF to Grassley - Chinese Switches.

[74] Pub. L. No. 117-159, § 12004(a)(5) ("the United States Sentencing Commission shall review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses.").

[75] *Cf.* U.S.S.G., App. C., Amend. 819 (explaining that 2023 amendments to §2K2.1(b)(5) addressed the heightened culpability of offenders "'upstream' in the gun trafficking pipeline," whose "conduct contributes to the illegal flow of firearms").

transfer of an unregistered MCD is a separate offense under 26 U.S.C. § 5861(e), punishable by up to ten years' imprisonment.[76] It is perfectly appropriate that the Guidelines include an enhancement for conduct that Congress has deemed to be an offense in and of itself.

Furthermore, the risk that enhancements under §2K2.1(b)(4) and other provisions will yield disproportionately high guideline ranges is reduced because, with one limited exception, the Guidelines cap at level 29 "[t]he cumulative offense level determined from the application of subsections (b)(1) through (b)(4)." Following a timely guilty plea, the offense level would drop to 26, which results in a guideline range of 63-73 months for a defendant in Criminal History Category I. A defendant with zero criminal history points would benefit from an additional two-level reduction under §4C1.1, resulting in a guideline range of 51-63 months. As noted above, such a range is hardly excessive for a defendant possessing or trafficking in one or more illegal devices specifically designed to convert a weapon into a machinegun. Nor is the result too severe when viewed in light of the 15-year maximum sentence provided by the Bipartisan Safer Communities Act for convictions under § 922(g) and § 933(b), and, as noted above, given the separate offense of transferring of an unregistered MCD under 26 U.S.C. § 5861(e), punishable by up to 10 years of imprisonment.

The Commission's proposed change would be equally sensible as applied to the remaining enhancements listed in the Issue for Comment. Section 2K2.1(b)(5) applies when a defendant provides a firearm to certain prohibited persons, including a person with prior convictions for crimes of violence and drug trafficking, a person who intends to commit a crime with the firearm, or a person who received such a firearm as a result of inducing such criminal conduct. Where the offense conduct involves an MCD rather than or in addition to a standard firearm, it is hard to see it as any less culpable, given the increased threat of injury and death made possible by the MCD.

As for subsection (b)(6)—which would apply to illegally exporting MCDs outside of the country—that conduct is no less culpable than exporting firearms limited to the GCA definition. Similarly, using an MCD in connection with another felony offense, or knowing that it would be used in connection with another felony offense, is equally, if not more culpable than such conduct limited to firearms as defined in 18 U.S.C. § 921(a)(3).

We also think it relevant that the enhancements at §2K2.1(b)(5)(B) and (C) and (b)(6) apply to transferring both firearms *and* ammunition. MCDs are, at a minimum, comparable to ammunition in the Guidelines scheme. If the Commission is concerned that MCDs in and of themselves are not capable of causing harm, the same is true of ammunition: unless that ammunition accompanies a gun or makes its way to someone with a gun, it is merely a potentially dangerous object. Likewise, while an MCD may be innocuous standing alone, it is deadly when added to a loaded gun for which it has been designed.

As for subsection (b)(7), it provides that, where a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, the sentencing court must increase the offense level for the substantive offense. This provision is rarely applied in its

[76] 26 U.S.C. § 5871. We note as well that serial number marking requirements apply to NFA firearms, and in fact, apply more broadly than under the GCA. *See* 26 U.S.C. § 5842.

current form—in FY 2023, for example, courts applied it to only four defendants, amounting to less than 0.1% percent of all those sentenced under §2K2.1.[77] But we see no reason not to apply the provision when the crime that the defendant sought to conceal via the recordkeeping violation involved MCDs.

Lastly, as concerns the cross reference under subsection (c), the fact that the defendant used an MCD to commit an offense associated with a higher offense level (that is, a more serious offense) should not preclude the defendant from being sentenced under §2X1.1 (attempt, conspiracy, solicitation) with reference to the guideline for that more serious offense, as is already the case for firearms defined under the GCA. And if the defendant used an MCD to commit another offense and death resulted, the most analogous homicide guideline should apply, just as it would if the defendant used a firearm defined under 18 U.S.C. § 921(a)(3) to commit another offense and death resulted.

e. Issue for Comment No. 5 asks whether there are any weapons that meet the NFA definition of firearm but not the GCA definition that should not be treated as firearms for purposes of §2K2.1. Our answer is no. Apart from MCDs, the number of weapons falling into this category appears to be extremely small. Moreover, regardless of the technical characteristics that may bring a device or component into one of the statutory definitions but not the other, the device must first be a "weapon" or a component thereof to fall under the NFA.[78] While the term "weapon" is not defined in the statute, the term's plain meaning connotes an instrument of offensive or defensive combat.[79] Where a defendant is charged with a weapons offense under the NFA, the Department sees no valid reason why a defendant should receive a sentencing benefit because the weapon is not a firearm under the GCA. Indeed, §2K2.1 is the guideline for offenses under the NFA, and those provisions should be applied with equal weight to NFA offenses.

f. Finally, noting that Option One would move the definition of "firearm" from the Guidelines commentary to the text, the Commission asks in Issue for Comment No. 6 whether it should move other definitions to the text to ensure consistent application. As stated above, the Department believes that it is generally prudent in light of recent case law to include definitional terms in the Guidelines text rather than the commentary. With respect to §2K2.1 in particular, Application Notes 1, 2, and 3 all contain definitional provisions that likely can be incorporated into the text without causing confusion, as does Application Note 13(A). The Department takes no position at this time on whether other provisions in the commentary, such as those addressing application of particular subsections in §2K2.1, could readily be moved to the text.

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[77] U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2023*, at 132, at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf.

[78] *See e.g.*, 26 U.S.C. §§ 5845(b) ("The term 'machinegun' means ***any weapon*** …); § 5845(e) ("The term 'any other weapon' means "any weapon or device capable of being concealed on a person from which a shot can be discharged….").

[79] *See e.g., Bond v. United States*, 572 U.S. 844, 861 (2014) ("[T]he use of something as a 'weapon' typically connotes 'an instrument of offensive or defensive combat' … or 'an instrument of attack or defense in combat, as a gun, missile, or sword.") (internal citations omitted).

B. Mens Rea *Requirement*

Part B of the proposed amendment would establish a *mens rea* requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. Although the Department would support predicating these enhancements on a rebuttable presumption of knowledge, it opposes the current proposal. The proposed amendment presents substantial evidentiary challenges that would critically undercut the public-safety function of these common enhancements and fail to account for the seriousness of the criminal conduct involved.[80]

These enhancements, as currently written, serve an important public-safety function that is independent of the defendant's *mens rea*. Congress imposed serialization requirements on manufacturers and importers of firearms "to assist law enforcement authorities in investigating serious crimes."[81] Serial numbers allow "law enforcement to determine where, by whom, or when" a firearm was manufactured and "to whom [it was] sold or otherwise transferred."[82] "When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect."[83] But "[w]hen a firearm is stolen, determining this chain is difficult and when serial numbers are obliterated, it is virtually impossible. Therefore, stolen or altered firearms in the hands of people recognized as irresponsible pose great dangers[.]"[84] The enhancements at §2K2.1(b)(4)(A) and (B)(i) thus "reflect[ ] both the increased likelihood that the firearm will be used in the commission of a crime and the difficulty in tracing firearms with altered or obliterated serial numbers."[85]

The evidentiary burden imposed by these new *mens rea* requirements would be substantial, and indeed, most often insurmountable. Because stolen firearms or ones with altered serial numbers may circulate in criminal channels for years, the government rarely has evidence tying the theft or alteration to the defendant who is charged with trafficking or possessing the firearm in question. Nor does the government typically have evidence of the communications surrounding the acquisition of such firearm, where the gun's features may be discussed. Accordingly, without a specific admission from the defendant, proving the defendant's knowledge that a particular firearm was previously stolen or its serial number was modified will be extremely difficult in practice. Indeed, criminal actors may deliberately decline to inquire into the provenance of a firearm when acquiring it, and firearm theft is a common means of supplying firearms to prohibited persons and criminals. Defendants being sentenced under

[80] Recent data shows that these enhancements are present in approximately one third of cases sentenced under §2K2.1. *See* U.S. Sent. Comm'n, *What Do Federal Firearms Offenses Really Look Like?*, at 9 (2022).

[81] *Abramski v. United States*, 573 U.S. 169, 180 (2014).

[82] 87 Fed. Reg. 24,652, 24,652 (Apr. 26, 2022).

[83] *Abramski*, 573 U.S. at 182.

[84] *United States v. Mobley*, 956 F.2d 450, 454 (3d Cir. 1992).

[85] *What Do Federal Firearms Offenses Really Look Like?*, *supra*, at 12.

§2K2.1 for firearms offenses should not receive a benefit for their ignorance, and putting the burden on the government to prove a defendant's *mens rea*—even with a willful-blindness backstop—will often result in a failure to account for the seriousness of the defendant's conduct.

In addition to these general evidentiary challenges, the difficulty will be heightened in the serial-number context specifically. Often the best available evidence that a defendant knew of serial number's condition will be obviousness of the alteration. By superimposing a *mens rea* requirement onto the naked-eye test now present in §2K2.1(b)(4)(B)(i), the Commission may unintentionally suggest that such obviousness is irrelevant or insufficient. Were the courts to adopt this interpretation—undoubtedly after much litigation—the serial-number enhancement will rarely be seen in practice.

In short, the Department expects that if the proposed amendment were adopted, the evidentiary difficulties would cause applications of these enhancements to plummet. Were that to happen, these enhancements would cease to promote public safety, leaving the Guidelines without meaningful recognition of the societal harms caused by the trafficking and possession of stolen firearms and firearms with altered or obliterated serial numbers.

On the other side of the ledger, the Commission has not identified any compelling need for a stricter *mens rea*. These enhancements have been present without a *mens rea* since the inception of the Guidelines Manual in 1987, and they have not, to the Department's knowledge, engendered substantial judicial criticism. Indeed, sentencing data indicates that downward variances are modest in cases where these enhancements are present. In 2022, for example, the Commission reported that the average sentence imposed under §2K2.1 where these enhancements were present was 55 months, compared to a guideline minimum of 61 months, which suggests that sentencing judges do not, by and large, find the guideline ranges yielded by these enhancements to be substantially too high.[86] In addition, last year's "naked eye" amendment already ameliorates the potential unfairness of applying the serial-number enhancement when the serial number's modification is not obvious or significant.

To the extent, however, that the Commission believes a *mens rea* requirement is necessary, we recommend a rebuttable presumption be included. The Department recommended a rebuttable presumption when the Commission first proposed an enhancement for unserialized firearms in 2023,[87] and we continue to believe that it appropriately balances concerns of fairness with the reality that evidence of a defendant's knowledge is most often found with the defendant, not the government. Indeed, such a presumption would balance those interests across *all* of the enhancements in §2K2.1(b)(4), including the one for unserialized firearms. The rebuttable presumption would also reflect the common judicial practice of assigning the burden of proving

[86] *What Do Federal Firearms Offenses Really Look Like?*, *supra*, at 32.

[87] 2023 DOJ Letter at 7.

a matter to the party with superior access to information concerning, or particular knowledge of, that matter.[88]

The Department would thus recommend the same language that it recommended in its February 2023 comment letter. As in that letter, the Department recommends that the following language apply to all of the enhancements in §2K2.1(b)(4):

> *"Subsection (b)(4) applies unless the defendant establishes by a preponderance of the evidence that he or she did not know, and had no reason to believe, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number [serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye]."*[89]

Such an approach would have the advantage of consistency by creating one *mens rea* across the three enhancements in subsection (b)(4). But should the Commission not wish to revisit the *mens rea* chosen when the unserialized-firearm provision was added in 2023, it should (at most) apply a rebuttable presumption to the stolen-firearm and serial-number provisions.

III. Circuit Conflicts

A. Definition of "Physically Restrained"

The Commission proposes three options to resolve a circuit conflict arising under the primary robbery guideline (§2B3.1), which provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." The term "physically restrained" is defined—in an application note applicable across the Guidelines—as "the forcible restraint of the victim such as being tied, bound, or locked up."[90]

The Department supports Option One, which would amend the language of § 2B3.1(b)(4)(B) to make clear that "physical[] restrain[t]" to facilitate the commission of a robbery or to facilitate escape therefrom is not limited to physical contact or confinement. Rather, this enhancement would apply when a defendant restricts a victim's movements or "creates circumstances allowing [the victim] no alternative but compliance."[91] That would include holding a victim at gunpoint or blocking a victim's path of escape.

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[88] *See, e.g.*, *Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"); 2 McCormick on Evidence § 337 (8th ed. 2022) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

[89] 2023 DOJ Letter at 7, adopted to current §2K2.1 language.

[90] U.S.S.G. §1B1.1 n.1(L).

[91] *United States v. Deleon*, 116 F.4th 1260, 1264 (11th Cir. 2024).

Section 2B3.1(b)(4)(B) provides for a two-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." Application Note 1 cross references the commentary to §1B1.1, which (in turn) defines "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up."[92] The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim's movement by brandishing a firearm triggers this enhancement.[93] In *United States v. Howell*, for example, the Sixth Circuit applied this enhancement when the defendant "ordered [the victim] at gunpoint to lie down on the floor."[94] The court reasoned that because the defendant "prevented [the victim] from continuing to move about," the victim was "physically restrained."[95] Importantly, "keeping someone from doing something is inherent within the concept of restraint."[96] As a result, the First, Fourth, Sixth, Tenth, and Eleventh Circuits have properly applied this enhancement "'when the defendant uses force, including force by gun point, to impede others from interfering with commission of the offense.'"[97]

The Department believes that the First, Fourth, Sixth, Tenth, and Eleventh Circuits have correctly interpreted the provision as written, and Option One clarifies as much. The current definition in §1B1.1(L) includes the qualifier "such as," which necessarily provides a list of examples that is "merely illustrative, . . . not exhaustive."[98] To conclude otherwise would read out the Commission's inclusion of the qualifying clause.[99]

Option One is also consistent with the purpose and structure of the enhancements in the robbery guideline. In terms of purpose, the majority view among the circuits properly accounts for the aggravating conduct of affirmatively inhibiting a victim's movements. As a practical matter, a victim who is ordered to the ground and required to remain there at gunpoint is no less physically restricted from movement than a victim whose wrists are tied together. As for structure, the robbery guideline and several others feature a two-point enhancement for physically restraining individuals to facilitate commission of the offense and a four-point enhancement for "abducti[ng]" someone for those purposes—a term defined to cover a victim

[92] U.S.S.G. §1B1.1 n.1(L).

[93] *United States v. Wallace*, 461 F.3d 15, 34-35 (1st Cir. 2006); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021); *United States v. Miera*, 539 F.3d 1232, 1235-36 (10th Cir. 2008); *Deleon*, 116 F.4th at 1261-62.

[94] *Howell*, 17 F.4th at 692.

[95] *Id.*

[96] *Miera*, 539 F.3d at 1234.

[97] *See, e.g.*, *id.* (quoting *United States v. Pearson*, 211 F.3d 524, 525-26 (10th Cir. 2000)).

[98] *United States v. DeLuca*, 137 F.3d 24, 39 (1st Cir. 1998).

[99] *See United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("By use of the words 'such as,' it is apparent that 'being tied, bound, or locked up' are listed by way of example rather than limitation.").

being "forced to accompany an offender to a different location."[100] The Guidelines thus provide graduated punishment depending on whether victims are forced against their will to stay at the robbery location or forced to go somewhere else with the offender. It is fully consistent with that tiered structure to apply the two-point enhancement for physical restraint of a person to actions that keep victims in the original location, whether through means that involve psychological coercion or contact with their bodies.

Option Two, which the Department opposes, generally adopts the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits. Those courts have required physical contact with a victim and have generally concluded that the restraint must entail "something more than a psychological restraint."[101] The Department believes that this approach is overly restrictive.

Consider two potential bank robbery scenarios:

In the first scenario, the defendant enters a bank, retrieves a firearm from his waistband, and points the firearm in the air. Upon seeing the defendant, all of the bank's customers drop to the floor and do not move as the defendant interacts with the bank teller. Throughout the entire interaction between the defendant and the bank teller, every occupant of the bank is frozen and immobilized out of a generalized fear.

In the second scenario, the defendant enters a bank, retrieves a firearm from his waistband, and points the firearm at the bank's customers. He walks directly to the customers and orders them to the ground at gunpoint. He tells them not to move and periodically points his firearm at the customers throughout his interactions with the bank teller to ensure their immobility.

These two scenarios are substantially different. The defendant's affirmative actions to restrict the customers' movements in the second scenario warrant an enhancement under § 2B3.1(b)(4)(B), and Option One appropriately accounts for this conduct. Option Two, however, draws no distinction between these two scenarios and fails to account for the aggravating conduct toward the victim bank customers.

If the Commission is not inclined to adopt Option One, then the Department recommends the hybrid alternative Option Three, which would provide for a two-level enhancement for scenarios involving restraint "through physical contact or confinement" and a one-level enhancement for offenses in which "any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape." At least under this option, the aggravating conduct of restricting a victim's movement—even without direct physical contact—would be accounted for in the guideline calculation in some respect.

[100] U.S.S.G. §1B1.1 n.1(A).

[101] *United States v. Bell*, 947 F.3d 49, 57 (3d Cir. 2020).

As a final point, the Commission observes that other guidelines use the term "physically restrained" and asks whether (i) any amendments made to that term as used in §2B3.1 should be applied to those particular provisions and/or (ii) whether Application Note 1(L) to §1B1.1 should be revised so that the amended language reaches every cross-referenced provision. The Department believes that amending Application Note 1(L) to §1B1.1 may best serve the goals of simplicity and consistency across the Guidelines. At a minimum, though, any clarifying language adopted should be applied to §2B3.2(b)(5)(B) (Extortion by Force or Threat of Injury or Serious Damage) and §2E2.1(b)(3)(B) (Collecting an Extension of Credit by Extortionate Means). Those guidelines have tiered enhancement provisions that mirror the one in the robbery guideline, and consistency—along with the similar offense conduct covered by those guidelines—favors applying the same definitions across those provisions.

B. Definition of "Intervening Arrest"

In Part B of the amendment, the Commission proposes to define "intervening arrest" in U.S.S.G. § 4A1.2 to require "a formal, custodial arrest." The proposed amendment also notes that an intervening arrest "is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." It also clarifies that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest." The Department does not object to this proposed amendment.

IV. Simplification of Three-Step Process

Last year, the Commission proposed simplifying the Guidelines by converting the existing three-step process set forth in the Manual's application instructions (§ 1B1.1) into a two-step process. In broad strokes, the proposed amendment would have deleted most departures from the Guidelines Manual and established a new Chapter Six to address the sentencing court's consideration of the factors set forth in 18 U.S.C. § 3553(a).

The Department explained in response to that proposal that, although we "support[ed] "simplification of the Guidelines, . . . we think it must be done through a meticulous, deliberative, and fully researched process to ensure both its legality and effectiveness."[102] We expressed concerns that the amendment as proposed could conflict with federal statutes and the Federal Rules of Criminal Procedure. We focused in particular on the proposed Chapter Six, which sought to limit and shape judges' sentencing discretion in a manner that (in our view) improperly intruded on sentencing judges' authority.

The Commission's current proposal similarly seeks to replace the three-step process with a two-step process by removing the departure provisions from the Guidelines Manual, but this time without a new Chapter Six addressing the district court's exercise of its sentencing discretion. The Department appreciates this change, which better reflects the relationship between the Guidelines and courts' authority under 18 U.S.C. § 3553(a) in the wake of *United*

[102] Letter from Jonathan J. Wroblewski to Hon. Carlton Reeves, Chair, at 10-15 (Feb. 22, 2024) ("Feb. 2024 DOJ Letter"), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=55.

States v. Booker, 542 U.S. 220 (2005). The move toward a two-step process also reflects the reality on the ground. The Commission's simplification data,[103] as well as stakeholder views expressed at the Commission's March 2024 hearings,[104] confirm that courts use departures far less often than variances and that many judges simply do not consider departures at all. Given that reality, the Department does not oppose the adoption of a two-step process and, to the extent permitted by law, the elimination of departure provisions needed to make that change.

At the same time, despite departures being applied in a relatively small percentage of cases (7.4% in FY 2022), the absolute number of defendants who received departures (4,725) is meaningful.[105] As reflected in the *2022 Sourcebook of Federal Sentencing Statistics*, that number is greater than the number of offenders sentenced in each of the First, Second, Third, Fourth, and Seventh Circuits.[106] And departures may play an especially important role in prosecutions for crimes that are less frequently charged or that arise under statutes raising particular complexities.[107] In such cases, the parties may look to departure provisions in structuring their plea agreements, and sentencing courts—having less experience applying the § 3553(a) factors to the factual scenario before them—may welcome the structure afforded by departure provisions in deciding whether a sentence outside the advisory range is warranted and, if so, to what extent.

In light of the departure provisions' continued utility to at least some litigants and judges, as well as the accumulated wisdom reflected in those provisions, the Department believes it of vital importance to preserve the provisions in a readily accessible form. The Commission's third Issue for Comment suggests that this could be in the form of a new Appendix to the Guidelines Manual. The Department supports that suggestion. Appendix C to the Guidelines Manual and its Supplement already contain a historical record of the more than 800 amendments made to the Guidelines and the reasons for each amendment, providing a valuable resource to judges and litigants when disputes arise over the interpretation of a guideline. We believe that an Appendix compiling departure provisions could serve a similarly important end. And, in response to the Commission's Issue for Comment No. 4, we also believe that such a compendium could contain the background information accompanying some departures that the Commission had previously determined to be relevant to the sentencing court's consideration.

There remains the question—raised in Issue for Comment No. 2—of whether the proposed amendment is consistent with the Commission's statutory authority or would conflict with any congressional directive. The Department previously expressed concern that the

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[103] 2024 Simplification Data, https://www.ussc.gov/education/backgrounders/2024-simplification-data.

[104] *Transcript of Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines*, at 217-19 (March 6, 2024) (Judge Altman), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20240306-07/transcript_20240306.pdf.

[105] 2024 Simplification Data, https://www.ussc.gov/education/backgrounders/2024-simplification-data.

[106] 2022 Sourcebook of Federal Sentencing Statistics, at 35, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

[107] *See, e.g.*, §2Q1.2 cmt. nn.4-9 (providing for multiple departures under guideline applicable to certain environmental crimes); §2Q1.3 cmt. nn.3-8 (same).

Commission had not grappled with pertinent language in the PROTECT Act,[108] which amended the Guidelines addressing departures and below-guideline sentences for sexual offenses and crimes against children.[109] Other stakeholders responded that Congress appears to have limited the Commission's authority to amend the Guidelines provisions added or addressed in the PROTECT Act only through a particular date—May 1, 2005.[110] If the Commission agrees with that reading, then the PROTECT Act would no longer pose an absolute bar to the deletion of Chapter 5 departure provisions that Congress added or amended as part of that legislation.

We remain concerned, however, that the simplification amendment fails to comply with other congressional directives. Specifically, on several occasions, Congress has instructed the Commission to ensure that appropriate punishments are imposed for particular types of offenses, and the Commission has responded by creating a departure.[111] The proposed amendment, however, would eliminate these departures without introducing some other means of implementing these directives. If the Commission chooses to eliminate departures, we urge that it take the necessary steps to continue to implement these and other congressional directives.

Finally, the Department previously observed that the Commission's simplification proposal raised "questions related to the interplay of the Guidelines with federal statutes and rules of procedure that specifically reference departures," such as 18 U.S.C. § 3742 and Federal Rules of Criminal Procedure 11 and 32.[112] We do not suggest that these provisions, which were enacted at a time when the Guidelines were mandatory, preclude the Commission from eliminating departures in the wake of *Booker* and *Pepper v. United States*.[113] But if the Commission moves forward with the simplification amendment, it may wish to suggest to

[108] Pub. L. No. 108-21, § 401(b), 117 Stat. 650 (2003).

[109] Feb. 2024 DOJ Comment Letter at 11-12.

[110] Federal Public and Community Defenders Comment on Simplification of the Three-Step Process, at 21 (Feb. 22, 2024), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=165; *see also United States v. Schnepper*, 302 F. Supp. 2d 1170, 1181 (D. Haw. 2004) (stating that, in § 401(j)(2) of the PROTECT Act, Congress "provide[d] that the Commission may not add a new ground for departure or take any action that is inconsistent with the limitations expressed in § 401(b) [of the Act] on or before May 1, 2005").

[111] *See, e.g.*, §5K2.24 (departure provision implementing the "direction" to the Commission in § 1191 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 110 Stat. 2960); § 2X7.2 cmt. n.1 (departure provision added to implement § 103 of the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296).

[112] Feb. 2024 DOJ Comment Letter at 12 & n.35.

[113] 562 U.S. 476 (2011) (invalidating 18 U.S.C. § 3742(g)(2), which restricts the discretion of a district court on remand by precluding the court from imposing a sentence outside the Guidelines range except upon a "ground of departure" that was expressly relied upon in the prior sentencing and upheld on appeal).

Congress and the Criminal Rules Committee that they adopt conforming amendments to those provisions to reflect the elimination of departures from the sentencing process.[114]

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

Sincerely,

Scott Meisler

Scott Meisler, Deputy Chief, Appellate Section,
Criminal Division
U.S. Department of Justice
Ex Officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

[114] *Cf.* 28 U.S.C. § 995(a)(20) (authorizing the Commission to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy").

FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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February 3, 2025

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on 2025 Proposed Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's proposed 2025 amendments, which are enclosed with this letter:

Proposal 1: Career offender

Proposal 2: Firearms offenses

Proposal 3: Circuit conflicts

Proposal 4: Simplification of three-step process

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Scott A.C. Meisler, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders Comment on Career Offender

(Proposal 1)

February 3, 2025

Table of Contents

For years, the Department of Justice and some judges have called for the Sentencing Commission to abandon the "categorical approach" for assessing prior convictions under USSG §4B1.2. Federal Public and Community Defenders and other judges have defended this approach. And we have argued against any amendment that would expand the reach of the career-offender guideline—which has included every past proposal to eliminate the categorical approach.[1]

The Commission this year has proposed a set of amendments that addresses concerns raised by both sides of this debate. Defenders appreciate the proposal, which seems to reflect a recognition that the Commission cannot liberalize §4B1.2's methodology without also narrowing its reach. Advocates for eliminating the categorical approach often complain about anomalous cases in which violently committed crimes are deemed not-violent. But the data tell a different story: §4B1.2 captures too many individuals, not too few. Judges vary downward from career-offender sentencing ranges in most cases[2]—and in "crime of violence" cases as well as drug cases.[3]

The Commission's proposed "crime of violence" definition has serious drafting flaws that would dramatically expand the career-offender guideline. But we don't think these are intentional. Defenders offer this comment in the spirit of collaboration. We begin by briefly reiterating what we've said before: the categorical approach, for all its flaws, is a solution to problems that arise with other methodologies for assessing prior convictions. But we do not linger there. The bulk of this comment presupposes that the Commission intends to move away from the categorical approach. Our primary focus, then, is helping the Commission accomplish this goal without creating the worst sorts of problems the categorical approach was designed to solve.

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[1] As we have said time and again, the career-offender guideline is arguably the most problematic in the book: it calls for overly harsh sentences and exacerbates pernicious racial disparities. Even the DOJ has acknowledged that there are "legitimate concerns about severity levels" associated with the career-offender guideline, and that "[d]ecades of research show that the career offender guideline produces a clear racial disparity in application." DOJ Comments on the U.S. Sent'g Comm's 2022–23 Proposed Amendments, at 27 & n.42 (Feb. 27, 2023) ("DOJ 2023 Comment"); *see also id.* at 35.

[2] USSC, Individuals Sentenced under §4B1.1:Proposed Amendment Data Background, at 7–8 (2025) ("USSC Data Background").

[3] USSC, Report to the Congress: Career Offender Sentencing Enhancements, at 34 (2016) ("USSC 2016 Career Offender Report").

I. Eliminating the categorical approach while at the same time narrowing the substantive definitions of "controlled substance offense" and "crime of violence" is a promising path forward for §4B1.2, but great caution is needed.

The categorical approach, as Defenders remarked in 2023, is "like democracy in the famous Churchill quote–the worst form of government, except for all the others."[4] No question, the categorical approach can seem hyper-technical and counter-intuitive. But it was not devised to annoy judges and practitioners; it is the Supreme Court's *solution* to problems that arise when applying recidivist-based sentence enhancements that look to convictions arising out of 50+ distinct criminal jurisdictions.

As the Commission ponders whether, and how, to eliminate the categorical approach, it is essential to keep the categorical approach's benefits top of mind, to avoid creating more problems than you solve.

1. Statutory text. The Supreme Court for 35 years has held that, as a matter of plain text, where a statute refers to a prior *conviction*, "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[5] The career-offender directive, like the Armed Career Criminal Act, refers to convictions, in calling for sentences at or near the statutory maximum where a defendant "has been *convicted* of" certain categories of felonies and also "has previously been *convicted* of" two or more offenses falling within the same categories.[6]

2. Avoiding mini-trials and misuse of court documents. The Supreme Court has long warned that fact-finding about how prior offenses were committed could lead to mini-trials at sentencing, which present both

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[4] Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments—Career Offender, at 11 (PDF p. 175) (March 14, 2023) ("Defender Comments on 2023 Career Offender Proposal").

[5] *Descamps v. United States*, 570 U.S. 254, 267 (2013) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Both of these cases address the categorical approach as applied to the Armed Career Criminal Act (ACCA), 18 U.S.C § 924(e).

[6] 28 U.S.C. § 994(h) (emphasis added).

administrative and substantive problems.[7] The DOJ in 2019 told the Commission it would "welcome" wide-ranging evidentiary hearings,[8] but others do not share that attitude—and we aren't just talking about defense attorneys.[9] To some extent, limiting courts considering prior-conviction-related conduct to certain court documents ("*Shepard* documents") reduces the risk of mini-trials; but that comes with its own problems: the Supreme Court has repeatedly warned that such documents are "prone to error" as to facts that were "unnecessary" to the prior proceeding—that is, non-elemental facts.[10]

3. Respecting plea bargains. The categorical approach avoids undermining negotiated pleas, through which constitutional rights are waived. The Supreme Court in *Taylor* balked at the idea that the government could attempt to prove in federal court that a person committed burglary when he had previously pled guilty (pursuant to a plea agreement) "to a lesser, nonburglary offense."[11] "Even if the Government were able to prove those facts," said the Court, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary."[12] For better or worse, our nation's criminal justice system is a system of pleas, not trials; and under this system, "a later sentencing court" should not be able to "rewrite the parties' bargain."[13] Moreover, where we are examining state

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[7] *See Taylor*, 495 U.S. at 601.

[8] DOJ Comments on the U.S. Sent'g Comm's 2019 Proposed Amendment—Career Offender, at 4 (Feb. 19, 2019) ("DOJ 2019 Comment") (explaining that the DOJ "welcomes the opportunity to put on evidence not limited to a judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent").

[9] *See, e.g.,* VAG Comments on the U.S. Sent'g Comm's 2019 Proposed Amendment—Career Offender, at 2 (Feb. 19, 2019) (supporting the Commission's proposal to limit assessments under a proposed conduct-based methodology to *Shepard* documents, in part because it "avoids the need for 'mini-trials' within a sentencing which can re-traumatize a victim of a prior offense").

[10] *Erlinger v. United States*, 602 U.S. 821, 841 (2024) (citing *Mathis, v. United States*, 579 U.S. 500, 512 (2016)).

[11] 495 U.S. at 601–02.

[12] *Id.*

[13] *Descamps*, 570 U.S. at 271.

offenses, reopening old plea bargains would contravene federalism principles, which counsel respect for state charging, plea, and adjudicative practices.

4. The Constitution. The Sixth Amendment mandates the categorical approach when a judge would find that a prior conviction elevates a mandatory sentencing range.[14] Post-*Booker*, of course, guideline ranges are not mandatory.[15] But this does not mean the Constitution gives judges carte blanche to find facts in the guideline context. Criminal defendants possess a due process right to be sentenced on accurate information.[16] And the Sixth Amendment still has relevance: some Supreme Court justices have noted that because a substantively unreasonable sentence is illegal and must be set aside, "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."[17]

5. Underinclusive by design. Finally, in recent years, the Supreme Court has explained that the categorical approach is "under-inclusive by design."[18] In the context of sentence enhancements that dramatically increase an individual's exposure to prison time, the categorical approach "*expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences."[19] Although potentially frustrating, the Supreme Court understands that this is better than the alternative—a methodology that is potentially *over*inclusive. In the career-offender context, the categorical approach has undoubtedly kept career-

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[14] *Mathis*, 579 U.S. at 511–12 ("[A sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

[15] *See United States v. Booker*, 543 U.S. 220 (2005).

[16] *See United States v. Tucker*, 404 U.S. 443, 447–49 (1972); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (same).

[17] *Jones v. United States*, 135 S. Ct. 8, 8 (Mem) (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

[18] *Borden v. United States*, 593 U.S. 420, 442 (2021).

[19] *Id.*

offender numbers lower than they would be otherwise.[20] Yet even now, data shows that the career-offender guideline is arguably over-, not under-inclusive: judges vary downward from the guideline in a great majority of cases.[21]

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This amendment cycle, the Commission has not proposed simply jettisoning the categorical approach, as it did in 2018 and 2022. Instead, it has paired eliminating the categorical approach with concrete steps to narrow §4B1.2's definitions: (1) excluding state drug priors from the definition of "controlled substance offense" and (2) including a prior-sentence-length limitation in the definitions. These changes have at least the potential to resolve the fifth concern above—over-inclusiveness—and thus could present a viable path forward.

However, the other problems the categorical approach was designed to solve loom large. And we speak only of a "potential" to resolve concerns about overinclusiveness because, as discussed below, two aspects of the "crime of violence" proposal would profoundly increase the number of individuals sentenced under the career-offender guideline. Also, the prior-sentence-length limitation is presented only as an "option." This is to say: the devil is in the details. If the Commission makes big changes that not only present new application challenges for prior cases that are assessed but also increase the number of cases getting assessed in the first place, and increase the number of career offenders, there will be immediate calls for further amendments. We genuinely hope the Commission can make smart reforms to §4B1.2 this year but we urge caution in crafting the details.

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[20] The Commission's recent data report illustrates this: since the Supreme Court first began tightening application of the categorical approach, with *Descamps* in 2013, the numbers have trended downward. USSC Data Background, *supra* note 2, at 4.

[21] *Id.* at 7. In FY2022, only 17.2% of sentences were within-range; 1% of sentences were above-range; and the overwhelming majority—82.2%—were below the applicable career-offender range.

II. The devil is in the details: comments on the Commission's proposed amendments section-by-section.

The career-offender proposal has four parts: (1) new "controlled substance offense" definition, which eliminates the need for the categorical approach; (2) new "crime of violence" definition, which eliminates the categorical approach by creating a novel conduct-based methodology;[22] (3) options for sentence-length-based limitations on these definitions; and (4) retention of the current, categorical definitions of CSO and COV[23] in non-career-offender guidelines where cross-references to §4B1.2 now appear. This comment addresses each part in turn. To summarize:

- The Commission's proposal to define "controlled substance offense" with reference only to federal offenses is an elegant solution to multiple problems. Indeed, if the Commission is unable to come to agreement this year on a "crime of violence" definition, which is a far more complex matter, it should enact this proposal on its own. We would expect to see immediate positive benefits.

- The proposed definition of "crime of violence" contains significant flaws, particularly regarding relevant conduct and the so-called elements clause. We view these flaws as potentially fatal to the proposal: they would undermine fairness, complicate administrability, and unduly inflate career-offender numbers. Fortunately, all our concerns can be resolved this amendment cycle.

- Adopting a sentence-length-based limitation for these definitions is essential to the Commission's package of amendments. We urge the Commission to adopt a limitation of at least 3 years' sentence-served, or even longer sentence-imposed.

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[22] This comment uses "conduct-based methodology" to refer to a methodology for analyzing prior convictions that takes into account non-elemental individual conduct—not to be confused with the conduct-based categorical approach described in *Shular v. United States*, 589 U.S. 154 (2020).

[23] For the most part, this comment spells out "controlled substance offense" and "crime of violence." But where the same phrase is used in close proximity or we think it otherwise reads better in shorthand, we use "CSO" or "COV."

- As for guidelines outside the career-offender context, we worry that creating multiple distinct definitions of "controlled substance offense" and "crime of violence" could derail the whole proposal. But we see no obstacle preventing the Commission from amending §4B1.2 (with Defenders' suggested revisions), while maintaining the current cross-references to §4B1.2.

After our discussion of these points, appended to this comment is a revised §4B1.2, based on that discussion, for the Commission's consideration.

A. "Controlled substance offense" definition: Eliminating state drug offenses is the right call.

The proposed definition of "controlled substance offense" is exactly the right kind of reform. It dramatically simplifies application of the career-offender guideline: by excluding state drug priors, it entirely eliminates the categorical approach as applied to "controlled substance offense," without creating new processes that would implicate the concerns discussed above. And it resolves an intractable circuit split.[24]

At the same time, it significantly narrows the definition of "controlled substance offense"—a category that the Commission has long understood is a problem. In a report published in 2004, the Commission raised doubts about the appropriateness of applying the career-offender guideline in drug cases, highlighting that:

- there was evidence that lengthy incapacitation of drug-traffickers "prevents little, if any, drug selling; the crime is simply committed by someone else";
- recidivism rates for these cases "are much lower than [for] other [individuals] who are assigned to criminal history category VI"; and
- application of the career-offender guideline in drug cases adversely impacts Black individuals, which is likely the result not of propensity but of "the relative ease of detecting and prosecuting

[24] *See Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., along with Barrett, J., respecting the denial of certiorari).

> offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods. . . ."[25]

The Commission made similar findings in its *Report to Congress* in 2016.[26] While the career-offender directive does not permit the Commission to exclude drug offenses entirely,[27] it does permit the Commission to eliminate state drug offenses.[28] The proposed amendment makes the right call in contracting the CSO definition almost as much as possible.

There is no good policy justification for including *any* of the proposal's extra statutory sections (that aren't listed in § 994(h)); indeed, the career-offender guideline would function better if it could exclude drug offenses altogether. Three of the extra sections aren't even necessarily trafficking offenses; and they are relatively low-level offenses that were added to §4B1.2 commentary in response to litigation, not based on a need for longer sentences in those cases.[29] Another section, 21 U.S.C. § 960, is not a criminal offense; it's a sentencing provision that attaches to convictions that would mostly already be predicates.[30] There are the inchoate offenses: §§ 846 and 963 (as limited to trafficking offenses). We do not see the need even for these. But since Commissioners just added these offenses to §4B1.2 in 2023, we

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[25] USSC, Fifteen Years of Guidelines Sentencing 134 (2004).

[26] USSC 2016 Career Offender Report, *supra* note 3, at 27 ("[T]he Commission concludes that drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.").

[27] *See* 28 U.S.C. § 994(h).

[28] Defender Comments on 2023 Career Offender Proposal, *supra* note 3, at 22–25 (PDF p. 186–89).

[29] USSG App. C, Amend. 568 (Nov. 1, 1997) (adding 21 U.S.C. §§ 843(a)(6) (possession of drug-manufacturing paraphernalia), 843(b) (use of a communication facility to commit any felony offense under the Controlled Substances Act, which includes non-trafficking offenses), and 856 (maintaining a premises for various purposes, including mere storage or use of a controlled substance)).

[30] *See* § 960 (sentencing ranges for offenses under the Import-Export Act; also cross-referenced in the MDLEA, 46 U.S.C. § 70506). Section 960 provides ranges for a few offenses that aren't career-offender predicates, but Congress expressly excluded those from § 994(h)—*e.g.,* § 952 subsections other than (a).

anticipate they'll want to maintain them; thus, the revised §4B1.2 in our appendix includes §§ 846 and 963. Finally, there's 21 U.S.C. § 860, which is an aggravated federal trafficking offense; we anticipate the Commission will want to maintain this as well, so we include it in our appendix.

Even with the extra federal offenses, the "controlled substance offense" proposal is a huge improvement. It is elegant, easy to apply, and positively impactful. Indeed, this part of the proposal is what allows Defenders to seriously engage with the part creating a new conduct-based methodology for "crime of violence," although we know the categorical approach remains the best way to assess prior convictions. If the CSO definition were to retain state drug priors, also relying on a conduct-based methodology, "the practical difficulties and potential unfairness of a factual approach" would be even more "daunting,"[31] and we'd have to simply oppose the proposal altogether, as we've done in previous years.

B. "Crime of violence" definition: There are serious flaws in this part of the proposal but an administrable conduct-based COV definition is possible this amendment cycle.

The Commission's "crime of violence" proposal, in contrast with the "controlled substance offense" proposal, has significant problems.

These problems extend far beyond the anticipated increase in violence-pathway career offenders. After all, we fully recognize that the impact of any new conduct-based methodology on our clients would be negative: many individuals whose prior offenses would not come within the current §4B1.2 would be captured by the new approach. Even so, Defenders are not categorically opposing the adoption of *any* conduct-based methodology this year. If the Commission eliminates state drug priors from the CSO definition and adds a meaningful prior-sentence-length limitation to the definitions, Defenders could be open to the possibility of a conduct-based COV methodology—if it were carefully crafted to be fair and administrable.

Unfortunately, the current proposal's conduct-based methodology is neither, primarily because of two features: (1) it uses a federal-guidelines-style concept of "relevant conduct"—which encompasses uncharged,

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[31] *Taylor*, 495 U.S. at 601.

dismissed, and even acquitted conduct—to assess "convictions," and (2) it relies on language from the so-called elements clause that does not work in the non-elemental context.[32] As to the first feature, if "crime of violence" is defined in part with reference to uncharged, dismissed, and acquitted conduct, then *any* conviction could be a COV: theft, shoplifting, trespass, unlawful possession of a firearm, drug possession—depending on what allegations are found in old court documents, which would vary from case to case. Second, if the elements clause is used in a non-elemental way, without definitional changes, the COV definition would capture misdemeanor-type offenses like common-law battery—the very offense the Supreme Court interpreted the elements clause to exclude. These two features implicate the Supreme Court's warnings about a conduct-based approach in the most extreme way possible.[33]

Concerns about the categorical approach have centered on anomalous cases in which apparently violent offenses (*e.g.* robbery, murder) are deemed nonviolent.[34] What the DOJ has advocated for is, effectively, the methodology that most judges used pre-*Descamps*, when they reviewed *Shepard* documents to determine not only the elements of prior offenses but also the

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[32] We also have other, less significant concerns and suggestions that are discussed in Section II.B.3 *infra*.

[33] Far from being underinclusive by design, both features will be *over*-inclusive. Moreover, determining whether a "conviction" was violent based on relevant conduct disregards entirely the text of § 994(h) and §4B1.1; it guarantees mini-trials; it blows open plea agreements; and it calls for fact-finding that is constitutionally suspect and will draw immediate challenges.

[34] DOJ 2019 Comment, *supra* note 8, at 2 & n.9 (complaining about the "problem" of the categorical approach, with citation to *United States v. Edling*, 895 F.3d 1153, 1156–58 (9th Cir. 2018) (holding that Nevada robbery is not a crime of violence); *United States v. McCollum*, 885 F.3d 300, 307–09 (4th Cir. 2018) (same, but with federal conspiracy to commit murder in aid of racketeering); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018) (same, but with North Dakota aggravated assault); *United States v. Mayo*, 901 F.3d 218, 224–31 (3d Cir. 2018) (finding that a Pennsylvania aggravated assault conviction was not an ACCA "violent felony"); *see also McCollum*, 885 F.3d at 309–14 (Wilkinson, J., dissenting) (bemoaning that use of the categorical approach led to the outcome that it did in that case).

means by which individuals committed them.[35] No one is clamoring for courts to examine the records of nonviolent offenses for allegations of violence. And no one is asking the Commission to expand the substantive definition of what is violent. Indeed, the last time the Commission released data about sentences imposed relative to the career-offender guideline that distinguished between the different career-offender pathways, it reported that sentences were generally below-guidelines not only for drug- pathway cases but also for mixed- and violence-pathway cases.[36] So the "crime of violence" definition, considered as a whole, is, if anything, already overbroad.

The Commission's recent data report indicates that the career-offender proposal, if promulgated, would significantly decrease drug-pathway career offenders and increase mixed- and violence-pathway career offenders. It can be read to suggest that, on the whole, the number of career offenders will stay in the same ballpark (a little more or a little less, depending on the prior-sentence-length limitation).[37] But under the proposal as written, this data report wildly undercounts COVs: it predicts impact based on counting prior convictions for fundamentally violent offenses (*e.g.*, robbery, aggravated

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[35] DOJ 2023 Comment, *supra* note 1, at 29 ("The Department has long maintained that the best approach to identifying qualifying state predicate offenses under the Guidelines is to retain the current 'crime of violence' and 'controlled substance offense' definitions . . . but to allow courts to consider actual conduct if necessary to understand the specific basis of the conviction."). As for how courts used to conduct this assessment*, see, e.g., United States v. Fish*, 368 F.3d 1200, 1202–03 (9th Cir. 2004) ("In those cases where a state statute criminalizes both conduct that does and does not qualify as a crime of violence, we review the conviction using a modified categorical approach. Under this . . . approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute was facially over inclusive." (cleaned up)).

[36] USSC 2016 Career Offender Report, *supra* note 3, at 34. Indeed, courts varied below the guideline in mixed-pathway cases almost as dramatically as in the drug-only-pathway cases. *Id.* at 34 (29.6% versus 32.7%). Sentences in violence-only-pathway cases deviated from the guideline range less dramatically (at 9.9%), but still averaged *below* the guideline range.

[37] USSC 2025 Data Background, *supra* note 2, at 21–22. It is worth noting that the mixed-pathway cases in this impact analysis would be comprised almost entirely of instant federal drug cases where there are two prior crimes of violence (since we'd expect to see a very small number of federal drug priors (*see id.* at 15)).

assault, forcible sex offenses).[38] The two features enumerated above (relevant conduct, non-elemental elements clause) will reach convictions for offenses far beyond this list. Under the proposal as written, Defenders would expect to see the number of career offenders *explode*.

We take heart from the Commission's introductory language to its proposal, which explains that the proposed COV definition is merely "intended to correct some of the 'odd' and 'arbitrary' results that the categorical approach has produced relating to the 'crime of violence' definition."[39] And also from the Commission's recent data report: The fact that it looked to prior convictions for serious, fundamentally violent offenses tells us that these are the crimes the Commission intends to reach. So, the fact that the current proposal will reach a large but unpredictable number of convictions for minor, nonviolent offenses appears to be a "bug," not a feature. What follows is Defenders' critique of the "crime of violence" proposal as written, along with suggestions for debugging the proposal.

1. **The proposal's reliance on conduct untethered to the offense of conviction, based on the Guidelines' concept of "relevant conduct," would conflict with §4B1.1 and § 994(h) and it would be administratively unworkable.**

The Federal Sentencing Guidelines' concept of "relevant conduct"—which includes uncharged, dismissed, and acquitted conduct[40]—is, by now, second nature to federal practitioners and judges. That is not to say it's popular; to the contrary, it has been the subject of vociferous criticism since the earliest days of guideline sentencing.[41]

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[38] *See id.* at 18 (audio accompanying the report), 25. Defenders confirmed with Commission staff that the report was based on labels attached to prior convictions.

[39] USSC, Proposed Amendments to the Sentencing Guidelines 1 (Dec. 19, 2024) (citations omitted) ("USSC 2024–2025 Proposed Amendments").

[40] Acquitted conduct, of course, now gets an exception in USSG §1B1.3.

[41] *See* Fed. Defender Comments on the U.S. Sent'g Comm's Proposed 2024–2025 Priorities, at 9–14 (July 15, 2024) (describing this criticism and collecting sources); *see also, e.g.,* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992) ("The single feature of the federal sentencing guidelines that state judges . . . and judicial administrators outside the United States find most astonishing is the Commission's policy decision to base

But even among federal practitioners and judges, there is nothing remotely familiar about assessing *prior convictions* with reference to uncharged, dismissed, or acquitted conduct. Chapter Four measures past criminal conduct solely with reference to *convictions*, for which sentences were imposed.[42] The career-offender guideline, §4B1.1, has always looked only to offenses of "conviction," and so has §4B1.2.[43] As far as Defenders know, no one has ever suggested doing otherwise—until now.

The proposed COV definition does not use the term "relevant conduct," but the broad language in the definition's introductory phrase ("offense . . . in which the defendant engaged in any of the following conduct") and the proposed subsection (b)(3) would have courts assess prior convictions based, in part, on conduct for which a person was never convicted.[44] This is unworkable for two reasons—the first legal, the second practical.

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guideline application on the defendant's 'relevant conduct,' including conduct alleged in charges that were dismissed or that resulted in acquittals or that were never filed. More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating.").

[42] *See* USSG §§4A1.1, 4A1.2. Courts can, of course, consider additional conduct that has been sufficiently proven in their wide-ranging § 3553(a) analysis, 18 U.S.C. § 3661, but they don't attempt to determine sentencing ranges based on prior-offense conduct beyond the offense of conviction.

[43] The original §4B1.2 called for a conduct-based methodology, but only as to the offense of conviction: the guideline enumerated several offenses (murder, manslaughter, kidnapping, aggravated assault, extortion, forcible sex offenses, arson, and robbery) and noted that other offenses were "covered only if the *conduct for which the defendant was specifically convicted* meets the above definition." USSG §4B1.2, comment. (n. 1) (1987) (emphasis added). After the Supreme Court adopted the categorical approach in *Taylor*, the Commission swapped-in the language that still appears in §4B1.2's commentary: "in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the *offense of conviction* (i.e., the conduct *of which the defendant was convicted*) is the focus of inquiry." §4B1.2, comment. (n. 2) (2024) (emphasis added).

[44] Subsection (b)(3) mirrors the language of USSG §1B1.3(a)(1)(A) except, oddly, in one respect. Section 1B1.3(a)(1)(A) covers "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of *the offense of conviction*, in preparation for that offense . . . ." (emphasis added). In the proposed §4B1.2(b)(3), the words "of conviction" are removed. Defenders can think of no reason why the

a. Reliance on "relevant conduct" would make the career-offender guideline legally incoherent.

The career-offender guideline is found at §4B1.1; the role of §4B1.2 is just to define §4B1.1's terms. And §4B1.1 is a sentence enhancement that's based entirely on offenses of conviction:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant *offense of conviction*; (2) the instant *offense of conviction* is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony *convictions* of either a crime of violence or a controlled substance offense.[45]

So, the question is not whether the individual engaged in conduct that can be categorized as a COV or CSO; it is solely whether he was *convicted of* a COV or CSO. This is consistent with everything else in Chapter Four. And it's also consistent with the career-offender directive, which is about *convictions*—indeed, given the directive, it is doubtful whether the Commission has the authority to base the career-offender guideline on free-floating conduct, rather than conduct for which the person was convicted.[46]

The Supreme Court has repeatedly emphasized that a person is only convicted of legal elements.[47] So, to some extent, *any* deviation from elements conflicts with the word "conviction." But there are two instances in federal law where the Supreme Court has found that a determination of what a person was convicted of calls for a conduct-based methodology, based on specific statutory context. In both instances, the only conduct relevant to the inquiry is that underlying the offense of conviction:

Commission would want the "crime of violence" analysis to be *even broader* than the already problematic §1B1.3(a)(1)(A).

[45] Emphasis added.

[46] *See* 28 U.S.C. § 994(h).

[47] *See, e.g., Mathis,* 579 U.S. at 511–12.

- **Misdemeanor crime of domestic violence.** In *United States v. Hayes*,[48] the Supreme Court held that for the offense of possessing a firearm or ammunition after having been convicted of a misdemeanor crime of domestic violence (MCDV),[49] the definition of MCDV has an actual-conduct-based component: whether the offense involved individuals with a specified domestic relationship. While *Hayes* requires this conduct-related question to be put to a jury, the key point here is that this inquiry pertains only to the offense of conviction.[50] This approach aligns with the language of § 922(g)(9), which requires that a person have been "convicted" of a MCDV. Section 4B1.1, of course, similarly requires that a person have been "convicted" of a "crime of violence."

- **Fraud in which the loss exceeded $10,000.** In *Nijhawan v. Holder*, the Supreme Court held in the immigration context—where the categorical approach is generally used—that the definition of "aggravated felony" involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000" calls for an actual-conduct-based assessment.[51] The purpose of this endeavor is to determine whether the individual was "convicted" of an aggravated felony.[52] So, the Court clarified that "the loss must be tied to the specific counts covered by the conviction," with citation to a circuit opinion expressly rejecting the idea of using a Guidelines-style "relevant conduct" assessment in this context.[53] The Supreme Court further

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[48] 555 U.S. 415 (2009).

[49] 18 U.S.C. § 922(g)(9).

[50] 555 U.S. at 426 ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim *of the predicate offense* was the defendant's current or former spouse or was related to the defendant in another specified way" (emphasis added)).

[51] 557 U.S. 29, 38 (2009).

[52] *Id.* at 32. This same determination can be relevant in the criminal context: the illegal-reentry statute has a sentence enhancement for persons whose removal was subsequent to a conviction for an "aggravated felony." *See* 8 U.S.C. § 1326(b)(2).

[53] *Id.* at 42 (cleaned up). The citation here was to a Seventh Circuit case in which the government had tried to prove loss exceeding $10,000 with reference to "total loss from the offense of conviction *and relevant conduct*." *Knutsen v. Gonzales*,

> clarified this proposition by quoting the government: the "sole purpose of the aggravated felony inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself."[54] The same is true of the career-offender inquiry.

It would be incoherent for §4B1.2 to define an "offense of conviction" with reference to conduct for which a person was not convicted. This would be akin to a puzzle instructing users to find all the triangles in a picture, then defining "triangle" to mean anything "related to" a triangle. This puzzle would make no sense. And in the context of a sentence enhancement that results in some of the most severe penalties imposed under the guidelines, such internal inconsistency and incoherence would inevitably lead to significant litigation over its legality.

b. Reliance on "relevant conduct" in this context would be an administrative nightmare.

If the determination of whether a prior conviction was for a "crime of violence" accounted for conduct beyond the offense of conviction, then every single conviction could be a career-offender predicate. And whether a judge might determine that any given conviction is a predicate would be unpredictable—making it impossible to assess the potential impact of this amendment and, if the proposal were adopted, making it impossible to advise our clients. Indeed, because of the many unknowns, the data the Commission recently released is not useful in assessing the impact of the proposal as written.[55]

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429 F.3d 733, 740 (7th Cir. 2005) (emphasis in original). The Seventh Circuit explained that although it was true that the individual had stipulated to loss exceeding $20,000 (apparently for purposes of restitution), this stipulation was "in a separate paragraph from the one in which Knutsen identified the conduct and losses to which he was pleading guilty." *Id.* Thus, the court rejected the government's argument, on the ground that "[t]o adopt the government's approach would divorce the $10,000 loss requirement from the conviction requirement." *Id.*

[54] *Id.*

[55] Defenders do not think there *could* be any way to assess how the current proposal would impact the reach of the career-offender guideline, given that it is essentially arbitrary whether a *Shepard* document related to a conviction for a nonviolent offense might reference some sort of violent act.

Even figuring out whether an *instant* federal offense is a COV could prove challenging: In a fraud case, if there's an allegation in the discovery that our client at one point threatened a co-defendant over fraud proceeds, would *fraud* be a career-offender predicate? With state priors, where we're dealing with thousands of distinct offenses arising from 50+ justice systems, the endeavor becomes overwhelming. We would expect litigation in career-offender cases to increase exponentially. Few of our clients would accept the notion that their federal sentence could double or triple because of, say, a robbery that a state prosecutor charged but then dismissed years ago, as consideration for a plea to theft and a waiver of constitutional rights.[56] Fewer still would accept such a sentence enhancement based on alleged conduct that didn't even merit a charge, or that was the subject of an acquittal.

The fact that the current proposal limits the government (in making its prima facie case) to *Shepard* documents does not solve this problem. Rather, it creates a new one: in addition to case-to-case disparities based on application difficulties, we would also see jurisdiction-to-jurisdiction disparities based on differences in state practices. In some states, charging documents incorporate full police reports. In others, they simply state how an individual's conduct violated each offense element. Myriad jurisdictions fall somewhere in the middle. And it is no answer to say (as the government might) that courts should be able to rely on other documents, like police reports. That might equalize jurisdictions, but by making the entire system fundamentally unfair and guaranteeing mini-trials.

Finally, to answer a question in the Commission's second issue for comment, it would not solve any of these problems if the Commission limited the relevant-conduct assessment to "acts and omissions that occurred 'during the commission of the offense of conviction.'" The concern here is not with timing. If an individual was originally charged with robbery but pled to theft, an attempt to reopen and prove the old robbery allegation is not any less offensive to the career-offender scheme because the government would be

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[56] This evokes *Taylor*'s reference to a person who was charged with burglary but pled guilty to a "lesser, nonburglary offense [as] the result of a plea bargain." 495 U.S. at 601–02. The Supreme Court said "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* This would seem *especially* unfair to the person who was a party to that agreement.

seeking to prove a robbery that was theoretically contemporaneous with the crime of conviction. Regardless of timing, assessing an "offense of conviction" with reference to conduct that the offense of conviction was not based on is legally incoherent, and it would make the career-offender guideline far less predictable and far more burdensome.

c. Relevant conduct is easy to excise from the Commission's proposal.

There is no reason for the Commission to adopt this novel method for assessing prior convictions. First, no one has asked for it. Again, the DOJ and various judges have essentially asked for the system that was used pre-*Descamps*, when judges determined whether an offense was a "crime of violence" based not only on legal elements but also on the specific means of committing an element, as described in court documents.[57] Pre-*Descamps*, judges would have called this the "modified categorical approach"; now we understand it was a conduct-based methodology.

Second, assessing prior convictions with reference to "relevant conduct" would not help federal judges get any closer to some fundamental truth about what *really happened*. Whether old records memorialize a factual allegation that never ripened into a charge is arbitrary. What we do know about such an allegation is that prosecutors deemed it unworthy of pursuing. With charges that were dismissed, all we know for certain is that the individual waived constitutional rights and the prosecutor decided the agreed-upon outcome was appropriate. With an acquittal, the idea of reopening the matter is downright offensive. Perhaps we could have mini-trials in every case. But even then, witnesses will be unavailable, memories will be stale, and evidence—at least, defense evidence, that wouldn't show up in police reports—will be lost. And ultimately, the differences among cases and jurisdictions regarding record retention and available evidence would result in unjust and unwarranted disparities.

The only rational conduct-based methodology for assessing prior convictions is the one adopted in *Hayes* and *Nijhawan*, which looks only to

[57] *See supra* note 36.

conduct underlying the offense of conviction. As it turns out, this is easily done, using language the Commission already has at its fingertips.

- In commentary to this year's proposal, the Commission explains that its new conduct-based methodology "allows a court to consider the conduct of the defendant underlying the offense *of conviction*."[58]
- And the Commission's career-offender proposal from 2018 explained: "In determining whether an offense is a 'crime of violence,' the focus of inquiry is on the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.[59]

The revised §4B1.2 in our appendix uses language pulled from these sources, which have been subject to public comment. Together, they clearly describe a non-categorical, conduct-based methodology, but one that, like §4B1.1 and the directive it's based on, looks exclusively to the offense of conviction.

2. Use of the elements clause in a non-elemental way would sweep in huge numbers of minor, misdemeanor-type offenses.

The so-called elements clause, which refers to an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," is central to many sentence enhancements and has been in the career-offender guideline from the start.[60] The Commission's proposal to use this clause but delete its reference to elements, and to define "physical force" as "force capable of causing physical pain or injury to another person," would expand §4B1.2's reach to an indefinite degree. This problem is distinct from the relevant-conduct problem and would not be resolved by tying the COV inquiry to the offense of conviction.

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[58] USSC 2024–2025 Proposed Amendments, *supra* note 39, at 12. We were surprised to see this in the commentary, since it seems to conflict with the proposed guideline text. But it works well when moved into the text.

[59] USSC, Proposed Amendments to the Sentencing Guidelines 26 (Dec. 20, 2018). The Commission lost a quorum before it could vote on this proposal.

[60] *See* §4B1.2(1) (1987) (simply cross-referencing 18 U.S.C. § 16's definition of "crime of violence," which contains an elements clause).

In *Curtis Johnson v. United States*, the Supreme Court examined the elements clause in the ACCA "violent felony" context; it explained that "physical force" "means *violent force*—that is, force capable of causing physical pain or injury to another person."[61] The Court referred to this as a "substantial degree of force," and reinforced its interpretation with dictionary definitions for both "violent" ("extreme," "furious," "severe," "vehement," and "strong") and "force" ("strength," "energy," "active power," and "vigor").[62] The Court quoted with approval Black's definition of "violent felony" as "'a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.'"[63]

Johnson's specific holding was that the elements clause does not encompass "common-law battery," an offense that may be committed by "even the slightest offensive touching."[64] Common-law battery can be committed by "[t]he most nominal contact, such as a tap on the shoulder without consent."[65] Historically, and usually even now, it is classified as a misdemeanor, but in many states it can be charged as a felony—as *Johnson*'s facts illustrate.[66] The Court said it would be a "comical misfit" for a misdemeanor-type offense like common-law battery to be deemed a "violent felony."[67]

Nine years later, the Supreme Court addressed the elements clause in the context of a robbery statute that did not have as an element a minimum level of force—any force sufficient to compel a person to part with their

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[61] 559 U.S. 133, 140 (2010).

[62] *Id.* at 139–40.

[63] *Id.* at 140–41. The Court also cited with approval a Seventh Circuit discussion of § 16's elements clause: "Section 16(a) refers to the 'use of physical force.' Every battery entails a touch, and it is impossible to touch someone without applying *some* force, if only a smidgeon. Does it follow that every battery comes within § 16(a)? No, it does not. . . . [Courts must] insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003).

[64] 559 U.S. at 139, 145.

[65] *Id.* at 138 (cleaned up).

[66] *Id.* at 136, 141.

[67] *Id.* at 145.

property would suffice.[68] The Court in *Stokeling* took pains not to "exclud[e] the quintessential ACCA-predicate crime of robbery."[69] It reaffirmed *Johnson* and its holding that common-law battery is not a "violent felony" but found that robbery-level force (regardless how minimal) is qualitatively more violent than common-law-battery-level force and thus the robbery offense at issue was a "violent felony."[70] The upshot is that *Johnson* still provides the general standard, although with a *Stokeling*-based asterisk for robberies.[71]

The Commission has proposed maintaining the elements clause, but without any reference to elements. And having done so, it makes sense that the Commission has proposed using *Johnson*'s definition of physical force: "force capable of causing physical pain or injury to another person." At first glance, Defenders assumed this would be unobjectionable, although we were prepared to ask the Commission not to delete the first word of this line from *Johnson*: "*violent*." After all, the career-offender guideline, like ACCA, is focused on "felon[ies]" involving "violence."[72] When Senator Kennedy first introduced the concept that would ultimately become the career-offender

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[68] *Stokeling v. United States*, 586 U.S. 73 (2019).

[69] *Id.* at 79–82.

[70] *Id.* at 82–83.

[71] *See id.* at 82 (discussing how the "conduct that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim"); *see also Borden*, 593 U.S. at 438 (2021) (reaffirming that *Johnson* required "a substantial degree of force").

[72] §4B1.1; *see also* 28 U.S.C. § 994(h) (same). It is noteworthy that although the career-offender guideline defines as a felony any conviction for an offense punishable by "imprisonment for a term exceeding one year," evidence indicates that when Congress used the word "felony" in § 994(h), it meant an offense designated as a "felony" by the convicting jurisdiction. When Congress enacted § 994(h) in 1984, the term "felony" was defined as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. §§ 802(13), 951(b). That definition was enacted as part of the Drug Abuse Prevention and Control Act of 1970 and remains today. Incidentally, the criminal firearms code defines "crime punishable by imprisonment for a term exceeding one year" to *not* include "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B) (emphasis added). This is all to say that §4B1.2 takes a maximalist view of what is a felony, and thus lacks guardrails that could help mitigate problems created by definitional errors that capture misdemeanor-type offenses.

guideline, he talked about the "relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets"—that is, those "who stab, shoot, mug, and rob."[73]

But upon further reflection, the elements clause as defined in *Johnson* does not work as intended when its reference to elements is deleted. Here is the problem: If we are looking only at elements, then "capable of causing physical pain or injury" is a meaningful limitation. The only offenses that would have *as an element* physical force that's capable of causing physical pain or injury to another would be aggravated assaults and offenses more serious than that (*e.g.,* murder, rape). But if we are looking at conduct, this is no limitation at all: *any* contact with another person is *capable of* causing pain or injury—including *Johnson*'s reference to a "tap on the shoulder."[74] The word "capable" does not require any particular degree of force or likelihood of injury.

The potential impact of this is difficult to predict. Might some judges rule that state drug-trafficking offenses are "capable of causing physical pain or injury to another person"? What about misdemeanor-type offenses like pickpocketing, prostitution, resisting arrest, or illegal tattooing? Under a conduct-based definition using *Johnson*'s "capable of" language, essentially any crime involving human contact could be deemed a crime of violence.[75] One thing appears certain: this definition would sweep in essentially all misdemeanor-level assaults and batteries when they are subject to sentences of more than a year—which happens frequently but arbitrarily, based on the state of conviction.[76] That is, if the Commission adopts *Johnson*'s definition of

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[73] 128 Cong. Rec. 26512, 26517–18 (Sept. 30, 1982).

[74] 559 U.S. at 138.

[75] After all, "it is impossible to touch someone without applying *some* force, if only a smidgeon." *Flores*, 350 F.3d at 672.

[76] At least six states have "misdemeanors" that are *generally* subject to more than a year in prison. Nat'l Conf. of State Legislatures (NCSL), *Misdemeanor Justice: Statutory Guidance for Sentencing* (July 16, 2019). In Pennsylvania, for example, misdemeanors can carry maximum sentences of two or five years, 18 Pa. C.S. § 1104, including simple assault, 18 Pa. C.S. § 2701. Many other states have recidivism provisions that make misdemeanors subject to felony-level sentences. NCSL, *supra*. In Wisconsin, for instance, any misdemeanor comes with a two-year maximum penalty if the person was convicted of any three misdemeanors, or one

"physical force," but related to conduct rather than elements, it would capture precisely the offense that *Johnson* held would be a "comical misfit" for a sentence enhancement meant to cover violent felonies.[77]

This is no minor concern: Commission data from the most recent five-year period reveals that "simple assault" is one of the most common prior-conviction events; it appears nearly twice as frequently as aggravated assault, which is the most common of sort of violent offenses that the Commission appears to actually *intend* to trigger a career-offender sentence (aggravated assault, robbery, etc.):[78]

Offense type	Total prior convictions
Traffic	346,949
Drug possession	214,029
Larceny/motor vehicle theft	202,691
Public order	194,356
Drug trafficking	125,548
DUI	99,182
Simple assault	***90,105***
Immigration	88,843
Fraud	84,047
Other property	84,047
Weapons	80,298
Burglary	71,386
Court violations	55,272
Aggravated assault	47,286
All other offenses	43,389
Robbery	36,567
Forcible sex offense	15,006
Other violent offense	14,243

felony, within a five-year period. Wis. Stat. § 939.62. This provision applies even if all three previous misdemeanor convictions were from the same proceeding. *State v. Wittrock*, 350 N.W.2d 647 (Wis. 1984); *see also generally* Bruce T. Cunningham, Jr., *Misdemeanors 'Kicked Up' to Felonies*, 22 Fed. Sent. R. 111 (2009).

[77] 559 U.S. at 145.

[78] The data used for this analysis were extracted from the Commission's publicly available "Criminal History of Sentenced Individuals" datafiles spanning fiscal years 2019 to 2023. U.S. Sent'g Comm, Commission Datafiles.

This is consistent with the Commission's recidivism reports, which often find that assault is among the most common rearrest events.[79] Thus, even if the Commission were to fix the relevant-conduct problem, Defenders would expect this elements-clause problem, alone, to spark a massive increase in career-offender sentences.

Defenders have thought hard about how to fix this problem while also addressing the Commission's concerns about violently committed crimes being deemed not-violent. The solution that makes the most sense is to keep the elements clause as the *elements* clause—as it currently reads; and to set up a new conduct-based methodology for enumerated offenses only, where it's less likely to cause unintended mischief.[80] This is the option we illustrate in our appendix. We expect other stakeholders to like it: judges could rely on years of elements-clause caselaw, which will cover many prior offenses without needing to examine conduct at all. But where the elements clause does not capture an offense the Commission has deemed violent—that is, an

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[79] *See, e.g.*, USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, at 10 (2017) ("Regardless of whether offenders had only one-point sentences or more serious two-point, or three-point sentences in their criminal history, assault was the most common offense of rearrest."); USSC, *Recidivism and Federal Bureau of Prisons Programs*, at 20 (2022) ("The most common post-release recidivism event for all three groups was assault."); *id.* at 38 (same, with a study of individuals as related to a different set of BOP programming). Recidivism reports that separate out simple assault indicate that it's this misdemeanor-level offense that is driving the data. *See* USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, at 7 (2018) (simple assault was the third most common recidivism event for the study group, after (1) court/supervision violation and (2) drug-trafficking); USSC, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, at 36 (Table C-1 (2020) (simple assault was the fourth most common recidivism event, after (1) court/supervision violation, (2) drug-trafficking, and (3) drug-possession).

[80] Defenders would prefer that the Commission eliminate the elements clause altogether; the career-offender guideline would be far simpler and more predictable without any conceptual definitions. It is our understanding, though, that the Commission is focused only on methodology here, such that it would not consider eliminating substantive categories—at least, not this year.

enumerated offense—the judge could turn to conduct in order to avoid what the Commission has called "odd and arbitrary results."[81]

Another solution would be to craft a new definition of "physical force" that would function well under a conduct-based methodology—perhaps, "violent force that is intended to cause physical pain or injury to another." This would allow the Commission to eliminate the categorical approach entirely, but it would mean defining identical words differently than the Supreme Court. And we don't see this option as plausible this amendment cycle: if the Commission intends to devise a new definition of "physical force," it would be essential for all stakeholders to get the opportunity to comment on specific language, to tease out unintended consequences.

3. Other matters: The Commission should revisit its definition of arson and retain §4B1.2's existing structure as much as possible.

The proposal's reliance on relevant conduct and its use of the elements clause in a non-elemental way are, by far, Defenders' most serious concerns with the Commission's proposed "crime of violence" definition. Each of these features would make the career-offender guideline less predictable and less administrable; increase disparities based largely, but not exclusively, on differences in state practices; and dramatically increase the number of career offenders, even with state drug priors excluded from the CSO definition.

But we do have two additional concerns. Defenders' first concern is substantive: the proposed definition of arson is too broad. Our second concern is stylistic: the proposed structure for §4B1.2(b) is hard to follow; we suggest retaining the current structure (including labels) as much as possible.

Arson. The Commission's proposal retains arson as an enumerated offense, but with a new definition: "The willful or malicious setting of fire to or the burning of property." The problem is that under a conduct-based methodology—and without even an "arson" label—this definition will be interpreted to cover numerous convictions that surely the Commission would not have intended, like unlicensed trash-burning, disorderly-conduct offenses

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[81] USSC Proposed 2024–2025 Amendments, *supra* note 39, at 2 (quotation marks omitted).

involving burning small personal items, and drug-possession offenses involving drugs that are smoked.

Even if the Commission were defining "generic" arson for the categorical approach, we would have concerns. The Commission's definition is broader than even the low-level arson statutes we're familiar with, which relate to specified types of property, or only to property belonging to another, or require risk-creation or at least damage.[82] The Commission's definition certainly doesn't look like the Model Penal Code, which defines arson as "causing a fire or explosion with 'the purpose of,' *e.g.,* 'destroying a building . . . of another' or 'damaging any property . . . to collect insurance.'"[83]

But we aren't talking about the categorical approach, where a court might look for a "generic" definition broad enough to capture the legal elements of most state statutes proscribing arson.[84] The Commission isn't describing elements; it's describing *conduct* that will be labeled a "crime of violence." And in this context, Defenders suggest: "the willful or malicious setting of fire to or burning of any building or inhabited structure."[85] This

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[82] *See, e.g., United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015) (Ohio arson statute requiring "a substantial risk of physical harm to property without the victim's consent"); *United States v. Misleveck*, 735 F.3d 983, 983 (7th Cir. 2013) (Wisconsin statute requiring "damage[] [to] any property of another without the person's consent"); *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (Texas statute requiring an intent to destroy or damage" certain specified property if at least one of several aggravators is present); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) (Missouri statute that covers starting a fire that damages property "of another"); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005) (Washington statute that covers maliciously causing a fire that "damages" property); *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (Vermont statute (Vt. Stat. Ann. tit. 13, § 504) that encompasses burning property, but only if it belongs to "another person" and has a minimum value); *see also* 18 U.S.C. § 844(i) (lowest level federal arson statute, requiring intent to "damage or destroy" property (along with interstate-commerce element)).

[83] Model Penal Code § 220.1(1) (1985), as quoted in *Begay v. United States*, 553 U.S. 137, 145 (2008), which was abrogated by *Johnson v. United States*, 576 U.S. 591 (2015).

[84] *See Quarles v. United States*, 587 U.S. 645, 653–54 (2019) (discussing "generic burglary").

[85] This is the description we include in our appendix. As noted above, in footnote 80, we understand the Commission to be focused on creating a workable non-

might be narrower than "generic" arson but it's a common enough means of committing arson and it's appropriate for a conduct-based methodology focused on violence; it won't sweep in trash-burning and other plainly nonviolent conduct. Arson of a building or inhabited structure is the sort of case that's most likely to involve a risk of injury or death.[86] And having a concrete definition, rather than one in which a federal judge assesses risk, would keep things simple and predictable.

Structure. Defenders strongly recommend keeping the basic structure for "crime of violence"—indeed, for §4B1.2 generally—as much as possible, for clarity and to make the transition away from the categorical approach easier for judges, probation officers, and practitioners. We will not use space here to explain what precisely we mean, since Commissioners can review our appendix to see for yourselves.

Defenders have been using §4B1.2 for decades and we review it frequently, as we assess new cases and potential arguments. We presume that judges and prosecutors do the same; probation officers no doubt review the guideline even more frequently than the rest of us. Despite this familiarity—or perhaps because of it—as the Commission's proposal is structured, it took us significant time to parse through the amendments. It was hard to distinguish between what would change and what would stay the same, and how each change might affect the entire scheme.

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categorical methodology, not revisiting substantive categories of offenses. But if the Commission were willing to entertain the idea, Defenders' topline recommendation would be to delete §4B1.2's reference to arson altogether. In 2016, the Commission deleted §4B1.2's reference to burglary upon finding that burglary is rarely committed violently. USSG App. C, Amend. 798 (Aug. 1, 2016). As far as Defenders know, the Commission has never asked how often arson is committed violently. If the Commission were to ask this question, we feel confident it would remove "arson" from the COV definition. For that matter, if the Commission were to inquire about mere unlawful possession of a "firearm described in 26 U.S.C. § 5845(a)" or "explosive material," we suspect it would delete those too.

[86] *See Misleveck*, 735 F.3d at 984 (ultimately defining generic arson broadly, to capture most arson statutes, but also musing that "[i]ntentionally setting fire to a building is likely to do extensive damage, and, if the building is occupied, to endanger life," while setting fire to personal property is usually far less serious).

Also, we found the lack of labels on what have always been the definitions of forcible sex offense, robbery, and extortion, along with the new definition of arson, extremely confusing. Indeed, in the absence of labels, we spent no small amount of time trying to discern if the Commission was trying to repurpose these definitions for some other use before going back to the proposal's introduction, which refers to "conduct that would constitute certain specific offenses that currently qualify as a 'crime of violence,' such as forcible sex offenses, robbery, arson, and extortion."[87] But we still can't be sure how unlabeled descriptions of conduct would be interpreted by each of the many hundreds of district judges in courts around the country.

The Commission is considering big changes here, and in preparing to apply whatever ultimately gets promulgated, it would be helpful to all stakeholders if §4B1.2 mostly stays the same—except where it's changing.

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Defenders are confident the Commission can promulgate a reasonable, debugged "crime of violence" definition this amendment cycle. If, however, Commissioners decide to take additional time to work on the COV definition, we ask that the Commission not delay promulgating a new CSO definition that removes state drug priors. This would have immediate benefits: in addition to simplifying §4B1.2, resolving a circuit split, and eliminating drug-pathway cases from the career offender guideline (which would result in sentences closer to the guideline range both for the §4B1.1 range and the §2D1.1 range), it would also give the Commission real-world data to consider as it assesses potential COV definitions.

[87] USSC Proposed 2024–2025 Amendments, *supra* note 39, at 3.

C. Sentence-length-based limitations: The career-offender definitions should include a limitation of at least three years, sentence served.

The Commission's proposal to create a conduct-based methodology for the "crime of violence" definition is a huge change. Adding a meaningful sentence-length-based limitation to at least the COV definition—ideally, to both definitions—will ensure that this huge change makes for a guideline that is administrable, won't inadvertently capture minor offenses that shouldn't trigger near-maximum federal prison sentences, and won't create new disparities. Defenders advocate for Option 3A: at least three years' sentence served. If Commissioners decide to go with Option 2 (time *imposed*), the minimum prior sentence length should go up, to five years. If Commissioners decide not to adopt a prior-sentence-length based limitation for both definitions, it should at a minimum promulgate our requested limitation for the new, untested COV definition.

Administrability. Even the best possible conduct-based methodology for assessing whether an offense is a "crime of violence" will pose new challenges in application. All we know right now is that there will be legal fights and evidentiary hearings; we don't actually know how frequently these will arise or how difficult they will be to resolve.[88] What is clear, though, is that a significant prior-sentence-length requirement in at least the COV definition would quiet concerns about administrability by reducing at the front end the number of prior convictions we need to assess.[89] And in a non-

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[88] In thinking through the career-offender proposal, Former Secretary of Defense Donald Rumsfeld's famous quote related to Iraq comes to mind: "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." Michiko Kakutani, *Rumsfeld's Defense of Known Decisions*, N.Y. Times, Feb. 3, 2011 (referring to this 2002 quote).

[89] Defenders saw this sort of benefit after the Commission amended USSG §2L1.2 in 2016, changing a sentence enhancement based on prior conviction category to one based on prior sentence. USSG App. C, Amend. 802 (Nov. 1, 2016). Defenders would prefer that §2L1.2 not base offense levels on prior convictions at all, as those are most appropriately addressed through Chapter Four. But this single change made the guideline far more predictable and simple, as the Commission reported in

arbitrary, definitional way: the sentence someone received in a prior case is our best indication of how serious—that is, how *violent*—the offense was.

Minor offenses. Defenders' are extremely concerned about the "crime of violence" definition inadvertently capturing minor, misdemeanor-type offenses. The career-offender guideline is supposed to capture a "relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets."[90] It is not meant to capture someone with a couple of disorderly-conduct convictions that would be misdemeanors in most jurisdictions. Nor is it meant to capture someone with a prior that looks bad on paper (*e.g.*, robbery) but resulted in only a short jail sentence because once it became clear the state couldn't prove guilt—maybe because of unreliable witnesses—the prosecutor made an offer for "time served."

This comment has alerted the Commission to the parts of the definition that seem certain to inadvertently capture minor offenses, to varying degrees (relevant conduct, elements clause, arson). But we don't know what we haven't noticed yet.[91] And in any event, with *any* system for assessing prior convictions, there will be anomalies. Under the categorical approach, anomalies have mostly favored our clients; under a conduct-based approach, they will almost certainly favor imprisonment. A meaningful prior-sentence-based limitation is the best way to avoid capturing minor, fundamentally nonviolent offenses.[92]

Unwarranted disparities. Eliminating state drug priors from the CSO definition while extending the reach of the COV definition does not resolve the career-offender guideline's pernicious racial-disparity problem; it does change it. The recent data report shows that if the Commission eliminates state drug priors from the CSO definition and alters the COV definition so it captures the offenses that the Commission deems fundamentally violent, the percentage of career offenders who are Black

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2022. USSC, Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment, at 19 tbl. 1 & 22 (2022).

[90] 128 Cong. Rec. 26512, 26518 (daily ed. Sept. 30, 1982) (statement of Sen. Kennedy).

[91] Again Donald Rumsfeld's quote comes to mind. *See supra*, note 88.

[92] Weeding out minor offenses should also help get career-offender sentences closer to applicable guideline ranges.

finally goes down somewhat, to just below 50%, but the percentage of career offenders identified as Hispanic or "other" goes up.[93]

This does not surprise us: Hispanics are more likely to have *federal* drug priors because of how frequently they are charged near the Mexican border; and the Commission's "other" category includes Native Americans who, on reservations, are under the federal government's general felony jurisdiction. For Native Americans in particular, there will be many convictions for both drug offenses and seemingly violent offenses that, if they had been prosecuted by the state, might have been misdemeanors. But they can't be charged by the state. What's more, federal sentences tend to be longer than state sentences, so a prior-sentence-length limitation of around one year would not weed out relatively minor offenses that might have been misdemeanors if the individual involved had not been Native American.

Another source of disparities arises between individuals with prior convictions in a jurisdiction without parole and individuals with priors in states that have parole. This is why our topline request is for a requirement of three years' sentence *served*. In a state with parole, a three-year sentence might translate as a determination that the offense warrants only 18 months of incarceration. In a jurisdiction without parole, a three-year sentence is a three-year sentence. These are very different assessments of seriousness and they shouldn't be treated the same. By adopting a sentence-served-based limitation, the Commission would eliminate unwarranted disparities that would arise from a time-imposed (or solely points-based) limitation.

One more source of disparities underlying Defenders' request for a threshold requirement of three years' sentence served is related to "time served" sentences. Criminal defense attorneys know that many clients stuck in pretrial detention—who tend to be indigent—will plead guilty to nearly *any* offense if it comes with a "time served" sentence; the ability to be free and among loved ones is often more important than proving one's innocence or exercising constitutional rights.[94] Thus, the Commission should choose a

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[93] USSC 2025 Data Background, *supra* note 2, at 23.

[94] *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 (2004) ("If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after

sentence-based limitation that is long enough to weed out most "time served" sentences—to reduce the likelihood that such sentences will distort application of the career-offender guideline. Defenders regularly see "time served" sentences of about a year.[95] It is far rarer to see a "time served" sentence that was imposed after three full years of pretrial detention.

D. Cross-references to §4B1.2: There is no reason to further proliferate definitions of "controlled substance offense" and "crime of violence."

The Commission's proposal would eliminate all the cross-references to §4B1.2 other than from the career-offender guideline (§4B1.1), and maintain the current, categorical definitions of "controlled substance offense" and "crime of violence" everywhere else, through lengthy commentary. Defenders have long argued in favor of the categorical approach, and we will not advocate against it here, but we have to acknowledge that this part of the proposal could derail the whole package. So, while Defenders are essentially neutral, we want to convey that if §4B1.2 is amended along the lines of our revisions, we do not see why the Commission shouldn't simply maintain all the current cross-references to §4B1.2.[96]

There are two problems with eliminating the cross-references: First, having a single Guidelines Manual contain two distinct definitions of "controlled substance offense" and "crime of violence"—neither of which lines up with any of the other similar definitions that federal courts must examine day after day—would be confusing.[97] Second, we simply cannot imagine that

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trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court.").

[95] This is even more true when we take into account revocation sentences (perhaps only for rule violations) that are tacked onto jail sentences.

[96] Really, the best action would be for the Commission to eliminate offense-level enhancements in §2K2.1 and other guidelines that are based on criminal history that is better addressed via Chapter Four, thereby eliminating the need for cross-references and simplifying these guidelines.

[97] *See, e.g.*, 18 U.S.C. § 924(e) ("drug trafficking crime" and "violent felony"), 18 U.S.C. § 924(c) ("controlled substance offense" and "crime of violence"), 21 U.S.C. § 802 ("serious drug felony" and "serious violent felony"). The Commission in 2016 reported to Congress that "[a] single definition of the term "crime of violence" in the guidelines and other federal recidivist provisions is necessary to address increasing

those individuals and groups who have lobbied against the categorical approach for years would accept maintaining it outside the career-offender context, including in USSG §2K2.1, which is one of the most frequently applied guidelines in the book.

We do not know why the Commission's proposal retains the current system for most guidelines that currently cross-reference §4B1.2; surely Commissioners can see how this works against simplification. Perhaps the Commission is concerned that applying a significantly amended §4B1.2 to all the guidelines that currently cross-reference that section would be too much change all at once? We do not view this as a problem. To the contrary, it is only by very frequently assessing prior convictions under the new system that judges, probation officers, and practitioners will get the hang of it. And it is only through frequent application that courts will develop a body of interpretive caselaw to help with further applications.

Alternatively, perhaps the Commission does not want to decrease the number of drug priors that elevate sentences, as applied to anything other than the career-offender guideline. This should not be a concern. Public opinion on drug offenses has become less punitive over recent decades.[98] Defenders have significant experience with the guidelines that currently cross-reference §4B1.2—especially §2K2.1—and it is the elevated base offense levels associated with prior drug offenses that often cause judges the most concern about overly harsh sentencing ranges. Thus, eliminating state drug

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complexity and to avoid unnecessary confusion and inefficient use of court resources." USSC 2016 Career Offender Report, *supra* note 3, at 3.

[98] *See* The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018) ("Across demographic groups and political parties, U.S. voters strongly support a range of major changes in how the states and federal government punish people who commit drug offenses. A nationwide telephone survey of 1,200 registered voters, conducted for Pew in 2016 by the Mellman Group and Public Opinion Strategies, found that nearly 80 percent favor ending mandatory minimum sentences for drug offenses. By wide margins, voters also backed other reforms that would reduce the federal prison population. More than 8 in 10 favored permitting federal prisoners to cut their time behind bars by up to 30 percent by participating in drug treatment and job training programs that are shown to decrease recidivism. Sixty-one percent believed prisons hold too many drug offenders and that more prison space should be dedicated to 'people who have committed acts of violence or terrorism.'" (footnotes omitted)).

priors from the CSO definition might not only help get career-offender sentences (and §2D1.1 sentences) closer to the guideline range; it might also help get sentences imposed under §2K2.1 and these other guidelines closer to the guideline range.[99]

Or, perhaps the Commission is concerned about a congressional directive that precludes retaining cross-references to §4B1.2. We don't share this concern. The only directive seeming potentially relevant is an uncodified 1994 directive related to §2K2.1 that instructed the Commission to "appropriately enhance penalties" for § 922(g) cases where there are one or two prior convictions for a "violent felony" or a "serious drug offense" as defined by ACCA.[100] But the Commission fully complied with that directive decades ago.[101] And this uncodified directive to link §2K2.1 penalties to ACCA, with which the Commission long ago complied, does not forever preclude the Commission from amending §2K2.1 as needed to ensure that guideline ranges permit courts to meet § 3553(a)'s sentencing objectives, to "provide certainty and fairness" and avoid "unwarranted disparities," and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[102] In any event, times have changed since 1989: §4B1.2 already deviates from ACCA in various ways.

Perhaps the Commission is not worried about the directive per se, but rather the notion that there will be too steep a cliff between ACCA sentences and other § 922(g) sentences that are sentenced under §2K2.1. After all, it appears the Commission amended §4B1.2 to mirror ACCA back in 1989, even

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[99] This assumes that the Commission takes to heart Defenders' suggestions regarding the "crime of violence" definition, and adopts a prior-sentence-length limitation for the definitions. If the Commission were to adopt a COV definition that captures myriad minor, fundamentally nonviolent convictions, Defenders would expect to see an *increase* in variances.

[100] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110513, 108 Stat. 1796, 2019 (1994).

[101] Indeed, the Commission had already amended §4B1.2 to mirror ACCA back in 1989. USSG App. C, Amend. 268 (Nov. 1, 1989).

[102] 28 U.S.C. § 991(b); *see also* Fed. Defender Comments on the U.S. Sent'g Comm's 2024 Proposed Amendments—Simplification, at 23–24 (Feb. 22, 2024) (discussing directives generally).

before Congress directed it to do so, largely related to this concern.[103] But while this may have been a serious concern in 1989, that's no longer the case. The number of ACCA cases is now very small, notwithstanding the high number of ACCA cases that get on the Supreme Court's docket. In FY2023, out of 8,040 convictions under 18 U.S.C. § 922(g), there were only 189 ACCA cases.[104] We expect that number to keep dropping—particularly now that ACCA is understood to be an element of an aggravated § 922(g) offense.[105] This is all to say that it does not make any sense to design a guideline around an incredibly rare mandatory minimum that's now understood to function as a legal element of a distinct offense.

III. Conclusion

The Commission's career-offender proposal is big and ambitious, and it impacts one of the harshest guidelines. The Commission's idea to move away from the categorical approach while narrowing §4B1.2's substantive reach is an exciting opportunity for smart reform. If the proposal works as intended—shrinking the CSO definition and crafting a conduct-based COV definition to capture all truly violent offenses (but not other offenses)—it could have enormous positive impacts. Indeed, if the amended §4B1.2 continues to apply to guidelines beyond §4B1.1, we'd likely see positive impacts there as well. If the proposal does not work as intended, it could become a cautionary tale.

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[103] USSG App. C, Amend. 268 (Nov. 1, 1989); *see also* USSC, Firearms and Explosive Materials Working Group Report 18–22 (1990).

[104] This was extracted from the Commission's publicly available "Individual Datafiles" for fiscal year 2023. U.S. Sent'g Comm, Commission Datafiles. A Commission report from 2021 showed ACCA cases declining over the years, very likely due to the Supreme Court tightening rules related to the categorical approach, from a high of 609 (in 2012—before *Descamps*) to 312 (in 2019). USSC, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 19 (2021). Again, in FY2023, that number was down to 189. Returning to the directive point, if the Commission were serious about making §2K2.1 strictly track ACCA, there would be far, far fewer sentence enhancements. That is, over the years, ACCA's definitions have been repeatedly narrowed, while §4B1.2's definitions have grown broader.

[105] *See Erlinger v. United States*, 602 U.S. 822 (2024) ("Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt"). Since the Supreme Court issued *Erlinger*, Defenders have seen prosecutors choose not to indict on ACCA and we have seen ACCA acquittals.

That is, it is important to get this right. And Defenders want to help the Commission get this right.

To be clear, the categorical approach is still the best system for assessing prior convictions—admittedly, among bad options. But the Commission, if it is careful, is capable of eliminating the categorical approach while at least mitigating the worst sorts of problems that the categorical approach was designed to solve. Defenders have identified some very serious problems with the currently proposed "crime of violence" definition; but these problems appear inadvertent, and they are fixable. And the Commission's proposal includes two features that will mitigate remaining concerns related to administrability, complexity, and over-inclusiveness: the CSO definition and the prior-sentence-length limitation.[106] We appreciate Commissioner's thoughtful consideration of our comment and its appendix and we look forward to the upcoming hearing on this proposal.

[106] In case we have not yet made this sufficiently clear, Defenders (categorically) oppose any conduct-based "crime of violence" definition that is not accompanied by these mitigating parts of the proposal.

APPENDIX

The following is a set of revisions to §4B1.2, working from the current guideline and generally using the current structure except where indicated. All language that is different from the current guideline (including language that is part of the Commission's proposal this year) is highlighted in red; language that is both different and not from the Commission's current proposal is additionally underlined. All language and structure that's different from the current guideline (and some that remains the same) is explained in footnotes.

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) CRIME OF VIOLENCE.—[1]

(1) DEFINITION. The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

a. has as an element the use, attempted use, or threatened use of physical force against the person of another;[2] or

b. is, as established by conduct of the defendant underlying the offense of conviction,[3] murder, voluntary manslaughter, kidnapping,

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[1] The placement of the "crime of violence" definition remains as in the current guideline, but the structure of this section is set up as in the Commission's proposal, with subsections for definitions, additional definitions, inchoate offenses, determination, and sources of information. Defenders' comment at pages 27–28 explains that the Commission should try to maintain §4B1.2's current structure and language as much as possible (that is, except where substantive change is intended).

[2] Section II.B.2. of Defenders' comment is devoted to the serious problems that would arise from importing the so-called elements clause to the non-elemental, conduct-based context (without definitional changes). On page 24–25, we explain the proposal to retain the elements clause as is, adopting a new conduct-based approach for the enumerated offenses only.

[3] Section II.B.1. of our comment addresses the current proposal's "relevant conduct" problem. This language is substituted for the currently proposed introductory language in order to establish a conduct-based methodology for the enumerated offenses that looks only to offenses of conviction, consistent with USSG §4B1.1. This text draws from language that is currently proposed for commentary, as discussed on page 19. *See* USSC, Proposed Amendments to the Sentencing Guidelines, at 12 (Dec. 19, 2024) (commentary explaining that the new conduct-based methodology "allows a court to consider the conduct of the defendant underlying the offense of conviction").

aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[4]

(2) ADDITIONAL DEFINITIONS.—[5]

(A) Forcible Sex Offense. A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(B) Extortion. The obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(C) Robbery. The unlawful taking or obtaining of personal property from a person, or in the presence of a person, against the person's will by means of actual or threatened force (*i.e.*, force that is sufficient to overcome a victim's resistance), or violence, or fear of injury against: (i) the person, the property of such person, or property in the custody or possession of such person; (ii) a relative or family member of the person, or the property of such relative or family member; or (iii) anyone in the company of the person at the time of the taking or obtaining, or their property.

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[4] The enumerated offenses here remain unchanged from the current guideline. Defenders' comment at pages 27–28 explains why it is important to retain this language and structure. Since we are proposing maintaining the elements clause as is, we do not delete any of the currently enumerated offenses. However, as suggested at page 26, footnote 85, if the Commission is willing to contemplate eliminating offenses from this list, arson and the possession offenses involving firearms and explosive material should be placed on the cutting table.

[5] The definitions here remain unchanged from the current guideline other than arson, which is addressed in the next footnote, and this uses the current label ("Additional Definitions"). *See* §4B1.2(e). As noted in footnote 1 of this appendix, although this section mostly remains unchanged, it has been nested under the "crime of violence" definition in line with the Commission's current proposal.

(D) Arson. ~~The willful or malicious setting of fire to or burning of property~~ The willful or malicious setting of fire to or burning of any building or inhabited structure.[6]

(3) COVERED INCHOATE OFFENSES. ~~The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.~~ An offense is a "crime of violence" if ~~the defendant engaged~~ the offense of conviction involved the defendant engaging in any of the conduct described in subsection ~~(b)~~(a)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense.[7]

(4) DETERMINATION OF WHETHER AN OFFENSE IS A "CRIME OF VIOLENCE."—In determining whether an offense is a "crime of violence," the focus of inquiry ~~is on the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. See subsection (a)(1)(A) of §1B1.3 (Relevant Conduct).~~ for sub. (a)(1)(A) is on the elements of the offense of conviction. The focus of inquiry for sub. (a)(1)(B) is on the defendant's conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.[8]

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[6] Currently, "arson" is undefined. The Commission has proposed a new arson definition, but Defenders explain at pages 25–27 of our comment how, although the Commission's proposed definition might work if we were relying on the categorical approach, it does not function appropriately under a conduct-based methodology. At pages 26–27, we explain why we chose this specific alternative definition.

[7] This is taken directly from the Commission's proposed language, with the exception of the underlined language. Defenders are generally comfortable with the Commission's inchoate-offense-related language (although of course, we'd prefer that inchoate offenses be excluded altogether), except that we altered the text where indicated so that it mirrors the new introductory phrasing for the conduct-based methodology, which is discussed at footnote 3 of this appendix. Then, we updated the cross-reference, which now looks only to the enumerated offenses (because the conduct-based approach attaches only to the enumerated offenses).

[8] The placement of and label for this section mirror the Commission's proposal but Defenders do not use the language of the proposal due to the grave relevant-conduct problem that is discussed at length in Section II.B.1. of our comment. Since the elements clause remains focused on elements in this revised §4B1.2, this section

(5) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence" under sub. (a)(1)(B), the government may only use the following sources of information from the record:

(A) The charging document.

(B) The jury instructions and accompanying verdict form.

(C) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(D) The judge's formal rulings of law or findings of fact.

(E) The judgment of conviction.

(F) Any explicit factual finding by the trial judge to which the defendant assented.

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).[9]

(b) CONTROLLED SUBSTANCE OFFENSE.—[10]

~~(1)~~ DEFINITION.—The term "controlled substance offense" means an offense under 21 U.S.C. § 841, § 860, § 952(a), § 955, or § 959; or § 846 or § 963, if the object of the conspiracy or attempt was to commit an offense covered by this provision); or 46 U.S.C. § 70503(a) or

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separates out the elements clause from the enumerated offenses. The text used to describe the new conduct-based methodology for the enumerated offenses is taken directly from the Commission's 2018 proposal, as discussed in our Comment at page 19. *See also* USSC, Proposed Amendments to the Sentencing Guidelines, at 26 (Dec. 20, 2018).

[9] This section is lifted directly from the Commission's proposal, with the added underlined language in the introductory clause cross-referencing sub. (a)(1)(B), since the new conduct-based inquiry would only be used for enumerated offenses.

[10] The "controlled substance offense" section is structured as it is in the Commission's proposal, but it's just moved back to the location within §4B1.2 where it currently appears for the same reason noted in footnote 1 of this appendix and elsewhere: to aid clarity and reduce transition-related problems.

§ 70506(b).[11] ~~[or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)]~~.[12] ~~federal or state law, punishable by imprisonment for a term exceeding one year, that—~~

~~(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or~~

~~(2) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).~~[13]

(2) ADDITIONAL CONSIDERATION.—A violation of 18 U.S.C. § 924(c) or § 929(a) is ~~a "crime of violence" or a~~ "controlled substance offense" if the offense of conviction established that the underlying offense was ~~a "crime of violence" or a~~ "controlled substance offense.~~":~~ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)[14]

(c) TWO PRIOR FELONY CONVICTIONS.—The term "two prior felony convictions" means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence,

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[11] This is the Commission's proposed new language, with three statutory sections that were presented as optional moved from the brackets to the main text (21 U.S.C. §§ 860, 846, and 963), in the location where they make the most sense grammatically. Defenders' comment at page 8–9 explains that we do not see the need for including any of the extra statutory sections in brackets; however, we anticipate that Commissioners will most likely want to include §§ 860, 846, and 963, so we include them here (to ensure our appendix is helpful).

[12] Again, our comment explains that we do not see the need for including any of the extra statutory sections in brackets but we have retained §§ 860, 846, and 963, by moving them into the unbracketed text discussed in the preceding footnote.

[13] These deletions are all from the Commission's proposal. As discussed in Defenders' comment at Section II.A., eliminating state drug priors from the "controlled substance offense" definition is exactly the right call.

[14] This subsection is presented exactly as it is in the Commission's proposal.

two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~,~~; and (2) ~~the sentences for~~ each of at least two of the aforementioned felony convictions (A) is counted separately under §4A1.1(a), and (B) resulted in a sentence for which the defendant served three years or more in prison. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.[15]

(d) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult ~~federal or state~~ conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).[16]

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[15] This is language from the current definition of "Two Prior Felony Convictions," as proposed to be modified by Option 3A of the Commission's proposal. Defenders' comment discusses this important part of the Commission's proposal at Section II.C., on pages 29–32.

[16] This is the current definition of "Prior Felony Conviction," as proposed to be modified by the Commission proposal.

Federal Public and Community Defenders
Comment on Firearms Offenses

(Proposal 2)

February 3, 2025

Table of Contents

PART A

PART B

PART A: Machinegun conversion devices. Part A of the "Firearms Offenses" proposed amendment lays out two options that would enhance sentencing ranges for certain individuals who possess machine gun conversion devices (MCDs). Both options function similarly to expand ranges in these cases. Option 1 does so via expanding §2K2.1's definition of "firearm" in a newly created subsection, whereas Option 2 does so by expanding application of several specific offense characteristics (SOCs) and the guideline's cross-reference subsection.[1] For the reasons below, Defenders urge the Commission to adopt neither option.

The Department of Justice (Department) asked the Commission to fix a supposed inconsistency, since §2K2.1 does not define MCDs as "firearms" for purposes of its SOCs or cross-reference. But as explained below, the different statutory definitions of what constitutes a "firearm" exist for a reason, and their "fix" will exacerbate disparity by treating offenses involving aftermarket parts (which cannot on their own inflict harm) more severely than offenses involving an actual weapon, which can. In addition, the strict liability base offense level (BOL) enhancements in §2K2.1(a) provide more than sufficient punishment for conduct involving MCDs, as evidenced by the below-guidelines average sentences meted out in those cases.

There is no need to increase penalties now. Defenders understand the alarm raised by the proliferation of small, easy-to-make, plastic pieces that convert semiautomatic weapons to automatic. But Defenders urge the Commission to heed public health experts who warn that gun violence requires systemic solutions beyond individual incarceration. For many of our clients, the everyday threat and untold toll of gun violence on their lives are the very reasons they become involved in the conduct this amendment seeks to root out. Many of our clients live in communities left behind, in a country deeply divided between the "haves" and the "have-nots." And when decades of policy failures at every level of government have not made these communities safer or more prosperous, who can fully blame people for taking their safety into their own hands?[2] If history is any guide, a reactive, punitive response

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[1] USSC, Proposed Amendment: Firearms Offenses 34 (Dec. 19, 2024).

[2] Johns Hopkins Center for Gun Violence Solutions, *In Depth: Community Gun Violence Solutions* ("Most community gun violence is highly concentrated within under-resourced neighborhoods impacted by a legacy of discriminatory public policies.").

to the possession of these small, easy-to-make "switches," will have an outsized impact on Black and Brown individuals and lead us down a well-traveled but dangerous, and ineffectual, road.[3]

Two years ago, sponsors of the Bipartisan Safer Communities Act (BSCA) urged the Commission to pursue "evidence-based, data-driven sentencing guidelines that consider the[] inequities" that impact communities of color in firearms sentencing.[4] Likewise, public health and firearms safety experts warned that protecting communities from gun violence demands systemic solutions beyond increased incapacitation of individual downstream actors.[5] As laid out below, both MCD options here defy this sage advice.

This Comment proceeds in three parts. Section I lays out proposed amendment's lack of empirical basis. Section II explains why neither option will further the statutory purposes of sentencing and will result in unwarranted disparity. Section III explores an alternative suggestion: if the Commission feels it must act now despite the lack of empirical support for this amendment, at most it should create a single, targeted specific offense characteristic (SOC) in §2K2.1(b) that applies only to MCDs.

I. The Commission should not expand application of an already empirically deficient guideline based on an empirically deficient request.

As explained below, this Commission may have inherited a defective guideline, but it does not have to compound §2K2.1's flaws by adding another unstudied increase. Commission data do not support the Department's request to increase penalties in MCD cases. And this guideline's history tells

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[3] *See* Section II.D., *infra* (discussing racial disparities).

[4] Letter from Sens. Cory Booker & Christopher Murphy to the U.S. Sent'g Comm, at 3 (Dec. 5, 2022) ("Booker & Murphy Letter").

[5] *See* Letter from Peter L. Zimroth Ctr. on the Admin. of Crim. L. to the U.S. Sent'g Comm Re: Proposed Priorities for the 2022-23 Amendment Cycle, at 5 (Oct. 17, 2022) ("Zimroth Letter") ("Data also suggests that focusing solely on illegal possession of firearms will not effectively address gun violence."); Everytown for Gun Safety, *Damming the Iron River* (May 21, 2024) ("It is primarily the U.S. firearms industry—our gun manufacturers and sellers, and the groups that enable them, here in the United States—fueling Mexico's gun violence crisis.").

a story of kneejerk increases in severity that have failed to further the purposes of punishment; the Commission should not exacerbate its flaws.

A. The Department's request to raise guideline ranges for MCD cases lacks an empirical basis.

We understand that the Department's repeated requests for increased penalties in cases involving MCDs and the corresponding proposal reflect a fear of a proliferation of illegal MCDs. But this Commission should create policy based on empirics, not headlines.[6] And the Commission's data show judges are, on average, sentencing individuals *below* the guideline minimum in §2K2.1 cases, *including* those cases involving an MCD.[7] In other words, sentencers—those most familiar with the facts of their cases—find the current guidelines greater than necessary when sentencing §2K2.1 offenses involving MCDs. This indicates that the Commission should not raise penalties at this time.

Further, cases involving MCDs remain rare, comprising less than 5% of all cases sentenced under §2K2.1 in fiscal year 2023.[8] The Commission should not create national policy with long-lasting impacts based on a handful of cases that do not indicate any increase is warranted, especially when doing so will compound disparity.[9] By forcing a small, plastic part—harmless on its own and resembling a Lego piece—into SOC enhancements designed for actual firearms, the proposed amendment attempts to fit the proverbial "round peg into a square hole." As Defenders warned in the past,[10]

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[6] *See* Written Statement of Kyle Welch on behalf of Fed. Defenders to U.S. Sent'g Comm, at 1 (Mar. 17, 2011) (noting problem of increasing individual punishment in response to high profile events).

[7] USSC, Public Data Briefing: Machinegun Conversion Devices 8 (Jan. 2025) ("MCD Data Briefing").

[8] *Id.* at 5.

[9] *See* Sections II.A. & II.D., *infra* (discussing disparities).

[10] In 2023, Defenders, along with gun safety experts, warned that increasing penalties in individual cases would not curb the American public health problem of gun violence, but would instead compound racially disparate outcomes. Testimony of Michael Carter on behalf of Fed. Defenders to U.S. Sent'g Comm, at 26 (March 7, 2023) ("[W]e request that the Commission resist [further] actions that seem mathematically rational[] in their incremental application but have the overall impact of increasing (yet again) the overall sentencing range." (internal quotation

adding ungrounded enhancements to an already empirically flawed guideline will only exacerbate the many problems of §2K2.1.

B. The firearms guideline is broken.

Section 2K2.1 never had an empirical basis,[11] and has grown into a guideline haunted by factor creep,[12] unstudied increases,[13] and racial disparity.[14] The original manual had multiple firearms guidelines for separate firearms offenses. It included a guideline for offenses involving restricted weapons regulated by the National Firearms Act (NFA), separate from the guideline for prohibited possessor offenses under the Gun Control Act (GCA).[15] Separating these offenses made sense as the NFA largely focused on prohibited weapons, while the GCA largely focused on prohibited conduct and historically rejected control over most firearm *parts*.[16] This is

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omitted)). Zimroth Letter, *supra* note 5, at 6 (summarizing study findings noting that despite increase in imprisonment for gun possession, gun homicides rose) (citation omitted); Brady, Comments on Consideration of Possible Amendments to §2K2.1, at 3 (Oct. 17, 2022) ("Brady Comment") ("[I]ndividuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not.").

[11] *See* USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 18 (1987) (explaining Commission did not use data analyses as a starting point for firearms guidelines).

[12] *See* Fed. Defenders' Annual Letter to the U.S. Sent'g Comm 6 (July 15, 2024) (noting original §2K2.1 guideline had only one special offense characteristic) ("2024 Defender Annual Letter").

[13] Testimony of Michael Carter, *supra* note 10, at 16–18 (discussing history of amendments to §2K2.1 resulting in "repeat, non-evidence based" increases).

[14] Section II.17D., *infra*; *see also* Testimony of Michael Carter, *supra* note 10, at 6–11 (discussing racial disparities in §2K2.1 sentencing); Testimony of Deirdre D. von Dornum on behalf of Fed. Defenders to U.S. Sent'g Comm, at A-13–15 (Feb. 27, 2024) ("2024 von Dornum Testimony") (same).

[15] Section 2K2.1 addressed prohibited person offenses, §2K2.2 addressed prohibited weapon—NFA firearm—offenses, and §2K2.3 addressed prohibited firearm transactions. *See* USSG §§2K2.1, 2K2.2, 2K2.3 (1987). The §2K2.2 base offense level was 12, with no SOC for number of firearms involved in the offense.

[16] *See* 18 U.S.C. § 921(a)(3) (1982) (defining firearm to include a weapon, frame, or receiver). The GCA largely does not focus on firearm parts, but it does deem "any firearm muffler or firearm silencer" to be a firearm, *id.,* a feature it retained from its predecessor. The GCA's precursor, the Federal Firearms Act, had treated "any part or parts" as a firearm, but lawmakers had learned it was "impractical to have

why, for the most part, the GCA defines "firearm" largely in line with how most laypeople would interpret that word—weapons that "expel a projectile by the action of an explosive" and the core components of such a weapon.[17]

A 1990 Firearms and Explosive Materials Working Group Report ("1990 Report"), whose faults Defenders previously highlighted,[18] recommended an overhaul and consolidation of the firearms guidelines with many increases in base offense level severity.[19] In 1991, the Commission adopted much of the 1990 Report's proposal, consolidating the guidelines into §2K2.1 with new enhanced base offense levels far higher than the base offense levels in its predecessor guidelines.[20]

In addition to the empirical flaws built into §2K2.1's enhanced BOLs[21] (including the enhancements for NFA firearms such as MCDs[22]), the SOCs

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controls over each small part of a firearm. Thus, the [GCA's new] definition substitute[d] only the major parts of the firearm; that is, frame or receiver for the words 'any part or parts.'" S. Rep. No. 90-1097 (1968).

[17] 18 U.S.C. § 921(a)(3).

[18] *See* Testimony of Michael Carter, *supra* note 10, at 20–21 & n. 72 (describing flaws in Report's methodology).

[19] *See generally* USSC, Firearms and Explosive Materials Working Group Report (1990) ("1990 Report").

[20] *See* USSG App. C, Amend. 374 (Nov. 1, 1991) (replacing three prior firearm-related guidelines). *Compare* USSG §§2K2.1 *and* 2K2.2 (Nov. 1, 1990) (highest base offense level of 18) *with* USSG §2K2.1 (Nov. 1, 1991) (setting four highest base offenses between 20 and 26). The consolidated Guideline employed the GCA definition of firearm with respect to its specific offense characteristics and cross-reference. *Id.*, comment. (n. 1).

[21] In our witness statement on the Commission's 2023 Firearms Proposal, Defenders addressed at length §2K2.1's history, with its years of piecemeal increases in penalties prompted mostly by requests from DOJ, congressional directives, and statutory minimum and maximum penalty increases, rather than the deliberative, empirical process the Commission is known for. *See* Testimony of Michael Carter, *supra* note 10, at 16–24.

[22] The enhanced BOLs for offenses involving NFA firearms, including MCDs, have also increased over time, with little empirical grounding despite sweeping in a broad array of firearms, many of which are curios or relics at this point. *See* 2024 Defender Annual Letter, *supra* note 12, at 6 n.22 (noting that 1987, §2K2.2, covering NFA violations, had a BOL of 12.). The 1990 Report proposed a BOL increase at ATF's request due to a "relatively high" statutory maximum penalty of 10 years. 1990 Report, *supra* note 19, at 13. The Report found that "courts in these cases

this proposal seeks to expand reflect a history of piecemeal increases based on emotion, not empirics. For example, the 1990 Report acknowledged, "sentencing correlates only loosely with the number of weapons involved,"[23] yet proposed no change to the (b)(1) SOC for number of firearms, and the Commission later further expanded (b)(1) at ATF's request.[24] And as Defenders have explained before at length, the enhancements in §2K2.1(b)(4) never had an empirical basis and fail to further the purposes of punishment.[25]

The 1990 Report proposed the ancestor of the modern-day enhancement in (b)(6)(B), targeting offenses committed "in connection with another felony offense," tracking closely "18 U.S.C. §§ 924(b), (c), [and] (g)."[26] The report cited "[s]throng statutory support," along with mixed data from a small sample of cases sentenced under the then-new Guidelines. Specifically, the 1990 Report found that courts "sentenced at the upper end of, or above, the range, in 39%" of the 64 cases sentenced under §2K2.1 it examined from 1989 where "criminal use of a firearm occurred" or was reasonably foreseeable; and in 60% of the 26 §2K2.2 cases from 1987.[27] Notably the

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impose higher average sentences when N.F.A. firearms are involved (average 19 months compared with a norm in §2K2.1 cases of 15 months)." *Id.* The consolidated guideline produced ranges far above these averages.

[23] 1990 Report, *supra* note 19, at 47.

[24] USSG App C., Amend. 631, Reason for Amendment (Nov. 1, 2001).

[25] *See* 2024 von Dornum Testimony, *supra* note 14, at A-8 (explaining the stolen-firearm enhancement was not grounded in past practice as the Original Manual noted data were not sufficient to determine the effect a stolen firearm has on the average sentence, and was silent on the origin of the enhancement for possession of a firearm with an illegible serial number). The stolen firearm and illegible serial numbers have also failed to deter this conduct. *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments—Firearms Offenses, at 26 (March 14, 2023) ("While DOJ requested the serial-number increase to provide stronger deterrence and better reflect the harm of these offenses, since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value." (internal quotation omitted)) ("2023 Defender Firearms Comment"); *see also id.* at 33 (urging Commission to gather data on PMFs before expanding penalties).

[26] 1990 Report, *supra* note 19, at 55.

[27] *Id.* at 9 n.29, 56 (explaining methodology).

average sentence in those cases was 17 months.[28] The Commission added a disproportionately large 4-level enhancement with an override to level 18,[29] and sentences today for cases sentenced under §2K2.1 that receive an enhancement under (b)(6)(B) now receive sentences far exceeding that 17-month average.[30]

In 2011, the Commission added the progenitor of today's (b)(6)(A) enhancement, targeting offenses involving unauthorized export of firearms or ammunition.[31] Over a decade later, Congress once again attempted to address firearms trafficking and straw purchasing via increased criminal penalties. The BSCA directed the Commission to raise guideline penalties for certain offenses involving straw purchase and firearms trafficking,[32] and the Commission did so.[33] In 2023, Defenders and gun safety experts warned that empirically lacking increases in individual penalties would do little to staunch the flow of trafficked firearms unless we first address upstream

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[28] *Id.* at 56 ("courts sentencing under §2K2.1 (1989) imposed an average 17-month sentence, and sentenced at the upper end of, or above, the range, in 39% of the cases. . . . A similar pattern plays out for §2K2.2 (1987) cases (average 17-month sentence, 60% at or above the upper end of the guideline range)."

[29] USSG App C., Amend. 374 (Nov. 1, 1991); §2K2.1(b)(5) (1991). For an individual in Criminal History Category I with no other adjustments, their then-mandatory guideline range would have been 27 to 33 months under the new BOL.

[30] While changes in variables and other factors make an apples-to-apples comparison difficult, the difference in modern sentence lengths is stark. For cases sentenced in the past five fiscal years under primary guideline §2K2.1 that received the enhancement under (b)(6)(B), the average sentence length was 67 months. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[31] USSG App C., Amend. 753 (Nov. 1, 2011). In addition, the 2011 amendment increased base offense levels for many straw purchasers. *See id.* (adding further increases to §2K2.1 to address . . . concerns about straw purchasers").

[32] Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(a)(5), 136 Stat. 1313, 1328 (2022).

[33] USSG App C., Amend. 819 (Nov. 1, 2023) (adding enhancements in §2K2.1(b)(5) and (b)(8) with no reference to empirical study).

sources,[34] and they could exacerbate existing racial disparities.[35]

II. Both options fail to effectuate the purposes of sentencing.

Beyond the lack of empirical basis, neither option will effectuate the statutory purposes of sentencing, and both options will increase unwarranted disparity. Both assign similarly severe punishment to dissimilar conduct. And both options will produce ranges greater than necessary by expanding existing enhancements for an overbroad class of all NFA firearms. Further, neither option requires mens rea or a nexus to the offense of conviction. And both options will exacerbate unwarranted racial and ethnic disparity. Finally, considering the Guidelines' goals of deterrence and public protection, the Commission should heed experts who warn we cannot punish our way out of this public health crisis.[36]

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[34] Zimroth Letter, *supra* note 5, at 5 (Oct. 17, 2022) ("Data also suggests that focusing solely on illegal possession of firearms will not effectively address gun violence."); s*ee also Damming the Iron River*, *supra* note 5 (explaining U.S. firearms industry is "fueling Mexico's gun violence crisis.").

[35] Testimony of Michael Carter, *supra* note 10, at 2 (citing Booker & Murphy Letter, *supra* note 4 at 1) (urging caution against guideline increases at the expense of communities of color); *see also* Zimroth Letter, *supra* note 5, at 1 ("there is a risk that [new BSCA statutes] can be misapplied in a manner that will thwart Congressional intent to target rogue gun dealers and large-scale traffickers, increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence"); Brady Comment, *supra* note 10, at 7 ("An amendment to §2K2.1 should properly account for the racial disparities in enforcement that underlie straw purchases to more accurately target the source of gun violence in the United States."). Given the failure of individual criminal penalties to deter this conduct in the U.S., Mexico has taken matters into its own hands with lawsuits targeting upstream sources of firearms. *See, e.g., Smith & Wesson Brands, et al. v. Estados Unidos Mexicanos*, 603 U.S. — (Oct. 4, 2024) (granting cert.); *Estados Unidos Mexicanos v. Diamondback Shooting Sports Inc.*, No. CV-22-00472-TUC-RM, 2024 WL 1256038, at *1 (D. Ariz. Mar. 25, 2024) ("Plaintiff alleges that Defendants knowingly and systematically participate in trafficking military-style weapons and ammunition to drug cartels in Mexico through reckless and unlawful business practices including straw sales, bulk sales, and repeat sales." (internal quotation omitted)).

[36] *See, e.g.,* Caroline Nobo, Think Global Health, *The United States Can't Arrest Its Way Out of Gun Violence* (Nov. 20, 2024); *see also* Zimroth Letter, *supra* note 5, at 5.

A. Both options would increase unwarranted disparity.

Both options contravene § 3553(a)(6)'s mandate to avoid unwarranted disparity by treating possession of a mere part, which alone can inflict no harm, the same as possession of an actual functional firearm, which can. While Defenders urge the Commission not to adopt either option, if the Commission chooses to act, it should treat MCDs differently than functional firearms, and narrowly tailor the amendment language to avoid treating a single firearm affixed with an MCD the same as two firearms.[37]

Under either option, a firearm and affixed MCD would count as two firearms, while a real machinegun, purpose-built to fire automatically with no modification, would only count as one firearm. This defies common sense and negates the Commission's mandate to establish sentencing policies that provide certainty and fairness and avoid unwarranted sentencing disparities.

Additionally, the Department raised concerns that §2K2.1's enhanced BOLs fail to distinguish conduct by not providing an additional increase for an MCD attached to a semiautomatic weapon capable of accepting a large-capacity magazine (LCM),[38] which the commentary defines as one that had a "magazine or similar device that could accept more than 15 rounds of ammunition" attached or "in close proximity to the firearm."[39] But both this argument and the outdated LCM enhancement ignore the reality of the contemporary firearm market: the majority of modern firearms sold today are semiautomatic weapons capable of accepting LCMs.

The outdated and overbroad BOLs for LCMs should not be grounds for expanding punishment in MCD cases in the way DOJ requested. The

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[37] As written, both options would lead to dissimilarly situated individuals being treated similarly, a result contrary to the Commission's obligation to avoid unwarranted sentencing disparities. 28 U.S.C. § 991(b)(1)(B). For instance, offenses involving true automatic weapons would be treated as only one firearm, compared to an MCD affixed to a handgun, which would be treated as two weapons. CBS News, *Police illegally sell restricted weapons, supplying crime* (Dec. 4, 2024) (summarizing investigation of illegal transfers of restricted weapons).

[38] DOJ's Annual Letter to the U.S. Sent'g Comm 4 (July 15, 2024) ("Failing to distinguish between those scenarios [of person with a semiautomatic capable of accepting a LCM versus one with an affixed MCD] makes little sense.").

[39] USSG §2K2.1, comment. (n. 2) (2024).

majority—over 70%—of firearms manufactured in this country in the modern era are pistols and rifles, the vast majority of which are semiautomatic firearms, which accept detachable magazines.[40] And it is "indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms."[41] Thus many pistols and rifles come straight from the manufacturer with magazines that the guideline considers LCMs.[42]

The outdated LCM definition comes from a law of questionable efficacy that expired two decades ago.[43] As far back as 2006—two years after that law's sunset (after which it was legal to buy, sell, and trade LCMs and previously-banned semiautomatic firearms)—when the Commission cemented the LCM enhancement into §2K2.1—Defenders *and DOJ* objected

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[40] Over 70% of firearms manufactured in the United States in 2023 were pistols or rifles. ATF, *National Firearms Commerce and Trafficking Assessment Part I: Firearm Commerce Updates and New Analysis* 28 Table FC-03 (2024). Most modern pistols and rifles are semiautomatic weapons, and "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc), *abrogated by N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)). A semiautomatic pistol or rifle is nearly synonymous with one capable of accepting a "large capacity magazine." *See Duncan v. Bonta*, 19 F.4th 1087, 1097 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), and *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022) ("Most, but not all, firearms use magazines. For those firearms that accept magazines, manufacturers often include large-capacity magazines as a standard part of a purchase of a firearm."). And the Commission determined decades ago that "offenses involving a semiautomatic firearm represent the typical or 'heartland' case under the guidelines." USSG App C., Amend. 531, Reason for Amendment (Nov. 1, 1995).

[41] David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 852–64 (2015) (discussing development and history of contemporary firearms design and technological innovations leading to larger magazine capacities).

[42] *Kolbe*, 849 F.3d. at 129. For example, the popular Glock 17 comes with a magazine that holds 17 rounds. Glock, G17 (last visited Jan. 18, 2025); *see also Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020), *vacated and remanded sub nom Duncan v. Bonta,* 142 S. Ct. 2895 (2022) ("[S]everal variants of the Glock pistol—dubbed 'America's gun' due to its popularity—come standard with a seventeen-round magazine.").

[43] *See* Testimony of Michael Carter, *supra* note 10, at 22–23 (describing passage and sunset of statutory ban and summarizing questionable efficacy of ban).

to maintaining the enhancement since this conduct was no longer illegal.[44]

Moreover, the Department's request ignores how MCDs work. MCDs have existed for decades,[45] thanks to the design of most modern semiautomatic firearms. This design allows users to convert them to fire in automatic fashion with a simple aftermarket part.[46] Functionally, an MCD can *only* attach to a semiautomatic firearm, so cases involving an affixed MCD should also involve a semiautomatic firearm. And as discussed above, millions of popular semiautomatic firearms come standard with LCMs, given that most states do not have magazine size restrictions.[47] The Department's requested additional increase would only compound the problems in the LCM enhancement.

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[44] Letter from Jon M. Sands on behalf of Fed. Defenders to the U.S. Sent'g Comm, at 3–10 (Mar. 9, 2006) *and* Letter from Michael Elston on behalf of DOJ to the U.S. Sent'g Comm, at 8–9 (Mar. 28, 2006) ("The Department favors this upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*.").

[45] Prior to the 1986 addition of § 922(o) to the GCA, the NFA already heavily restricted machinegun ownership, including MCD kits, which the ATF deemed to be machineguns over four decades ago. ATF Ruling 81-4 (1981). *See also* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 668 (1987) (discussing history of § 922(o), which was introduced amidst concern about commercial MCDs).

[46] Glenn Thrush, *Minnesota and New Jersey Sue Glock Over Lethal Add-On for Guns*, N.Y. Times, Dec. 12, 2024 ("Glock is a dominant player in the American handgun market, accounting for an estimated two-thirds of all pistol sales in the United States in any given year."). Recent lawsuits by Minnesota and New Jersey against Glock allege that the "ability to easily function as either a semi-automatic weapon or a machine gun is built into Glock's design." Press Release, N.J. Att'y Gen., *Attorney General Platkin Sues Glock for Design and Sale of Guns Switchable to Machine Gun Configuration* (Dec. 12, 2024). *See also* MN Att'y Gen., Press Release, Office of the Mn. Att'y Gen., *Attorney General Ellison sues Glock for making and selling handguns that can easily be turned into machine guns* (Dec. 12, 2024) ("Glock, however, has known since at least 1988 that its semi-automatic handguns can be easily converted into fully automatic machine guns by a small device that allows a Glock handgun to fire continuously with a single trigger pull.").

[47] The enhanced BOLs for LCMs also likely creates geographic disparity, as only a minority of states have magazine size restrictions. In most states, this often means an individual would have to actively seek out smaller magazines that might not be common. *See* Congressional Sportsmen's Foundation, *Standard Capacity Magazines* (last visited Jan. 30, 2025) (listing 10 states with magazine size restrictions).

Defenders agree the enhanced BOLs for LCMs create disparity, especially geographic disparity, but only because they are overbroad and outdated.[48] If the Commission wants to distinguish dissimilar conduct, it can remove the meaningless and statutorily baseless LCM enhancements instead of raising penalties in cases involving MCDs.

B. Treating MCDs like GCA firearms under §2K2.1's SOCs is unnecessary and will produce absurd results.

The Department claims that "§2K2.1 contains inconsistent definitions of the term 'firearm.'"[49] But using the GCA definition of "firearm" makes sense for most §2K2.1 SOCs considering their origins and purposes. Grafting on the broad NFA definition of "firearm" to these SOCs will lead to absurd results (*i.e.*, conduct involving a small plastic device would be treated as proportional to, or more severely than, conduct involving a functional machinegun) and to ranges greater than necessary, especially given that MCDs already trigger several strict liability enhanced BOLs.

1. SOC (b)(1)

Both options will produce unwarranted disparity in (b)(1) by potentially treating an MCD the same as an actual gun, and an MCD affixed to a gun as *two* firearms, while counting a true automatic weapon as *one*. Both options potentially also treat a person with 10 MCDs and no actual GCA firearm much more severely than a person with two sniper rifles. This makes no sense. An MCD affixed to a firearm should only count as one firearm, and an MCD alone should not be treated the same as an actual gun.

In addition to this logical flaw, the (b)(1) enhancement lacks a mens

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[48] Without the underlying data, it is difficult to determine the precise overlap between offenses involving affixed MCDs and offenses involving LCMs, but the data hint at a possible overlap between these offense characteristics. Out of the 2023 MCD cases examined for the MCD Data Briefing, 64% of MCD cases involved an affixed MCD, and 66% of MCD cases also involved a "large capacity magazine." MCD Data Briefing, *supra* note 7, at 9–10.

[49] DOJ Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments, at 10–11 (Feb. 27, 2023) ("2023 DOJ Comments").

rea requirement.[50] Many MCD devices are low-profile and small, making it easy for those unfamiliar with handguns to miss the fact that one is affixed.[51]

Pistol (left) and pistol with affixed MCD (right)

Under both options, an individual could easily possess two "firearms" under (b)(1) for having a firearm with an MCD affixed and not even know it.

2. SOC (b)(4)

Likewise, there is no need to include MCDs in the definition of "firearm" for the (b)(4) enhancements, because it will result in double counting and conflict with the SOC's purposes. As the Department pointed out, MCDs are "readily made using a 3D printer,"[52] and the vast majority of such MCDs will not be legally owned or serialized.

The (b)(4)(A) enhancement for a stolen firearm tracks the statutory prohibition on stealing a GCA firearm.[53] If that enhancement's goal is to punish stealing an otherwise legally owned firearm, it makes no sense to apply it to offenses involving MCDs, the vast majority of which cannot be

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[50] Defenders have long urged the importance of scienter requirements in punishment. *See* Federal Public and Community Defenders Comment on Mens Rea (Proposal 2, Part B) (Feb. 3, 2025) (summarizing previous comments).

[51] *See* Erin Wise, , *ATF sees rise in quarter-sized switch that turns handguns into machine guns*, WBMA May 4, 2022 (describing police officer not recognizing Glock switch on seized weapon before submitting as evidence).

[52] 2023 DOJ Comments at 11.

[53] *Compare* §2K2.1(b)(4)(A) *with* 18 U.S.C. §§ 922(i), (k).

legally owned.[54] And like the (b)(1) enhancement discussed above, presently the (b)(4)(A) enhancement lacks a mens rea requirement, although we are pleased the Commission is considering fixing that problem.[55]

Regarding the (b)(4)(B) enhancements for firearms with illegible serial numbers and unserialized privately made firearms (PMFs), the Commission previously stated that they reflect the difficulty in tracing these firearms.[56] But homemade or illegally imported MCDs will not be serialized in the way a commercially manufactured GCA firearm is, and they cannot be traced.[57] And they have no serial number to deface. As such, the illegible serial number enhancement is irrelevant to modern MCDs, and the unserialized PMF enhancement would apply in virtually every MCD case. The latter is particularly problematic given SOCs are meant to distinguish atypical or aggravated conduct from otherwise run-of-the-mill offenses.[58]

3. SOC (b)(5)

The SOC enhancements in (b)(5) came from the BSCA directive on straw purchasing and trafficking—offenses regulated by the GCA. Regarding (b)(5)(A), one cannot be convicted under § 933(a)(2) or (a)(3) for transfer of an MCD alone. And the Commission explained that the (b)(5)(B) enhancement

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[54] As written, the proposed amendment would lead to absurd results by increasing punishment for possession of a stolen item that the original possessor *also* possessed illegally.

[55] However, unless the Commission adopts Part B of the proposal, under both options here, a person who unwittingly possessed a stolen MCD could be punished as if he stole the MCD himself.

[56] Defenders continue to maintain that a firearm's traceability has little to do with the statutory purposes of punishment, and we encourage the Commission to revisit these empirically lacking enhancements. *See* 2024 von Dornum Testimony, *supra* note 14, at A-8–A-9 (outlining lack of empirical basis underlying enhancement for stolen firearm and enhancement for illegible serial number); 2023 Defender Comment, *supra* note 25, at 26—34 (discussing the lack of relationship between traceability, offense seriousness, and punishment for most §2K2.1 offenses and urging the Commission to gather data and study cases involving PMF cases instead of adding enhancement without study).

[57] *See* 18 U.S.C. § 923(i).

[58] *See* USSG, Ch. 1, Pt. A (Basic Approach) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

"incorporates the elements of the [other GCA] straw purchasing and firearms trafficking statutes . . . to provide an increase for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of a firearm or ammunition."[59] The (b)(5)(C) enhancement "ensure[s] straw purchasers and firearms traffickers meeting [certain] criteria receive increased penalties as required by the [BSCA's] directive."[60] That directive to the Commission explicitly focused on "persons convicted of an offense under section 932 or 933 . . . and other offenses applicable to the straw purchases and trafficking of firearms."[61] A person cannot straw purchase a homemade MCD.

Because the BSCA specifically dealt with GCA offenses, Defenders urge the Commission not to go beyond its narrow statutory mandate, especially given that the law's proponents wrote the Commission to clarify that their focus was upstream supply, not fungible individuals.[62] Grafting the NFA definition onto SOC (b)(5) will result in excessive or unnecessary sanctions for individuals not responsible for upstream GCA firearm trafficking.

4. SOC (b)(6)

Likewise, adding in the NFA definition of "firearm" into the (b)(6) enhancements would not further this SOC's purposes and would create unwarranted similarity. The (b)(6)(A) enhancement for possessing a firearm while leaving or attempting to leave the United States aimed to address the "illegal flow of firearms across the southwestern border," and it tracked GCA straw purchase and trafficking offenses,[63] which cannot be committed with an MCD alone. This makes sense as the demand in Mexico is for functional

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[59] USSG App. C, Amend. 819, Reason for Amendment (Nov. 1, 2023).

[60] *Id.*

[61] Pub. L. 117-159, § 12004(a)(5), 136 Stat. 1313, 1328 (2022).

[62] Specifically, the BSCA aimed "to punish suppliers of the large numbers of firearms diverted from lawful commerce, while avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories." Booker & Murphy Letter, *supra* note 4, at 2. The Commission chose to enhance the guideline pursuant to the BSCA directive without further study.

[63] USSG App C., Amend. 753, Reason for Amendment (Nov. 1, 2011).

firearms unavailable there, not aftermarket parts easily made at home or purchased online from overseas.[64]

The (b)(6)(B) enhancement aimed to mirror the offenses in §§ 924(b), (c), and (g),[65] which involve GCA firearms. The first clause of (b)(6)(B) applies if a person uses or possesses a firearm in connection with another felony offense. That enhancement often applies in cases involving drug trafficking and guns, with commentary explaining that the enhancement applies where a firearm is found near drugs because "the presence of the firearm has the potential of facilitating [the drug trafficking offense]."[66] The second clause applies if a person possessed or transferred any firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. People are unlikely to carry an unaffixed MCD to facilitate a drug deal or other felony offense, and a firearm with an affixed MCD will already be covered by the (b)(6)(B) enhancement. By adding the NFA definition of "firearm" to this enhancement, (b)(6)'s second clause could potentially apply in unaffixed MCD cases where, for instance, someone is illegally selling MCDs. It makes no sense to treat a person who sells unaffixed MCDs the same as someone whose offense involves trafficking true machineguns given that the former, on its own, is harmless, whereas the latter has the potential to inflict harm. And someone who sells or trades MCDs is already subject to a strict liability heightened BOL of either 26, 22, 20, or 18. Thus, the proposed expansion of (b)(6)(B) is unnecessary. If the Commission feels such an enhancement is necessary to address the illegal exchange (as opposed to mere possession) of "switches," it should craft a standalone SOC less punitive than the 4-level (b)(6)(B) enhancement already applied to GCA firearms (with or without an MCD affixed).

C. There is no need to sweep in all NFA weapons.

Options 1 & 2 are overbroad, and both unnecessarily sweep in all NFA firearms even though they have not been raised as an issue of concern. If the Commission feels it should address MCDs, it should say what it means and narrowly target MCDs, instead of the broad category of NFA firearms. The

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[64] Data show that this enhancement applied in less than 1% of cases involving MCDs in fiscal year 2023. *See* MCD Data Briefing, *supra* note 7, at 13.

[65] *See* 1990 Report, *supra* note 19, at 55.

[66] USSG §2K2.1 comment. (n.14(B)).

Department's concerns are specific to MCDs, not, for example, flare launcher inserts.[67] Further, §2K2.1 already contains enhanced penalties for all NFA firearms via enhancements in several BOLs, without an explicit scienter requirement.[68] Finally, both proposed options conflict with the relevant statutory schemes in that they could result in penalty ranges exceeding the ten-year statutory maximum penalty applicable to § 922(o) or 26 U.S.C. § 5861(d).[69]

D. Both options will exacerbate severe racial and ethnic disparity in cases involving MCDs.

Defenders have repeatedly cautioned against empirically unsound expansions of §2K2.1, given the guideline's outsized impact on people of color.[70] The Department has put forth no reason to believe that this time will be different in terms of racial inequity. Both options will sharply exacerbate such disparities.

1. A tale of two Second Amendments.

As scholars and Defenders have pointed out, racial disparities permeate federal firearm enforcement and sentencing,[71] given "centuries of

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[67] NFA firearms include "[a]ny other weapon[s]," which includes flare launcher inserts, when possessed with a flare launcher gun. ATF, Firearms Guide - Identification of Firearms - Section 7. With the constant evolution of technology, in the someone may well invent additional firearms or devices that are regulated by the NFA but not the GCA, but we cannot predict those now.

[68] §§2k2.1(a)(1)(A)(ii), (a)(3)(A)(ii), and (a)(4)(B)(i)(II).

[69] Take a young man in Criminal History Category I convicted in a § 922(o) conspiracy, which involved no GCA firearms. And say his actions furthered the transfer of 8 MCDs. Under both options, he might receive a 4-level increase under (b)(1)(B), a 4-level increase under (b)(4) because the MCDs lacked serial numbers, and a potential 5-level increase under (b)(5)(C) if they were transferred to someone he had reason to believe intended to use them unlawfully. His offense level prior to any adjustments would be 31, with a range of 108–135 months. If he fell in CHC II or higher, his unadjusted range would exceed the statutory maximum even at the low end.

[70] *See* Testimony of Michael Carter, *supra* note 10, at 6–11.

[71] See *id*. at 6 n.24 (citing Emma Luttrel Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 164 (2018) ("[S]ince the first colonists set foot on the New World,

unequal and racially disproportionate crime control."[72] MCD cases are no different. The Commission's own data show, out of all §2K2.1 cases involving an MCD sentenced in fiscal year 2023, nearly 60% of individuals sentenced in such cases were Black, and 22% were Hispanic.[73] This tracks broader patterns in federal firearms offenses.

The fact that Black people make up over half of those sentenced under §2K2.1, and are subject to higher sentences than their white counterparts,[74] is no coincidence.[75] The vast majority of offenses sentenced under §2K2.1 involve convictions under § 922(g) for possessing a firearm after a felony conviction,[76] and they often trigger the guideline's enhanced BOLs,[77] which

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firearm and weapon control laws were enacted to suppress the enslaved and free Black populations.") (citations omitted)).

[72] *Id.* at 7.

[73] MCD Data Briefing, *supra* note 7, at 7.

[74] Of cases sentenced under primary guideline §2K2.1 from fiscal years 2019 to 2023, the average sentence for Black individuals was 53 months, compared to 43 months for white individuals. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[75] *See* Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2198 (2016) (analyzing racial disparities in firearm convictions in light of the War on Drugs and urging that "we *must* address the racial costs of the current regime and of further criminal regulation of gun possession"); *Benjamin Levin & Kate Levine*, *Redistributing Justice*, 124 Colum. L. Rev. 1531, 1574 (2024) ("Race-class subordinated populations tend to face heavier policing than whiter and wealthier populations, and studies have shown that minoritized defendants tend to face harsher charges and sentences.").

[76] USSC Federal Firearms Offenses, *supra* note 8, at 4.

[77] Many prior convictions trigger enhanced severe base offense levels, due to an empirically unfounded recommendation in the 1990 Report. The 1990 Report did not look at sentencing trends, instead citing the desire for "proportionality" with § 924(e)'s 15-year mandatory minimum. *See* 1990 Report, *supra* note 19, at 18–22, 32. A later directive to the Commission in the Violent Crime Control and Law Enforcement Act of 1994 instructed the Commission to "appropriately enhance penalties" for § 922(g) offenses in which an individual had a controlled substance offense or crime of violence "as defined in section 924(e)(2)(B)." Pub. L. 103–322, September 13, 1994, 108 Stat 1796. Decades later, the firearm guideline employs the "crime of violence" definition in §4B1.2, which looks very different now from the statutory definition. In fiscal year 2023, only 2% of individuals convicted of prohibited possession under 18 U.S.C. § 922(g) were subject to the enhanced ACCA penalty. USSC, QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses, FY 2023.

also serve to compound racial disparities.[78]

Dating back to the nation's founding, firearms laws have been used to disenfranchise and categorically disarm groups thought to be a threat to public safety, such as enslaved Black individuals and Native Americans.[79] Laws continued to prohibit Black individuals from lawfully owning or possessing firearms in the post-Reconstruction South.[80] These disparities have carried into the modern mass incarceration era.[81]

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[78] USSC, QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses, FY 2023 (Fifty-nine percent of those convicted and sentenced under 18 U.S.C. § 922(g) were Black. And of all people convicted under § 922(g), almost 93% fell into a criminal history category of II or higher); *see also* USSC Firearms Offenses, *supra* note 76, at 33 ("The Commission's analysis revealed racial differences between the 27.5 percent of firearms offenders arrested following a routine police patrol compared to firearms offenders who were arrested for other reasons."); Testimony of Michael Carter, *supra* note 10 (firearm enforcement disproportionately targets and harms people of color and their communities); 2024 Defender Annual Letter, *supra* note 12, at 8 & 8 n.2 (explaining how enhancements based on prior convictions compound racial disparity).

[79] *See Kanter v. Barr*, 919 F.3d 437, 451, 457–58 (7th Cir. 2019) (Barrett, J., dissenting).

[80] *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. Law Rev. 537 (2022); Dave Davies, *Historian Uncovers the Racist Roots of the 2nd Amendment*, NPR (Jun. 2, 2021), ("the right to bear arms, presumably guaranteed to all citizens, has been repeatedly denied to Black people."). Even Dr. Martin Luther King Jr. was denied his concealed carry permit, after being the victim of a violent crime, despite the facially neutral gun laws in effect at the time. *See* Donald T. Ferron, *Notes on MIA Executive Board Meeting*, Martin Luther King, Jr. Research and Education Institute (Feb. 2, 1956); *see also* Patrick J. Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, Duke Center for Firearms Laws (April 8, 2020) (discussing the 1967 Mulford Act designed to restrict Black gun ownership); Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. C.R.L.J. 67 (1991) (discussing how gun control measures have been used throughout American history to intentionally disarm and oppress people of color); Brief for Amicus Curiae Nat'l African Am. Gun Ass'n, Inc. in Support of Petitioners, *N.Y. State Rifle & Pistol Ass'n., Inc. v. City of New York*, 140 S. Ct. 1525 (2020), 2019 WL 2103434, at *34.

[81] *See Guns and Drugs*, *supra* note 75, at 2197 ("to the extent that the War on Drugs has led to more people of color with felony convictions, a system of gun control that requires mandatory minimum prison terms for felons risks sending the same individuals to prison for extended sentences."); *see also* Brief for Amicus Curiae National African American Gun Association, Inc. in Support of Petitioners, *New*

Regardless of one's personal feelings on firearms, they are endemic to the United States,[82] but not everyone has equal access. When we imagine an American gun owner, we default to the "image of the gun owner as rural white male. This idealized gun owner has become a symbol of sorts,"[83] and stands in contrast to those we disarm. People who aren't prohibited possessors and can afford to do so can lawfully purchase machine guns pursuant to NFA requirements,[84] and those who cannot afford to do so can still lawfully shoot them at machinegun tourist attractions.[85] While we do not have statistics on those tourists, it seems unlikely the demographics track those convicted for federal machinegun offenses, given the unique historical context of federal firearm enforcement.

2. Puerto Rico and ethnic disparities.

The ethnic disparities are just as stark for convictions under § 922(o). Hispanic individuals comprised 50% of individuals sentenced from fiscal years 2019 to 2023 under §2K2.1 in cases with at least one count of conviction under § 922(o).[86] An additional 26% were Black.[87] And in that timeframe, the District of Puerto Rico alone has produced 38% of sentenced cases involving at least one count of conviction under § 922(o).[88] Understanding the racial impact of federal firearms convictions in Puerto Rico presents a unique

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York State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 at 27–34 (July 16, 2021) (discussing Jim Crow era licensing restrictions aimed at disarming Black community); USSC Federal Firearms Offenses.

[82] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

[83] *Guns and Drugs*, *supra* note 75, at 2193.

[84] *See* Ruben Mendiola, *Dealer NFA Inc.: Machine Guns* (last accessed Jan. 31, 2025) (listing transferable fully automatic machine guns for sale ranging in price from $9,495 to $109,995 for transferable machine guns).

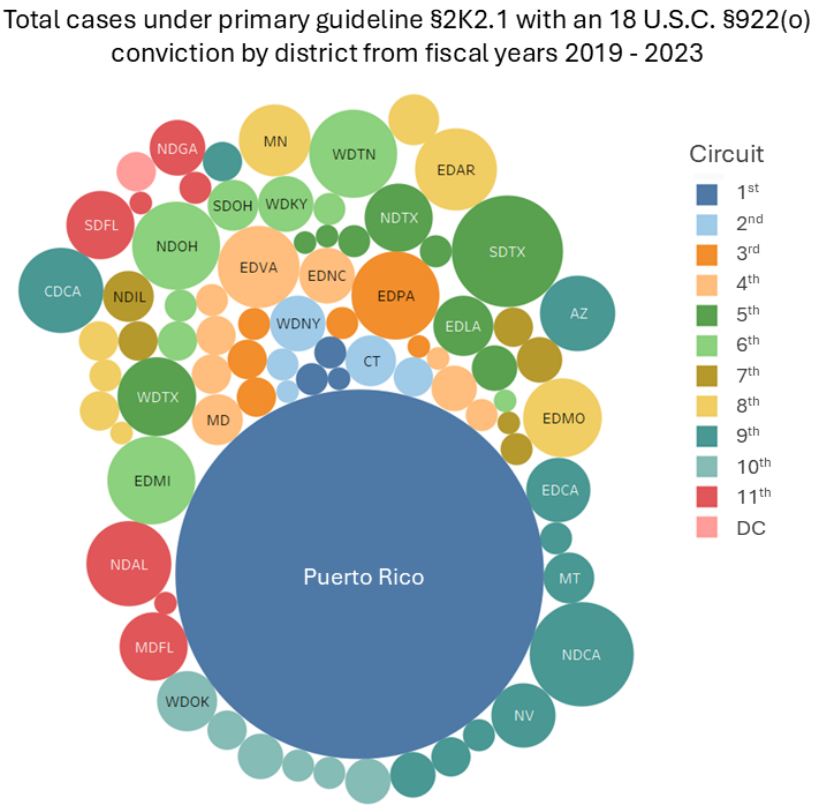
[85] In Pennsylvania, guests from around the world are invited "to experience classic machine guns from WW-II to state-of-the-art military and law enforcement firearms and explosives." *See* WCMG, *Machine Gun Rentals*, (last accessed Jan. 22, 2025). In Nevada, tourists are encouraged to "feel the thrill of firing" machine guns such as those used by the United States Armed Forces at Battlefield Vegas. *See* Shoot Machine Guns: Battlefield Vegas (last accessed Jan. 22, 2025).

[86] The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[87] *Id.*

[88] *Id.*

challenge given that the complexities of post-colonial racial identity differ from conceptions of race on the mainland, but Part A will have an outsized impact in the district.[89] The heightened proportion of § 922(o) convictions from Puerto Rico cannot be considered outside of its legacy of colonialism, which continues to shape politics, identity, and law on the island.[90]



Puerto Rico is also unique in that it has long had the highest poverty

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[89] Research involving race in Puerto Rico presents unique challenges; "[m]ore than three-quarters of Puerto Ricans identified as white on the last census, even though much of the population on the island has roots in Africa." Natasha S. Alford, *Why Some Black Puerto Ricans Choose 'White' on the Census*, N.Y. Times (Published Feb. 9, 2020, Updated Aug. 7, 2020). Though fewer Puerto Ricans identified as white in 2020 than in 2010, "activists and demographers say [the numbers are] still inaccurate and they are working to get more Puerto Ricans of African descent to identify as black on the next census in an effort to draw attention to the island's racial disparities." *Id.*

[90] *See generally* Emmanuel Hiram Arnaud, *Colonizing by Contract*, 124 Colum. L. Rev. 2239 (2024) (discussing federal firearms prosecutions in Puerto Rico).

rate out of all U.S. states and territories,[91] with almost 40% of inhabitants living in poverty.[92]

And Puerto Rico's high proportion of MCD offenses is particularly unusual due to a unique Memorandum of Understanding between the Department and Puerto Rico's commonwealth government,[93] which for over a decade, has funneled firearms cases into the federal court system that would normally be handled in local courts.[94] The result: a dramatic rise in federal firearms offense prosecutions and convictions in the district of Puerto Rico,[95] including offenses involving MCDs.

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[91] *See* Carlos Vargas-Ramos, et. al, *Pervasive Poverty in Puerto Rico: A Closer Look*, CENTRO, (Sept. 2023); WIOA State Plan, *Puerto Rico PYs 2020–2023* ("Since 2007 until fiscal 2018 [PR's GNP] declined an average of -2.0%, while the US economy expanded at an average annual rate of 1.7%.")

[92] USCB, *QuickFacts Puerto Rico*, (last accessed Jan. 24, 2025); s*ee also* Willie Santana, *The New Insular Cases*, 29 Wm. & Mary J. Race Gender & Soc. Just. 435 (2023) (discussing the Insular Cases, a series of opinions issued by the Supreme Court of the United States discussing the status of the U.S. territories acquired during the Spanish-American War. The Insular Cases establish that while residing in "unincorporated" territories (such as Puerto Rico and the U.S. Virgin Islands) were not entitled to all of the rights granted under the Constitution, such as the right to vote for the President, to elect a voting member of the United States Congress, to receive certain Social Security benefits, etc.). Puerto Rico's economy has been crippled in recent years by mounting debt, the lasting effects of natural disasters, and a shrinking population. *See* Diana Roy and Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Relations: Backgrounder, (Updated Jan. 8, 2025).

[93] *See* Arnaud, *supra* note 90, at 2239 (discussing the 2010 confidential MOU, which subverted the constitutional protections established in Puerto Rico, such as the stringent speedy trial rights, and prohibitions on wiretaps and the death penalty). The MOU has "subject[ed] a growing number of Puerto Ricans to federal laws and procedures they had no say in creating." *Id.*

[94] *See id.* at 2251.

[95] *See id.* at 2270. In 2010, the Puerto Rico district courts applied §2K2.1 in just 33 cases; in 2013, following the implementation of the MOU, the number of cases increased (nearly 6 times) to 227. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2010 and 2013. Complicating matters, the Commonwealth firearm laws have historically diverged from those of the continental United States, taking a more strict, and at times inconsistent, approach to gun control. Puerto Rico Weapons Act of 2020, Act No. 168 (Dec. 23, 2019).

Mr. Alcantara's federal case offers a tragic example.[96] After being held at gunpoint at his wife's restaurant, Mr. Alcantara wanted to arm himself to protect his family's business as soon as possible. But the process to do so legally in Puerto Rico was too costly and prohibitively slow. In desperation, he purchased a firearm from an unlicensed vendor; the firearm came with an MCD already affixed. Mr. Alcantara was convicted under § 922(o) and was sentenced to 12 months and one day in custody. With strong family support, he completed supervised release early. But many do not have the support to successfully complete supervision,[97] and the over-incarceration of young men of color hurts their communities.[98] In light of the racial and ethnic disparities prevalent in MCD cases, we urge the Commission not to add another empirically unsupported enhancement, which will have an outsized impact on people of color.

E. Neither option will effectively deter conduct.

Finally, there is no evidence that increasing guideline ranges will deter MCD possession. Four decades of MCD prohibition has not curbed the proliferation of MCDs, given the unchanged design, and popularity of, semiautomatic pistols and rifles.[99] MCDs have become more common, not less. Nor has consistent harshening of the primary firearm guideline over the decades managed to deter gun violence or illegal gun possession. We have no reason to believe that adding SOC enhancements for MCDs throughout

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[96] We use a pseudonym here to protect the individual's privacy.

[97] USSC, Federal Offenders Sentenced to Supervised Release 4 (July 2010) (noting that "one-third had their terms revoked and were sent back to prison"). As the Department has acknowledged, prison may have a criminogenic effect and any crime prevention benefits of lengthening imprisonment "fall far short of the social and economic costs." *See* Nat'l Inst. of Just., *Five Things About Deterrence* (2016) (noting certainty of punishment is better deterrent than severity).

[98] *See generally*, Becky Pettit and Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 Am. J. Econ. Social. 1153–1182 (2018). And many convicted individuals are held in mainland prisons far from their families. Emmanuel Hiram Arnaud, *Llegaron los Federales: the Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53.3 Colum. Hum. Rts. L. Rev. 894 (2022) (discussing imprisonment of convicted individuals in Puerto Rico).

[99] *See The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. at 668–69 (discussing the 1986 passage of § 922(o) and early MCDs).

§2K2.1 will achieve what no other past punishment increase has done.[100] A systemic problem requires systemic solutions.[101] We urge the Commission to listen to the experts who warn that we cannot overcome the public health crisis of gun violence by magnifying individual punishment.[102]

III. If the Commission feels that it should act, it should create a narrowly tailored standalone SOC for certain MCD offenses.

We urge the Commission not to take any action at this time. But if the Commission feels it must act now to address MCDs, it should do so with precision. Instead of implementing an empirically deficient, disparity-creating, blanket increase across all SOCs for all NFA weapons, it could instead create a narrowly tailored standalone enhancement focusing explicitly on aggravated conduct involving MCDs. A standalone, narrowly tailored SOC could limit some of the disparity built into both Options 1 and 2, and would be less likely to result in punishment greater than necessary. The standalone SOC should ensure an MCD is not treated the same as an actual functional firearm. It should also require mens rea and a nexus to the offense of conviction. Additionally, it should focus on MCDs alone, instead of broadly sweeping in all NFA firearms.

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[100] *See* 2023 Defender Comment, *supra* note 25, at 26 ("While DOJ requested the serial number increase to 'provide stronger deterrence and better reflect the harm of these offenses,' since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value."). Nor were the 2011 enhancements for straw purchase and firearm trafficking effective in stopping the flow of firearms out of the country, as evidenced by Congressional attempts to address that problem over a decade later in the BSCA.

[101] *See Redistributing Justice*, supra note 75, at 1591–92 ("[T]he institutional design of the criminal system means that an assignment of criminal liability all too easily does the exact opposite--scapegoating an individual and suggesting that problems involve bad apples rather than rotten barrels or blighted orchards.").

[102] *See* Caroline Nobo, Think Global Health, *The United States Can't Arrest Its Way Out of Gun Violence* (Nov. 20, 2024) (citing U.S. Surgeon Gen., Firearm Violence: A Public Health Crisis in America (2024)) ("Public health advocates do know that—regardless of federal support—they can continue to have an impact on gun violence through community and state-based public health approaches."); Johns Hopkins Center for Gun Violence Solutions, The Public Health Approach to Prevent Gun Violence: Quick Facts About the Public Health Approach to Prevent Gun Violence (last visited Jan. 22, 2025) ("To reduce gun violence, we should apply this same time-tested public health approach. . . .").

Finally, the Commission should not move additional commentary definitions to the text nor take any additional action at this time beyond implementing a careful study of this broken guideline.

IV. Conclusion

For the reasons above, the Commission should not adopt Option 1 or Option 2. Both options increase unwarranted disparity, and neither effectively advances the statutory purposes of sentencing. The data show judges do not see MCDs as warranting sentences within—much less above—extant guideline ranges. Further, adding yet another empirically unsupported increase into the bloated firearms guideline goes against the Commission's broader goals of simplification and reducing the unnecessary costs of incarceration.[103] Defenders want our communities and families to be safe as much as anyone else. But decades of increases to §2K2.1 penalty ranges have not decreased the number of offenses sentenced under the guideline and have instead compounded disparity. If the Commission feels that it must act to address MCDs, it should do so in a more empirically sound manner.

The Commission has mighty tools at its disposal beyond increasing punishment to address the problem, such as exercising its empirical might to aid researchers seeking systemic solutions to gun violence, as well as making recommendations to Congress.[104] As researchers have explained,[105] exploring such a "public health approach to prevention and how it fits our current epidemic of gun violence" will require "measuring problems and identifying

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[103] USSC, Proposed 2024–2025 Priorities (May 31, 2024).

[104] *See* Joshua Horwitz, *How A Public Health Prescription Could Help Curb the Gun Violence Epidemic*, Health Affairs (Jan. 31, 2025) (citing Cedric Dark & Seema Yasmin, *Under the Gun: An ER Doctor's Cure for America's Gun Epidemic* (2024)) ("following the public health approach consistently requires us to challenge our assumptions"). Research can also shed light on racial disparities. *See* Testimony of Rob Wilcox, Everytown for Gun Safety before March 2023 USSC Firearms Offenses Hearing 11–12 (Mar. 7, 2023) (("urg[ing] the Commission to collect data on sentences imposed for these two new federal offenses to determine whether racial disparities arise. Studying this issue is consistent with the BSCA's mandate. . . .").

[105] *See* Johns Hopkins Center for Gun Violence Solutions, *The Public Health Approach to Prevent Gun Violence* (drawing comparison to successful public health campaign that reduced car fatalities).

risk and protective factors that are amenable to intervention."[106] But it also "means constantly challenging one's own assumptions, and at times politically popular ideas, to keep fidelity with the evidence."[107] We encourage the Commission to follow its characteristic empirical approach and resist the politically popular, but unfounded, idea that increases in individual punishment will adequately solve this problem, and to reject both options.[108]

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[106] *How A Public Health Prescription Could Help Curb the Gun Violence Epidemic*, *supra* note 104.

[107] *Id.*

[108] 28 U.S.C. § 991(b)(1)(C) (purpose of the Commission include establishing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

PART B: Mens Rea. Part B of the "Firearms Offenses" proposed amendment would apply the mens rea currently applied only to §2K2.1(b)(4)(B)(ii) (unserialized—or privately manufactured—firearms) to the other two enhancements contained within §2K2.1(b)(4): offenses involving stolen firearms or those with an illegible serial number ("the Enhancements"). Defenders support Part B and thank the Commission for proposing this improvement.[1] We continue to urge the Commission to take on comprehensive mens rea reform in §2K2.1 and more broadly in the Manual.[2]

I. The Commission must act now to add a mens rea requirement into the empirically deficient Enhancements.

As Defenders have explained at length before, the Commission should enact mens rea reform across the Manual.[3] This amendment cycle it should start by adding a scienter requirement to the Enhancements—for a number of reasons. First, doing so will ameliorate disparity, by "helping to separate those who understand the wrongful nature of their act from those who do not."[4] Second, a mens rea requirement would cabin the application of the Enhancements, which compound racial disparities in sentencing outcomes.[5]

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[1] Defenders have asked the Commission for years to better these broken enhancements by adding a mens rea requirement. *See, e.g.,* 2024 Fed. Defenders' Annual Letter to U.S. Sent'g Comm, at 17 (July 15, 2024); Testimony of Deirdre D. von Dornum on behalf of Fed. Defenders to U.S. Sent'g Comm, at A-15–A-19 (Feb. 27, 2024); 2023 Defender Comment on Firearms Offenses to U.S. Sent'g Comm, at 21–27 (March 14, 2023); 2022 Fed. Defenders' Annual Letter to U.S. Sent'g Comm, at 9–11 (Sept. 14, 2022).

[2] *See* 2024 Defender Annual Letter, *supra* note 1, at 16–17 (urging return to default mens rea requirement in §1B1.3); 2022 Defender Annual Letter, *supra* note 1, at 9–11 (discussing §2K2.1's strict liability enhanced base offense levels and other areas in the Manual in need of mens rea reform).

[3] 2024 Defender Annual Letter, *supra* note 1, at 16–17.

[4] *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (cleaned up). As things stand, the Enhancements treat a person who unknowingly possesses a stolen firearm the same as one who actually stole it, and treats a person who does not know that one of three serial numbers on a pistol is illegible the same as the one who intentionally obliterates them all.

[5] *See* von Dornum Testimony, *supra* note 1, at A-14 ("Black individuals made up 50% of those receiving the Enhancement in the past five fiscal years. And when they

Third, the Enhancement's strict-liability nature has never had an empirical basis, and does not further the purposes of sentencing.[6] Strict liability punishment cannot deter conduct, "since a person cannot be deterred from doing what he or she does not know is being done."[7] And in the typical §2K2.1 case involving a prohibited possessor,[8] the Enhancements arguably impose double punishment on the same conduct—illegal possession of a firearm.[9] Finally, the sentences in cases where the Enhancements apply suggests that sentencing judges think the ranges in these cases are too high.[10] A mens rea

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received the Enhancement, Black individuals received longer sentences than their white counterparts.").

[6] *See* 2023 Defender Firearms Comment, *supra* note 1, at 25; von Dornum Testimony, *supra* note 1, at A-7–A-8 (discussing empirically lacking history of the Enhancements); *see also United States v. Jordan*, 740 F. Supp. 2d 1013, 1016 (E.D. Wis. 2010) (noting the Commission "never satisfactorily explained why an increase of this extent should apply on a strict liability basis").

[7] *United States v. Handy*, 570 F. Supp. 2d 437, 480 (E.D.N.Y. 2008) (*disapproved of on other grounds by United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010)). The data suggest that the increase in severity to the illegible serial number enhancement has not deterred this conduct. 2023 Defender Firearms Comment, *supra* note 1, at 26 ("While DOJ requested the serial-number increase to provide stronger deterrence and better reflect the harm of these offenses, since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value." (cleaned up))

[8] USSC, What Do Federal Firearms Offenses Really Look Like? 8 (July 2022) ("The vast majority of [people] (88.8%) sentenced under §2K2.1 were prohibited from possessing a firearm.") ("USSC Federal Firearms Offenses").

[9] *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020) (explaining that for individuals convicted of being a felon in possession of a firearm, "there is no legal avenue by which that person could have purchased a firearm . . . . Thus, every felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun").

[10] Forty-three percent of §2K2.1 cases receiving the (b)(4)(A) enhancement were sentenced below guideline range, while 53% of §2K2.1 cases receiving the (b)(4)(B) (now the (b)(4)(B)(i)) enhancement were sentenced below guideline range. Note that "below guideline range" includes cases with §5K1.1 and §5K3.1 departures. Cases where the enhancement levels were coded as negative numbers were not included, which removed less than 1% of cases. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

requirement will ameliorate some of these flaws by making punishment more proportionate to the offense.

II. Requiring the government to meet its evidentiary burden to establish mens rea is not a reason to forego the amendment.

The Commission now seeks comment on whether there would be "evidentiary challenges in firearms cases to proving a [person's] mental state."[11] Any mens rea requirement places evidentiary burdens on the government, but the requirement to prove mental intent is a familiar and key feature of the American criminal legal system. And the mens rea requirements in the proposed amendment are "well established in criminal law" and already present elsewhere in §2K2.1.[12]

1. Mens rea is fundamental to the criminal system.

The Supreme Court has reaffirmed the importance of mens rea in recent years.[13] It explained that the presumption of mens rea should be excused only where statutory provisions at issue are part of a "regulatory" or "public welfare" program and "carry only minor penalties."[14] The Enhancements are not part of a regulatory or public welfare program. Nor are they minor; even a two-level enhancement can lead to a guideline range increase of a year or more. Moreover, firearms cases are not unique; they are the third-most-sentenced offense in the federal system.[15] Guideline ranges

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[11] USSC, Proposed Amendments to the Sentencing Guidelines 46 (Dec. 19, 2024).

[12] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023) ("[T]he Commission determined that the doctrines of 'willful blindness' and 'conscious avoidance' are 'well established in criminal law.'" (quoting *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011))).

[13] *See, e.g., Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (explaining that "'wrongdoing must be conscious to be criminal'") (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)); *Rehaif*, 588 U.S. at 233–37; *see also* Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 Vill. L. Rev. 51, 56 (2023) ("Within specific categories of crime, where the act can be seen as a constant, the defendant's mens rea is a key factor in how we "rank" the particular act and assign appropriate punishment").

[14] *Rehaif*, 588 U.S. at 232.

[15] USSC, 2023 Sourcebook Fig. 2.

and enhancements should suggest punishment proportionate to an individual's culpability.[16] If the government cannot meet its burden of proof at sentencing as to mental state—which is lower than the burden of proof required to obtain a conviction—then the Enhancements should not apply.

Further, the statutes that the Enhancements track carry a mens rea requirement, indicating Congress understood the importance of mens rea here.[17] Section § 922(k), covering offenses involving a firearm with a removed, altered, or obliterated serial number, requires the offense be committed "knowingly."[18] And violations of §§ 922(i) and (j), covering offenses involving stolen firearms, also require knowledge or "reasonable cause to believe" the firearm was stolen.[19] In §2K2.1 cases involving convictions under these statutes, there will be no evidentiary issue as the burden of proof will be met already. And in cases where the issue arises based on relevant conduct, and not convictions, the government will have to meet a less stringent mens rea standard, under a much weaker proof standard, for one of the Enhancements to apply. The current scheme is far more problematic: enabling the government to use relevant conduct and a lower evidentiary standard as an end-run around the burden of proof required to obtain a conviction.[20]

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[16] 28 U.S.C. § 991(b)(1)(A), (B) (instructing the Commission to craft sentencing policy to avoid unwarranted disparities, reflect distinctions in offense severity, and provide certainty and fairness in sentencing); *see also* 18 U.S.C. § 3553(a)(2)(A) (sentencing objectives).

[17] *Handy*, 570 F. Supp. 2d at 478 (noting in rejecting the strict liability nature of the stolen firearm enhancement that "there is a closely related specific and unambiguous statute" that requires mens rea, and the Commission "cannot ignore this congressional policy and the constitutional implications attached to it").

[18] 18 U.S.C. § 922(k).

[19] 18 U.S.C. §§ 922(i) and (j) ("knowing or having reasonable cause to believe"). The original prohibited firearm transactions guideline included a mens rea requirement tracking the statute for the Enhancements. *See* §2K2.3(b)(2)(C) (1987) ("If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.").

[20] *See* von Dornum Testimony, *supra* note 1, at A-16–A-17 ("Commission data show that while there were only 258 cases involving at least one count of conviction under § 922(k) and sentenced under §2K2.1 from fiscal years 2018 through 2022, there were 2,328 cases where the altered or obliterated serial number enhancement

2. Section 2K2.1 requires the same scienter elsewhere.

Section 2K2.1 already carries the same scienter requirement proposed here in two other places: the (b)(4)(B)(ii) enhancement for unserialized firearms and the (b)(8) gang enhancement.[21] In 2023, the Commission noted that "the doctrines of 'willful blindness' and 'conscious avoidance' are 'well established in criminal law.'"[22] The existence of these same scienter requirements elsewhere in §2K2.1 supports a parallel mens rea requirement for the Enhancements as well.

In particular, the Commission added the (b)(4)(B)(ii) enhancement for unserialized firearms because it felt "there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm that is not marked with a serial number."[23] With "no meaningful distinction" between the bases for the (b)(4)(B) enhancements, there is also no reason not to add the scienter requirement to the illegible-serial-number enhancement. This is particularly true as commercially serialized firearms often have several serial numbers in different places, meaning it is easy to miss whether one of these numbers has been made illegible.[24]

Finally, the scienter requirement is even more crucial for the stolen firearm enhancement.[25] By and large, the "fact that the gun was stolen is not visually detectable, nor is the [person] in possession capable of tracing the

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applied.").

[21] *Compare* USSC, Dec. 2024 Proposed Amendments to the Sentencing Guidelines, at 46 ("knew, was willfully blind to the fact, or consciously avoided knowing that") *with* §§2K2.1(b)(4)(B)(ii) ("knew . . . or was willfully blind to or consciously avoided knowledge of such fact") *and* (b)(8)(B) ("knowing or acting with willful blindness or conscious avoidance of knowledge").

[22] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023) (quoting *Glob.-Tech Appliances*, 563 U.S. at 766, 769)).

[23] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023).

[24] *See* von Dornum Testimony, *supra* note 1, at A-18 (explaining that "an individual might not inspect or notice defacement on every single iteration of the serial number, especially one on the underside of the firearm"). Defenders urge the Commission to consider clarifying in the future that the enhancement should only apply if *all* serial numbers are illegible.

[25] *Id. See also* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm, at 3 (Feb. 27, 2023) ("it may not be as readily apparent that a gun is stolen").

gun to determine if it was stolen."[26]

3. There are more stringent mens rea requirements in the Manual.

Other enhancements in the Manual also carry a similar mens rea requirement,[27] or a knowledge requirement,[28] which is more stringent than the willful-blindness standard here.[29] So the government has experience proving scienter for these other enhancements. With respect to willful blindness, the Supreme Court explained, while iterations of the doctrine differ slightly across circuits, at its core it has a "limited scope that surpasses recklessness and negligence," such that a person engaging in willful blindness "can almost be said to have actually known the critical facts."[30] If the government cannot prove that an individual was at least willfully blind to the conduct at issue, the Enhancements should not apply.

In sum, Defenders urge the Commission to adopt Proposal B, as an important first step toward further mens rea reform in the Manual, in both §2K2.1 and beyond.

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[26] *Handy*, 570 F. Supp. 2d at 454. Even ATF has difficulty tracing commercial firearms and acknowledges that tracing is of limited utility beyond determining the "first retail seller." 2023 Defender Firearms Comment, *supra* note 1, at 31 (quoting an ATF publication for this proposition).

[27] *See* §2D1.1(b)(13)(B) ("willful blindness or conscious avoidance of knowledge").

[28] Many provisions require proof of knowledge or belief. *See e.g.* §§2A3.1(b)(6)(A); 2A3.2(b)(2)(A); 2A3.3(b)(1); 2A3.4(b)(4); 2D1.1(b)(5); 2D1.1(b)(12) & comment. (n. 17); 2D1.1(b)(13)(A); 2D1.1(b)(16)(B); 2G1.3(b)(2)(A); 2G2.1(b)(3); 2G2.1(b)(6)(A); 2G2.2(b)(3)(F); 2G3.1(b)(1)(F); 2K1.3(a)(4)(B); 2K1.4(a)(1). Others require knowledge or belief. *See e.g.* §§2D1.11(b)(2); 2D1.12(a)(1); 2D1.13(a)(1), (2); 2S1.1(b)(1); 2S1.3(b)(1). Others require knowledge or intent. *See e.g.* §§2B1.1(b)(14); 2G1.3(c)(3); 2K1.3(c)(1); 2K2.1(c)(1); 2K2.5(c)(1); 2N1.1(c)(1).

[29] The willful-blindness standard has been criticized by some for being too expansive. *See* Heritage Foundation, *The Supreme Court's Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions* (June 30, 2011) ("Punishing as criminals those whom prosecutors decide—after the fact—'should have known' that their conduct was unlawful is a misuse of criminal law.").

[30] *Glob.-Tech Appliances*, 563 U.S. at 769 (explaining that circuits all "agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact").

Federal Public and Community Defenders
Comment on Circuit Conflicts

(Proposal 3)

February 3, 2025

Table of Contents

The Commission's third set of proposed amendments addresses two circuit conflicts, regarding (1) the "physically restrained" enhancement in USSG §2B3.1; and (2) Chapter Four's definition of "intervening arrest." This document includes Federal Public and Community Defenders' comments on each of these proposals.

I. PART A: "Physically restrained"

Part A of the proposed amendments for circuit conflicts sets forth three options to address whether the robbery guideline's "physically restrained" enhancement ("Enhancement") in the robbery guideline requires actual physical restraint, or can be triggered by nonphysical means, such as holding victims at gunpoint.[1] Defenders urge the Commission to adopt Option 2. Under that approach, the Enhancement would apply only to cases involving physical confinement or contact, and not to cases involving psychological coercion or other nonphysical restraint (i.e, pointing a gun at a victim).

As discussed below, Option 2 better aligns with the Enhancement's purpose by targeting distinctive conduct beyond what occurs in a typical robbery. It also avoids unwarranted sentencing disparities and problematic double counting of conduct already captured by the robbery guideline's base offense level and other enhancements. And it best tracks current sentencing patterns showing that judges often find guideline ranges excessive in robbery cases, particularly those involving firearms. While Defenders generally support Option 2, we offer modest refinements to ensure the amendment best serves the purposes of sentencing.

Options 1 and 3, in contrast, would effectively transform what should be a specific offense characteristic ("SOC") targeting distinctive conduct into a de facto guideline-range increase that would apply in virtually every robbery case, undermining the Enhancement's purpose and exacerbating existing sentencing disparities.[2] Defenders urge the Commission to reject those options.

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[1] *See* USSC, Proposed Amendments to the Sentencing Guidelines 48–53 (Dec. 19, 2024) ("USSC 2024–2025 Proposed Amendments"). The 2-level enhancement applies "if any person was physically restrained to facilitate commission of the offense or to facilitate escape[.]" USSG §2B3.1(b)(4)(B).

[2] Option 1 expands the 2-level "physically restrained" enhancement to apply when a person's movement is restrained by either physical or nonphysical means.

A. Option 2 is superior to Options 1 and 3.

1. Option 2 better aligns with the Enhancement's core purpose.

Option 2 best furthers the Enhancement's purpose to identify and increase punishment for distinctive, aggravating conduct. Use or threat of force is definitional to robbery.[3] And in federal robbery cases, firearms are commonplace.[4] Options 1 and 3 would make the Enhancement apply in a great many cases based on, essentially, this conduct.[5] As the Second Circuit explained when rejecting the expansive reading Options 1 and 3 countenance, if the Enhancement is interpreted so broadly, "virtually every robbery would be subject to the to the 2-level [E]nhancement for physical restraint unless it

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Option 3 creates a tiered enhancement with a 2-level increase for physical restraints and a 1-level increase for nonphysical restraints.

[3] *See, e.g.*, Ninth Circuit Model Crim. Jury Instr. 9.8 (Hobbs Act Robbery, 18 U.S.C. § 1951) (defining "Robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence…"); *see also* Eleventh Circuit Pattern Jury Instr. O70.3 (Hobbs Act Robbery, 18 U.S.C. § 1951(a)) (requiring proof that an individual "took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future"); *cf. Stokeling v. United States*, 586 U.S. 73, 77 (2019) ("[T]he elements of the common-law crime of robbery [have] long required force or violence.").

[4] According to the Commission's 2022 Robbery Report, "more than three-quarters (77.6%) of robbery events involved a weapon, and firearms were the most common type of weapon. Of the robbery events involving a weapon, more than three-quarters (79.8%) involved a firearm." USSC, Federal Robbery: Prevalence, Trends, and Factors in Sentencing 30 (2022) ("USSC 2022 Robbery Report"). And the (b)(2) enhancements for using or brandishing a firearm or dangerous weapon or making a threat of death applied in 63.5% of cases sentenced under §2B3.1 in fiscal year 2023. *See* USSC, Quick Facts on Robbery Offenses (2024) ("Robbery Offenses Quick Facts, FY23").

[5] These options both encompass psychological restraint, in line with cases such as, *e.g.*, *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997) ("physical restraint occurs whenever a victim is specifically prevented at gunpoint from moving"); *United States v. Dimache*, 665 F.3d 603, 608–09 (4th Cir. 2011) (affirming the Enhancement's application where a person used a gun to force bank tellers to the floor because they "were prevented from both leaving the bank and thwarting the bank robbery…").

took place in unoccupied premises."[6] Such an interpretation would render the Enhancement "at risk of no longer operating as a sentencing enhancement but instead as a potentially automatic increase of the. . .base offense level."[7]

Option 2's narrow enhancement targeting actual physical restraint represents the most principled approach to applying a SOC by distinguishing conduct that truly warrants additional punishment from conduct inherent in virtually every robbery offense. It recognizes that actual physical restraint adds "another dimension" to a typical robbery that is qualitatively different from the psychological coercion of issuing an immobilization order.[8]

Option 1's expansive approach is "unnecessarily punitive" because individuals receive additional punishment "not only for conduct beyond the rule's scope but also for conduct, in effect, constituting the underlying crime of armed robbery."[9] It also violates 18 U.S.C. 3553(a)(6)'s requirement that

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[6] *United States v. Anglin*, 169 F.3d 154, 163 (2d Cir. 1999). The Fifth Circuit has similarly observed, where a person holds a firearm and instructs a victim to get on the ground, he has "simply ma[de] explicit what is implicit in all armed robberies: that the victims should not leave the premises. Such conduct does not differentiate this case in any meaningful way from a typical armed robbery." *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (cleaned up).

[7] Drew Curtis, *Criminal Law-the Federal Sentencing Guidelines: Examining the Physical Restraint Sentencing Enhancement*, 44 U. Ark. Little Rock L. Rev. 561, 591 (2022).

[8] *See United States v. Deleon*, 116 F.4th 1260, 1267 (11th Cir. 2024) (Rosenbaum, J., concurring). Additionally, Option 2 best aligns with the Enhancement's use of the modifier "physically," which reflects the Commission's deliberate policy decision to limit it to instances of actual physical restraint. *See id.* ("[I]f the framers of the guideline wanted it to apply whenever any person was restrained in either a physical or non-physical way, they wouldn't have included the qualifier 'physically'."). This interpretation is supported by the original robbery guideline's background commentary that the "guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up." USSG §2B3.1 (Background) (1987). Of course, the Commission is always free to revisit policy decisions, but the reasons discussed herein counsel against doing so.

[9] *See* Curtis, supra note 7, at 591; *see also* Heather Crabill, *Restraints of the Body or of the Mind: Conflicting Interpretations of the Physical Restraint Sentencing*

courts avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct by improperly equating the threats inherent in virtually every robbery with the distinct and more serious act of physical restraint.[10]

Option 3 fares no better. Although it attempts to lessen Option 1's overreach by reducing the offense-level increase for non-physical, psychological restraint to one level, its approach still results in an unwarranted guideline range increase in most robbery cases.[11] Adding even a one-level increase for conduct essentially inherent to robbery serves no legitimate sentencing purpose, particularly since the level added would be added to what's already typically a high guideline range.[12] This can translate into an additional 12 to 36 months of imprisonment, while still failing to meaningfully distinguish specific offense conduct.

Beyond overbroad application, both Options 1 and 3 introduce a problematic subjectivity that would undermine the Guidelines' fundamental goal of sentencing uniformity and this Commission's goal of simplification. These options could result in enhancement decisions turning on victims' subjective reactions to threats rather than objective offense characteristics—a framework that would likely lead to inconsistent application.[13]

Enhancement, 74 Okla. L. Rev. 795, 819–20 (2022) (expanding the Enhancement to "include psychological restraint would cause the two-level enhancement to apply to virtually all robberies.").

[10] *See* § 3553(a)(6) (providing that in sentencing, courts shall consider the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *Gall v. United States*, 552 U.S. 38, 54 (2007) (discussing § 3553(a)(6)).

[11] *See Gall*, 552 U.S. at 55 (affirming a sentence where "it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated" (emphasis in original)).

[12] *See* Robbery Offenses Quick Facts, FY23, *supra* note 4, at 2 (showing an average guideline minimum of 123 months).

[13] *See Herman*, 930 F.3d at 876 (providing that a person's "physical response to [an individual]'s attempt to coerce, however, is not something that logically belongs within the scope of the physical-restraint guideline"); *see also* Julia Knitter, *"Don't Move": Redefining "Physical Restraint" in Light of a United States Circuit Court*

2. Option 2 avoids applying separate enhancements for identical, weapon-related conduct.

Using a firearm to hold victims in place may be distinct at least from unarmed robbery; but this conduct is already captured and punished by §2B3.1's weapon-related specific offense characteristics.[14] Section 2B3.1(b)(2) provides a graduated enhancement framework imposing escalating penalties based on the severity of weapon use, ranging from 3 to 7 levels.[15] The robbery guideline also adds enhancements for otherwise using other dangerous weapons (§2B3.1(b)(2)(D)), making death threats (§2B3.1(b)(2)(F)), and causing bodily injury (§2B3.1(b)(3)).[16] Options 1 and 3 would make the Enhancement clearly duplicative of those.[17]

There is an 11-level cap on cumulative adjustments from applying these enhancements,[18] which reflects the Commission's intent to punish aggravating conduct while avoiding excessive enhancements for overlapping conduct.[19] Adding what would function as another weapons-based enhancement on top of the others, via Options 1 or 3, would undermine that

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Divide, 44 Seattle U. L. Rev. 205, 224 (2020) (explaining that "a victim's reaction to a[n individual]'s actions should not be the determination of whether the physical restraint enhancement is applied.").

[14] This conduct also may result in a conviction under 18 U.S.C. § 924(c) for using or carrying a firearm in furtherance of a crime of violence. *See* § 924(c); *see also* Joshua McCroskey, *Held at Gunpoint: Applying the Physical Restraint Sentencing Enhancement*, 73 Fla. L. Rev. 919, 946–47 (2021) (discussing how conduct like showing or pointing a firearm already faces large enhancements for brandishing or otherwise using a gun, including under § 924(c)).

[15] *See* USSG §2B3.1(b)(2)(a)–(c).

[16] *See id.* §§2B3.1(b)(2)(D), (F); §2B3.1(b)(3).

[17] To be sure, in the rare case involving extraordinary psychological restraint that might not be captured by the guideline's existing structure, courts have discretion under § 3553(a) to consider "conduct that appears to the judge to be the equivalent of a physical restraint." *See Herman*, 930 F.3d at 877.

[18] *See* USSG §2B3.1(b)(3).

[19] This cap works as an important check against using the guidelines as a "prosecutorial hammer." Conner J. Purcell, *This Is Your Captain Speaking, Please Remain Physically Restrained While the Robbery Is in Progress*, 38 Touro L. Rev. 453, 489 (2022).

structure. Option 2 respects this structure by targeting distinct conduct not already captured by these other enhancements.

Consider a common bank robbery scenario: a person points a gun at a teller and demands money, and the teller complies. This conduct very likely would trigger a 5-level enhancement for brandishing a firearm under §2B3.1(b)(2)(C), or enhancements when a firearm or dangerous weapon is "otherwise used."[20] But under Options 1 and 3, the same conduct would also warrant an enhancement under §2B3.1(b)(4)(B), effectively punishing identical behavior twice.[21] This double counting is significant, subjecting individuals to more months or even years of incarceration.[22]

3. Option 2 best tracks current sentencing patterns.

Existing data supports Option 2. Robbery guideline ranges, particularly in cases where firearms were involved, already call for lengthy punishment. And data show that below-guideline sentences in robbery cases have increased in recent years.[23] Even when the Enhancement applies, courts impose sentences, on average, that are nearly 17 months below the average guideline minimum.[24] It does not make sense to expand the

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[20] *See also United States v. Hano*, 922 F.3d 1272, 1297 (11th Cir. 2019) (pointing a toy gun, which qualified as a "dangerous weapon," at a person with the intent to instill fear in another amounted to "otherwise used").

[21] *See* Purcell, *supra* note 19, at 488–89.

[22] *See* Curtis, *supra* note 7, at 591–92 ("While the two-level upward adjustment sounds relatively mild, it has significant consequences for [an individual], who is subjected to additional months—often years—of incarceration because of its application.").

[23] *See* USSC 2022 Robbery Report, *supra* note 4, at 22. Between fiscal years 2012 and 2021, the proportion of within-range sentences decreased from 51.1% to 38.8%, while below-range sentences, excluding USSG §5K1.1 departures, increased from 27.6% to 45.0%. *Id.*

[24] The data used for this analysis was extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023, which is publicly available for download on its website. The data show in robbery cases where §2B3.1(b)(4)(B) was applied, courts imposed an average sentence of 121.2 months compared to an average guideline minimum of 138.0 months. Sentence length was calculated using SENSPCAP and guideline minimum was calculated using a modified GLMIN where life was recoded as 470 months.

Enhancement when data indicate judges find that the guideline ranges are already too severe in firearm cases.

Moreover, the expanded approach described in Options 1 and 3 would exacerbate racial disparities in the federal criminal justice system. According to the Commission's data, most individuals sentenced for robbery offenses in FY2023 were people of color: 60.3% were Black, 19.7% were Hispanic, 16.1% were white, and 3.9% were other races.[25] What's more, Black and Hispanic individuals received, on average, much higher sentences than their white counterparts.[26] Making the Enhancement nearly automatic in robbery cases—which would be the impact of Options 1 and 3—would disproportionately harm these already overrepresented, marginalized groups.

Further, on average, individuals sentenced for robbery offenses are young, with a large percentage involving people in their twenties.[27] It makes no sense to call for even lengthier sentences for young people, who, as the Commission recently recognized through last year's age-related amendment to §5H1.1, have greater capacity for rehabilitation and warrant more measured sentences to account for their potential for positive change.[28]

B. While Option 2 is superior, key refinements can ensure the Commission resolves the present conflict.

While Option 2 presents the most equitable path forward for resolving the current circuit conflict, minor refinements to its language would ensure more consistent application. A key issue contributing to the current circuit split is courts' interpretation of the phrase "such as" in §1B1.1's commentary.

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[25] *Id.*

[26] The data used for this analysis was extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023, which is publicly available for download on its website. The data show that the mean sentence for Black and Hispanic individuals was 120.0 months and 101.2 months, respectively, while the mean sentence for White individuals was 89.9 months. Average sentence length calculated using SENSPCAP. *Id.*

[27] *See* USSC 2022 Robbery Report, *supra* note 4, at 15 & Fig. 5. The proportion of those ages 21–29 for FY 2021 was 43.0% for robbery, 32.1% for other violent crimes, and 24.9% for non-violent offenses. *See id.*

[28] *See* USSG App. C, Amend. 829, Reason for Amendment (Nov. 1, 2024)

Courts on both sides of the split have read this language as providing illustrative examples of physical restraint rather than expressly limiting the Enhancement's application to those examples.[29]

So, while Option 2 provides the best approach, the Commission can strengthen its proposal by adding language to Option 2 that expressly excludes psychological coercion: "if any person's freedom of movement was restricted through physical conduct or confinement, such as by being tied up, bound, or locked up…*but not including restrictions achieved through threats with weapons or other forms of psychological coercion*."[30] This language is similar to a proposal that an academic commentator suggested.[31] Or, the Commission could simply state: "if any person's freedom of movement was restricted through physical contact or confinement (not including psychological coercion), such as being tied, bound, or locked up . . ." This would help ensure that Option 2 achieves its intended purpose of aligning with those circuits providing a more targeted Enhancement.

Finally, Part A seeks comment as to whether the Commission should amend other guidelines that reference the term "physically restrained" in Application Note 1(L) of §1B1.1's Commentary, or amend that Commentary itself.[32] The facts on the ground suggest such broader amendments are unnecessary: little evidence suggests that the circuit conflict over physical restraint extends significantly beyond §2B3.1. The D.C. Circuit's

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[29] *Compare Anglin*, 169 F.3d at 163 ("[T]he modifier 'such as' in the definition of 'physical restraint' found in § 1B1.1, Application Note 1(i), 'indicates that the illustrations of physical restraint are listed by the way of example rather than limitation[.]'" (quoting *United States v. Rosario*, 7 F.3d 319, 320-321 (2nd Cir. 1993))), *with United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("By use of the words 'such as,' it is apparent that 'being tied, bound, or locked up' are listed by way of example rather than limitation.").

[30] USSC 2024–2025 Proposed Amendments, *supra* note 1, at 51–52 (italicized language added).

[31] *See* Knitter, *supra* note 13, at 224 (proposing that the definition of physically restrained "means the forcible restraint of the victim by the direct physical actions of the defendant and does not include psychological coercion experienced by the victim. Examples of such acts include, but are not limited to, the defendant tying, binding, or locking up the victim").

[32] *See* USSC 2024–2025 Proposed Amendments, *supra* note 1, at 53.

interpretation of physical restraint under Chapter 3, for instance, aligns with Option 2's approach.[33] Moreover, Chapter 3 already includes important limitations on that enhancement's application, instructing courts not to apply it "where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself."[34] Given these existing safeguards and the nature of the circuit conflict manifesting in the robbery context, combined with the fact that §2B3.1 would no longer use that phrase, the Commission can effectively resolve the issue by modifying the language in §2B3.1 alone, without needing to revise the Chapter 1 commentary or other guidelines provisions. Focusing the amendment narrowly on §2B3.1 would also promote the Commission's goal of simplifying the guidelines, avoiding unnecessary changes that could complicate their application.

C. Conclusion

Defenders urge the Commission to adopt Option 2 with the minor adjustment suggested above. Option 2 provides the most effective path forward by adhering to the Enhancement's core purpose of punishing conduct distinct from a typical robbery, avoiding problematic double-counting, and reflecting current sentencing practices showing the robbery guidelines are already overly punitive, especially when firearms are involved.

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[33] In *United States v. Drew*, the court emphasized that "physical restraint" means exactly what its plain language connotes—actual physical restraint, not psychological coercion. 200 F.3d 871, 880 (D.C. Cir. 2000).

[34] USSG §3A1.3 comment. (n.2).

I. PART B: "Intervening arrest"

Defenders support the proposed clarifying amendment defining what constitutes an "intervening arrest" under §4A1.2(a)(2)'s single sentence rule.

Chapter 4 of the Guidelines Manual sets forth rules for when to treat multiple prior sentences as a single sentence when calculating a person's criminal history score.[35] Specifically, §4A1.2(a)(2) directs sentencing courts to count multiple prior sentences as separate sentences when the underlying offenses are separated by an intervening arrest.[36] If not separated by an intervening arrest, multiple prior sentences are counted separately "unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day."[37]

The Commission has previously amended §4A1.2 to clarify what constitutes a single sentence.[38] The Commission now proposes to add the following definition of "intervening arrest" to further clarify §4A1.2(a)(2)'s operation:

> [A] formal, custodial arrest [that] is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or

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[35] USSG §4A1.2.

[36] *Id.*

[37] *Id.*

[38] *See* USSG App. C, Amend. 382 (Nov. 1, 1991). The original 1987 manual directed sentencing courts to count "prior sentences imposed in *unrelated* cases" separately and "[p]rior sentences imposed in *related* cases…as one sentence" when computing a person's criminal history score. USSG §4A1.2(a)(2) (1987) (emphasis added). In 1991, the Commission amended §4A1.2's commentary, defining related cases, explaining that "cases separated by an intervening arrest…are not treated as related cases." USSG App. C, Amend. 382, Reason for Amendment (Nov. 1, 1991). Then, in 2007, to resolve a circuit split and reduce complexity, the Commission replaced the "related cases" terminology with an instruction within the Guideline's text that prior sentences are to be counted separately if they are separated by an intervening arrest. USSG App. C, Amend. 709, Reason for Amendment (Nov. 1, 2007).

> booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.[39]

This definition is consistent with the plain meaning of the word "arrest" and is supported by at least three salient policy goals.

A. The proposed clarifying amendment is consistent with the ordinary usage of the word "arrest."

Diverging from every other circuit to have considered the issue, the Seventh Circuit misinterprets "intervening arrest" to include noncustodial traffic stops.[40] In splitting from the Third, Sixth, Ninth, and Eleventh Circuits, all who have examined §4A1.2(a)(2) more recently,[41] not only does the Seventh Circuit's approach conflict with the purposes of the single sentence rule, it ignores the plain meaning of the term "arrest," which does not include a noncustodial police encounter and ticket, summons, or citation.[42] Ordinarily "arrest" refers to "the taking or detainment (of a person) in custody by authority of law" or "legal restraint of the person."[43] Expanding the definition of an intervening arrest to include noncustodial encounters with law enforcement, such as traffic stops, would conflict with the "ordinary, contemporary, common meaning" of the word "arrest."[44]

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[39] USSC 2024–2025 Proposed Amendments, *supra* note 1, at 55.

[40] *See United States v. Morgan*, 354 F.3d 621, 623–24. (7th Cir. 2003).

[41] *See United States v. Rogers*, 86 F.4th 259 (6th Cir. 2023); *United States v. Ley* 876 F.3d 103, 109 (3rd Cir. 2017); *United States v. Wright*, 862 F.3d 1265, 1281-83 (11th Cir. 2017); *United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011).

[42] *See Leal-Felix*, 665 F.3d at 1044–1046 (McKeown, J., concurring, joined by Kozinski C.J., Graber, J., and Wardlaw, J.) (relying on the ordinary meaning canon and finding it compelling that the "common understanding of the term arrest does not include being pulled over and ticketed for a traffic violation"); *see also Knowles v. Iowa,* 525 U.S. 113, 117 (2014) (noting that in contrast to a formal custodial arrest, a traffic stop is a "a relatively brief encounter… more analogous to a *Terry* stop" (internal citations omitted)).

[43] *See Webster's Third New International Dictionary* 109-10 (unabridged ed. 1993).

[44] *See Leal-Felix*, 665 F.3d at 1046 (internal citations omitted).

B. The proposed clarifying amendment is supported by sound sentencing policy.

There are at least three policy reasons to define "intervening arrest" as a formal, custodial arrest.

First, the purposes of Chapter 4's criminal history rules support this definition. These rules, inherited from the parole system, aimed "to take into account *culpability* (i.e., harsher punishments for [people] with aggravated criminal backgrounds) and *recidivism* (i.e., the likelihood of re-offending)."[45] To account for both factors, the rules should be supported by empirical research and "should incorporate 'additional data insofar as they become available in the future.'"[46] As to the goal of recidivism prediction, we know of no data or other evidence to indicate that treating as a custodial arrest a mere citation or summons to appear in court will enhance Chapter 4's ability to adjudge dangerousness.[47]

As to the culpability function, there are legitimate reasons to treat as a single sentence prior sentences resulting from offenses in the same charging document or imposed the same day. The single sentence rule prevents overinflated criminal history scoring that would inevitably result from treating multiple, related prior sentences separately in every instance. The intervening arrest rule serves as a *limited* exception, isolating and removing unrelated criminal conduct from the single sentence rule's reach. Treating an intervening summons or citation as equivalent to an arrest—in other words, broadening the meaning of "arrest" beyond recognition, as the Seventh

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[45] USSC, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 1 (2004) ("It was reasoned that the Salient Factor Score's high predictive power would transfer, at least in part, to the nascent guidelines' criminal history measure.").

[46] *See id.* at 2 (citation omitted).

[47] Indeed, back in 1991, when the Commission first introduced the concept of using an "intervening arrest" to distinguish related cases from supposed unrelated cases for purposes of the single sentence rule, some federal defenders argued that even treating offenses separated by an intervening arrest as separate sentences would not improve the criminal history score's ability to predict likelihood of future criminality. *See* Fed. Defender Office (E.D. Mich.) Comment on the U.S. Sent'g Comm's 1991 Proposed Amendments, at 1–2 (PDF 36–37) (Mar. 26, 1991).

Circuit has done—frustrates the single sentence rule's salutary purpose to better reflect culpability in these cases.

In this way, the Seventh Circuit's approach risks substantially increasing guideline ranges based on minor, noncustodial encounters.[48] Generally, citation in lieu of arrest programs allow police to issue a citation or summons in lieu of an arrest for traffic, misdemeanor, and other petty offenses.[49] These programs provide an obvious benefit to everyday citizens by letting them avoid an arrest record—with all its deleterious collateral consequences—for minor violations.[50] Jurisdictions permitting officers to issue a citation or summons for more serious offenses, such as felonies, are the exception, not the rule.[51] Section 4A1.2(a)(2) instructs courts to use the longest sentence for concurrent sentences, or the aggregate sentence for consecutive sentences, when prior sentences are treated as a single sentence. This reduces the likelihood that a single sentence under this rule will underrepresent an individual's criminal history. And in the rare cases where it does—say in one of those infrequent instances where a police officer issues a citation for a serious offense—courts can vary (or depart) above the guideline range if appropriate.[52]

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[48] Not only would expanding the "intervening arrest" definition impact criminal history calculations under Chapter 4, Part A, but §4A1.2 also impacts certain offense level computations, including the Chapter 2 guidelines governing firearms and immigration. *See e.g.* USSG §2K2.1 comment. (n.10) and §2L1.2 comment. (n.3); *see also* Fed. Defender Comment on U.S. Sent'g Comm's 2024-2025 Proposed Priorities, at 8 (July 15, 2024) (encouraging the Commission to eliminate the double counting of criminal history in Chapter 2 and highlighting the disparate impact double counting has on people of color given most individuals sentenced under the gun and immigration guidelines are Black and Hispanic). It could also lead to career offender status for someone who otherwise would not qualify. *See* §§4B1.1 comment. (n.1) & 4B1.2(c).

[49] Nat'l Conference of State Legs, *Citation in Lieu of Arrest* (March 18, 2019).

[50] *See* Int'l Ass'n of Chiefs of Police (IACP), *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States Project*, at 3 (April 1, 2016).

[51] *Id.* at 11.

[52] *See* 18 U.S.C. § 3553(a); *see also* §§4A1.2, comment. (n. 3(B)) ("Upward Departure Provision") & 4A1.3 ("Departures Based on Inadequacy of Criminal History Category").

Simply put, there's no evidence that the "single sentence" ranges resulting from related criminal history separated by an intervening summons or citation are inadequate to serve Chapter 4's purposes.

Second, defining arrest to include citations or summonses following traffic stops or other noncustodial police encounters risks exacerbating unwarranted racial disparities.[53] Traffic stops are among the most common interaction between police and civilians.[54] Police have significant discretion to decide whether to initiate a traffic stop and "[r]esearch on police traffic stops has consistently found widespread racial disparities, with Black drivers more likely than white drivers to be pulled over[, searched, cited, and arrested] in cities across the country."[55] Indeed, racial profiling in traffic stops is so pervasive and well-documented that the attendant "violation" is commonly referred to as "Driving While Black."[56]

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[53] *See* 28 U.S.C. § 991(b)(1)(B) (among the Sentencing Commission's purposes are to establish policies that ensure fairness and guard against unwarranted disparities in sentencing).

[54] *See* Susannah N. Tapp and Elizabeth J. Davis, *Contacts Between Police and the Public, 2022*, DOJ, Office of Justice Programs, Bureau of Justice Statistics (November 2022).

[55] Libby Doyle and Susan Nembhard, *Police Traffic Stops Have Little to Do with Public Safety*, Urban Institute (2021); *see also* Wendy Regoeczi and Stephanie Kent, *Race, poverty, and the traffic ticket cycle: Exploring the situational context of the application of police discretion*, Sociology & Criminology Faculty Publications, Cleveland State University (2014) (discussing how Black drivers can become caught in a cycle of unpaid traffic tickets and license suspensions, further exacerbating disparities in the issuance of traffic citations); Emma Pierson et al, *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behavior 736 (2020); Tapp, *supra* note 54, at 7, Table 5; *see also* Meghan McGone, *Tickets for loud music nearly 3 times more likely for Black drivers under new Florida law*, The Gainesville Sun (May 2, 2023). The enforcement of Florida's Loud Music Law provides one striking example of disparities in issuing citations following traffic stops, where Black drivers are three times more likely than white drivers to be cited. *See id.*; Fla. Stat. § 316.3045 (2022) (making it a noncriminal traffic infraction to play music that is "plainly audible" from 25 feet away while occupying a motor vehicle).

[56] *See, e.g.*, *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) ("Henry L. Gates, Jr. has written, poignantly, '[n]or does [University of Chicago Professor] William Julius Wilson ... wonder why he was stopped near a small New England town by a policeman who wanted to know what he was doing in those parts. There's

In a DOJ Bureau of Justice Statistics report from 2020, Black drivers were less likely to receive a warning, but more likely to receive a ticket, be searched, or be arrested, than white drivers.[57] The Commission itself has acknowledged that

> [c]oncerns over racial disparities in sentencing practices have been well documented and were one of the factors Congress sought to address in passing the Sentencing Reform Act of 1984. Furthermore, the use of race as a key factor in deciding whether to make a traffic stop is an issue that has been litigated in courts and has received attention from the federal government for decades.[58]

Indeed, the disparate impact of Chapter 4's criminal history rules on Defenders' clients of color is one reason we have for years called on the Commission to find ways to deemphasize criminal history throughout the Guidelines.[59] So too have courts—often pointing to concerns with criminal

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a moving violation that many African–Americans know as D.W.B.: Driving While Black.'" (quoting Gates, Henry L. Jr., *Thirteen Ways of Looking at a Black Man,* New Yorker, Oct. 23, 1995 at 59)); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Kathryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. Rev. 717 (1999); *cf. Jamison v. McClendon*, 476 F.Supp.3d 386, 414–15 (S.D. Miss. 2020) ("Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'" (Citations omitted)).

[57] *See* Tapp, *supra* note 54 at 7, Tbl. 5.

[58] USSC, *What Do Federal Firearms Offenses Really Look Like?* 32 (2022).

[59] *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2022-2023 Proposed Priorities, at 20 (Sept. 14, 2022) (pointing out that "[t]he criminal history rules are numerous, complex, and often lead to unjust, and unnecessarily long sentences that perpetuate racial disparities."); Fed. Defender Comments on the U.S. Sent'g Comm's 2023-2024 Proposed Priorities, at 23 (May 24, 2023) (encouraging the Commission "to deemphasize criminal history to make the guidelines adhere more closely to the parsimony principle."); Fed. Defender Comments on the U.S. Sent'g Comm's 2024-

history as reasons "for imposing non-government sponsored below range sentences."[60] Thankfully, the Commission heeded those calls in 2023 when it made data-driven changes to the criminal history rules through Amendment 821.[61]

Certainly, the Commission cannot singlehandedly eradicate the intractable plague of racial discrimination and disparity that persists at every stage of the criminal legal process. The problem is systemic, with actors at every level—from legislators to police and prosecutors to individual judges—bearing some responsibility. This amendment will do nothing to ameliorate the impact of the uneven number of traffic stops and *arrests* of Black and Brown drivers as compared with their white counterparts.[62] But it will mitigate the impact of racially-biased policing on individuals who are cited or served a summons, rather than arrested. It also aligns with the Commission's priority to reduce the costs of unnecessary incarceration.[63]

Finally, the proposed clarifying amendment will fix the unwarranted geographic disparity caused by the Seventh Circuit's misreading of the term "intervening arrest." Of course, one of the Commission's primary responsibilities is to establish policies that avoid unwarranted sentencing disparities.[64] A disparity based solely on the fortuity of where in the country one was cited or issued a summons is the quintessential "unwarranted" disparity.

2025 Proposed Priorities, at 12 (May 15, 2024) (encouraging the Commission to continue to revise the criminal history guidelines).

[60] USSG App. C, Amend. 742, Reason for Amendment (Nov. 1, 2010).

[61] *See id.* Amend. 821 (Nov. 1, 2023) (reducing or eliminating the impact of "status points" on the criminal history score, creating a two-level reduction for certain people with zero criminal history points, and adding criminal history points resulting from the simple possession of marijuana as an example of a basis for a downward departure under §4A1.3).

[62] Further, individuals who are cited rather than arrested will not benefit from this amendment unless their multiple sentences resulted from offenses in the same charging instrument or were imposed the same day. *See* §4A1.2(a)(2).

[63] *See* USSC, Notice of Final 2024-2025 Priorities (Aug. 2024). By providing a clear, commonsense definition of "intervening arrest," the amendment is also in line with the Commission's priority to simplify the Guidelines. *See id.*

[64] *See* 28 U.S.C. § 991(b)(1)(B).

C. Conclusion

Not only does the proposed definition of intervening arrest track the plain meaning of the word "arrest," it furthers important sentencing policy goals. We urge the Commission to adopt this proposed clarifying amendment.

Federal Public and Community Defenders
Comment on Simplification of Three-Step Process

(Proposal 4)

February 3, 2025

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Federal Public and Community Defenders explained last year that the Commission's previous proposal to eliminate departures and correctly reframe the Guideline's three-step process as a two-step process held "tremendous promise," although we raised "serious concerns" related to the proposal's execution.[1] With this year's rendition, Defenders are pleased to see that the execution has improved dramatically. In this comment we identify further improvements to better fulfill the proposal's goals. We believe the Commission can act on this proposal this amendment cycle and we encourage the Commission to do so.[2]

This year's simplification proposal consists of two broad changes to the Guidelines: (1) re-envisioned Chapter One, which recites the Commission's purpose and authority as well as the Guidelines' role vis-à-vis 18 U.S.C. § 3553(a); and (2) elimination of almost every departure, preserving only two, §§5K1.1 (substantial assistance) and 5K1.3 (fast track), which are converted from departures to bases for reduction in the Guideline range.

Defenders' comment proceeds in two parts. Section I discusses the proposed revisions to Chapter One of the Guidelines Manual, which Defenders fully support. Indeed, if the Commission is unable to fully eliminate departures this year, we suggest it at least implement the Chapter One revisions. Section II endorses removing departures from the Guidelines Manual, without adding last year's "Additional Specific Offense Characteristic (AOSC)" language. We reiterate our position that there are special considerations regarding §§2L1.2, 4A1.3, 5C1.1, and 5G1.3 and offer possible language for those. And we suggest other ways the Commission can ensure that courts understand the elimination of departures to be a post-*Booker* update, not an insistence on compliance with the Guidelines. This includes, among other suggestions, excising mandatory-sentencing language from the Guidelines Manual. An appendix lists each instance of mandatory language and suggests alternative phrasing.

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[1] Defenders' Comment on U.S. Sent'g Comm's 2024 Proposed Amendment–Simplification, at 1 (Feb. 22, 2024) ("Defenders' 2024 Simplification Comment"). Because of how often Defenders refer to our 2024 Simplification Comment, each additional citation to that document is hyperlinked.

[2] Given the significant overlap between last year's proposal and the substance of Defenders' responses, Defenders in this comment focus primarily on any new points, providing only brief summaries of points previously made, with links to our 2024 comment, which is attached as an appendix.

I. Proposed Chapter One faithfully adheres to the post-*Booker* sentencing scheme.

Defenders welcome the Commission's proposed rewrite of Chapter One and appreciate that the new language properly describes the present-day lay of the sentencing landscape.[3] To be sure, the proposed revisions draw their strength from faithfully reciting the law as it currently stands, but Defenders are optimistic that having this recitation in "the Manual" will ensure that judges faithfully follow established sentencing law.

Two aspects of the proposal are especially welcome. First, the revised Chapter One appropriately describes the importance of the Guidelines post-*Booker* without overstating their role. It continues to make clear that the post-*Booker* Guidelines are the "'lodestone' of sentencing."[4] Yet it also clarifies that calculating the applicable guideline range is the first step of a larger analysis, with § 3553(a) requiring courts to consider "additional factors" beyond the guideline range.[5]

Second, the revised Chapter One clarifies that the Commission and sentencing courts do not operate on identical statutory foundations. There's a meaningful difference between the factors the Commission was permitted to consider in crafting sentencing guidelines and the virtually unlimited array of considerations that a sentencing court may consider at sentencing.[6]

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[3] *See* Defenders' 2024 Simplification Comment, *supra* note 1, at 13–14 (noting that the current Chapter One's recitation of history and description of a "three step" sentencing process is outdated and incomplete). Defenders appreciate the Commission's decision to forego last year's "AOSCs" which led to this year's substantially improved Chapter One proposal. Including AOSCs in place of departures posed multiple problems, which Defenders and others detailed in last year's comments. By removing AOSCs—which were potentially in tension with, or duplicative of, § 3553(a)—the Commission has both avoided those concerns and simplified and streamlined the amendment.

[4] USSC, Proposed Amendments to the Sentencing Guidelines 23 (Dec. 19, 2024) (quoting *Peugh v. United States*, 569 U.S. 530 (2013)) ("USSC 2024–2025 Proposed Amendments").

[5] *See id.*

[6] *See, e.g., id.* at 18 ("The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court.").

If the Commission decides to again delay removing departures from the Manual this year, we encourage it to at least promulgate the revised Chapter One.[7] To be clear, Defenders are not encouraging the Commission to delay promulgating a Simplification amendment. Quite the opposite, Defenders encourage the Commission to make further refinements and promulgate the entire proposal this amendment cycle.

II. As paired with the revised Chapter One, Defenders continue to support deleting departures but encourage additional steps to ensure outcome-neutrality.

Defenders continue to support the Commission's proposal to remove departures from the Guidelines. We have long contended that departures "needlessly complicat[e]" sentencings by compelling judges "to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions."[8] For the reasons we explained last year, the time has come for the Commission to jettison departure language from the Guidelines Manual.[9]

As also explained last year, the Commission has the authority to eliminate departures notwithstanding that Congress has issued various directives over the years. Defenders refer the Commission to pages 18 through 24 of our 2024 comment for a detailed explanation of the Commission's authority to implement its proposal.[10] Therein Defenders offer that many directives do not require their corresponding departures in the first instance, and most others do not contain language requiring the

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[7] If the Commission were to promulgate only the Chapter One portion of its proposal, without entirely eliminating departures, it could still move away from the three-step process with just one change: replace the proposed new section §1B1.1(a)(9) with the text found in the current §1B1.1(b). That alteration would direct courts to consider departure provisions but would place that requirement as a subpart of the Step One guidelines calculation.

[8] Defenders' 2024 Simplification Comment, *supra* note 1, at 3 (quoting Statement of Alan Dubois & Nicole Kaplan on behalf of Fed. Defenders to the U.S. Sent'g Comm. on The Sentencing Reform Act of 1984: 25 years later, at 17 (Feb. 10, 2009)).

[9] *See id.* at 3–7. We also continue to support maintaining in modified form the provisions related to substantial assistance and fast track (§§5K1.1 and 5K3.1).

[10] *See id.* at 18–24.

corresponding Guidelines amendments remain in perpetuity. The Commission's organic statute makes clear beyond dispute that the Guidelines are to be an evolving and responsive concept, adjusting to changes in law (like *Booker* and its progeny), social science, and on-the-ground realities.[11] Defenders are unaware of any directive explicitly setting aside the organic statute's evolutionary default.

Also, as with last year, Defenders advocate for eliminating departures despite considerable discomfort and uncertainty about the real-world ramifications of this change. The Commission has been clear that it does not intend to alter sentencing outcomes, but rather to simplify the sentencing process and bring the Manual into conformity with what already happens in most courtrooms around the country and with what is required by *Booker* and its progeny.[12] However, there is no guarantee judges will read it this way.

While certainly relatively few judges in a handful of districts use departures as opposed to variances (outside of substantial-assistance and fast-track departures), for some judges departures represent the only way to achieve an at-all-individualized sentence. Defenders in districts with such judges expressed grave concerns that eliminating departures might increase sentences. Simply put, we do not want this theoretically outcome-neutral shift to inadvertently push sentences higher.

We hope the Chapter One revisions will help these judges understand that a variance under § 3553(a) could be appropriate in a case where they might have previously departed under the Guidelines Manual. But we lack any assurance this will be the case.[13] Last year, we identified four places in the Manual where eliminating departures seemed likely to substantively and systematically alter sentencing outcomes. We reiterate this concern below

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[11] *See, e.g.,* 28 U.S.C. § 994(o) (directing the Commission to "review and revise" the Guidelines considering input from various stakeholders).

[12] *See* USSC 2024–2025 Proposed Amendments, *supra* note 4, at 57–63 (describing the Proposal as addressing changes in practice and law and making no mention of an attempt to raise or lower sentences).

[13] Moreover, as we raised last year, issues with available data make it impossible to fully grasp how many judges rely almost exclusively on departures to achieve sentences "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). *See* Defenders' 2024 Simplification Comment, *supra* note 1, at 24; *see also id.* at 24–26 (explaining how ending departures may improve Commission data quality).

and offer suggestions. Additionally, we suggest additional changes to clearly send the message to courts that eliminating departures is intended to reflect existing federal law, not insist on compliance with guideline ranges.

A. To avoid impacting sentencing outcomes, the Commission should preserve underlying concepts related to departures at §§2L1.2, 4A1.3, 5C1.1, and 5G1.3.

For the same reasons Defenders provided last year, we still urge the Commission to preserve information in several additional provisions—§2L1.2,[14] §4A1.3,[15] §5C1.1,[16] and §5G1.3,[17] without using departure language. These provisions require special attention: §§2L1.2 and 4A1.3 are more heavily relied upon than other departures by judges to achieve fair sentences; §5C1.1 is mandated by § 994(j) for certain people with no criminal history points; and §5G1.3 provides needed guidance on the complex and often confusing question of how to account for related terms of imprisonment.[18]

For the provisions in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3 that Defenders proposed preserving last year, we refer the Commission again to our comment last year and explanation.[19] We aren't sure why the Commission chose not to take special action related to these provisions in this year's proposal. But it is possible that Commissioners agree with the substance of our concerns but did not feel comfortable with language specifically

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[14] *See* *id.* at 34–36.

[15] *See* *id.* at 37–39.

[16] *See* *id.* at 40–42.

[17] *See* *id.* at 42–44.

[18] There is one more departure provision Defenders wish to bring to the Commission's attention, albeit not for special treatment in this year's amendment cycle. Last year, while deferring on the prior simplification proposal, the Commission promulgated an amended age policy statement. *See* §5H1.1. That policy statement, unanimously promulgated following extensive comment and testimony, discusses important information regarding a person's youthfulness at both the time of prior convictions and the time of the federal conviction. Given the work and care put into that provision last year, now that it is set to be deleted along with other departures, Defenders encourage the Commission to turn its recent age-related work into a stand-alone report to which judges and advocates may turn.

[19] *See supra* notes 14–17.

recommending courts consider a sentence above or below the guideline range in these situations. Hoping this is true, we suggest the Commission simply maintain the information in the current departure provisions, without referring to departures *or* variances—as illustrated below.[20]

1. §2L1.2

Applying this suggestion to § 2L1.2, Application Note 6 would read:

> *6. ~~Departure Based on~~ Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. ~~In such a case, a departure may be warranted.~~*

And here is how Application Note 7 would read:

> *7. ~~Departure Based on~~ Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, and the time served is not covered by an adjustment under §5G1.3(b) ~~and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case~~, the court may decide to consider whether ~~a departure is appropriate~~ to ~~reflect~~ account for all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. ~~Any such~~ ~~departure~~ should be fashioned to*

[20] Should the Commission adopt the amendment without preserving in the Manual itself the concepts in these selected departure provisions—which would best ensure that judges, probation officers, and practitioners know this information—the Commission should at least make the information readily accessible, either online or in an appendix.

achieve a reasonable punishment for the instant offense.

2. §4A1.3

As a substitute for §4A1.3, rather than maintaining the departure section, we suggest adding a third paragraph to Chapter Four, Part A's Introductory Commentary, stating:

> The Commission notes that these Guidelines are employed in 94 judicial districts, each of which see differing patterns of criminal history practices due to the diversity of laws and practices in the nation's 50 states, territories, tribal jurisdictions, municipalities, and the federal courts. The criminal history scoring system represents the Commission's best attempt to create a single scoring scheme for this diverse array of criminal history sources. However, cases will arise in which a defendant's criminal history category substantially under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

3. §5C1.1 Application Note 10(B)

Application Note 10(B) of Section 5C1.1 is unique among departure provisions because it implements a directive contained within the Commission's organic statute. While Defenders are confident about the Commission's authority to eventually move on from one-off directive-induced provisions, directives in the organic statute plainly remain in effect indefinitely. While Defenders suggest new language for each of the identified provisions this year without referring to a sentence outside the guidelines range, Defenders do not believe such an option exists to preserve the value of Application Note 10(B), consistent with § 994(j). As such, Defenders continue to propose the Note be kept and amended as follows:

> (B) ~~Departure for~~ Cases Where the Applicable Guideline Range Overstates the Severity of the Offense.—~~A departure, including a departure to~~ A sentence below the guideline range, including a sentence other than a

> sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

4. §5G1.3

Defenders again suggest the Commission should revisit §5G1.3 in its entirety in the near future, given how frequently courts and practitioners are confused by its subject matter. Meanwhile, we propose the Commission amend Application Note 4(E) to read:

> ~~**Downward Departure**~~ **Certain Extraordinary Cases.**—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, ~~in an~~ extraordinary cases may arise involving a~~n~~ undischarged term of imprisonment under subsection (d) ~~it may be appropriate for the court to downwardly depart~~. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a court may decide to consider how ~~a downward departure may be warranted~~ to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. ~~Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.~~
>
> To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the

> Commission recommends that the court clearly state ~~any downward departure under this application note be clearly stated~~ on the Judgment in a Criminal Case Order that the adjustment is made as a variance ~~as a downward departure pursuant to §5G1.3(d)~~, rather than as a credit for time served.

B. The Commission should revise the new introduction to Chapter Five by adding language about departures' historical role and should emphasize its goal of neutrality in the amendment's RFA and at trainings.

Shifting from specific guidelines to more general principles that might impact the outcome-neutrality of this set of amendments, Defenders think that clear language in Chapter Five is key. The Commission's new introduction to Chapter Five should: (1) briefly explain the former departure provisions and why they were removed, (2) unequivocally express that the Commission intended to effect no change in sentencing outcomes by deleting departures, and (3) explicitly recognize courts' authority to vary from the guideline range both for reasons that previously justified departures and otherwise. This new language would help ensure that judges—especially new judges—understand their authority to sentence outside the guideline range when warranted by § 3553(a) factors. And including this language at the beginning of Chapter Five makes sense: at this point, judges have already calculated the offense level and criminal history category under Chapters 2, 3, and 4. All that's left is to review the sentencing table to determine the sentencing range before moving to the holistic review mandated by § 3553(a).

This is the sort of language we envision:

> From the Guidelines' inception until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 244 (2005), the Guidelines were mandatory. The Guidelines provided a limited number of "departures," many of which were located at Parts H and K of this Chapter. Those departure provisions permitted courts to impose sentences outside of the otherwise-mandatory guideline range based upon certain, limited, Commission-established criteria. The Commission promulgated those

> departures consistent with 28 U.S.C. § 994's constraints, and as directed by certain subsequent legislation, both of which applied only to the Commission and not sentencing courts.
>
> Following *Booker*, courts are permitted to vary from the applicable guideline range, both for reasons related to the operation of the applicable guideline provisions and individual characteristics unrelated to the guideline provisions. In years since *Booker*, variances became the norm and departure use dramatically decreased.
>
> In 2025, the Commission amended the Guidelines Manual to remove departures. In so doing, the Commission sought both to bring the Manual in line with the post-*Booker* legal landscape and to better reflect sentencing practices nationally. The Commission intended and framed the 2025 Amendment to be outcome neutral, understanding that judges who would have relied upon departures would have the authority to vary from the applicable guideline range as appropriate under 18 U.S.C. § 3553(a).

Defenders are optimistic that language such as this would decrease the likelihood of departure-only judges responding to this amendment by imposing higher sentences based solely on removing departures from the Guidelines Manual.

Second, and additionally, the Commission's Reason for Amendment (RFA) should make clear that the Commission intends the amendment to be outcome neutral. This language, in concert with Defenders' proposed Chapter Five introduction, provides a proverbial "belt and suspenders" to reinforce that the Commission is updating the Manual in light of current law, not insisting on greater compliance with guideline ranges.[21]

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[21] Including information regarding the Commission's intent within the Guidelines' text, not only in the RFA, is particularly important given the Third Circuit's holding that courts need not defer to the Manual's commentary, *see, e.g., United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), and presumably would not defer to RFAs.

Third, the Commission should ensure that its trainings for judges (both new and veteran), probation officers, and practitioners, highlight the outcome-neutral reason that departures were eliminated while also highlighting the courts' authority to vary from guideline ranges—that is, the content of this Chapter Five introduction and the RFA.

C. The Commission should strike language that conflicts with the Commission's revised Chapter One and *Booker*.

Finally, in reviewing the Proposal, Defenders identified additional language in tension with the post-*Booker* advisory guidelines system—that is, language suggesting certain Commission guidance is mandatory. For example, §5B1.1 provides that the guidelines "do not authorize" probation for individuals whose guideline range falls within Zones C or D. Post-*Booker*, the Guidelines do not "authorize" specific increased sentences; they only advise in favor of (*i.e.* recommend) them. Thus, that provision should instead say the Guidelines "do not recommend" probation.

While *Booker* plainly renders such provisions advisory, replacing language that mandates a specific sentence with permissive language is consistent with the rest of the Proposal's post-*Booker* update. Defenders sought to identify each such instance of this language, as well as to propose alternative language, in the attached Appendix A.

III. Conclusion

Defenders are encouraged by the Commission's improved and streamlined approach to simplifying the Guidelines Manual—an approach that is more faithful to the amendment's purpose and to the statutory sentencing framework than last year's Simplification proposal. Like last year, we have endeavored to offer content-neutral suggestions to improve upon this version in a manner that is hopefully acceptable to all stakeholders. Defenders look forward to discussing this proposal, and our ideas to improve upon it, during the upcoming hearing.

APPENDIX

List of mandatory provisions in the Guidelines Manual and Defenders' proposed alternative language

Provision	**Current Text** **(text-at-issue in bold)**	**Defenders' Proposed Text** **(proposed revision in bold)**
§2K2.4 App. N. 3	"In a case involving multiple counts, the sentence **shall be imposed** according to the rules in subsection (e) of §5G1.2 . . . ."	"In a case involving multiple counts, **it is recommended that** the sentence **be imposed** according to the rules in subsection (e) of §5G1.2 . . . ."
§4B1.1 App. N. 4	Same as above	Same as above
Chapter Five, Introductory Commentary	"For certain categories of offenses and offenders, the guidelines **permit the court to impose** either imprisonment . . . ."	"For example, for certain categories of offenses and offenders, the guidelines **recommend that the court** impose either imprisonment . . . ."
§5B1.1(a)	"Subject to the statutory restrictions in subsection (b) below, a sentence of probation is **authorized** if . . . ."	"Subject to the statutory restrictions in subsection (b) below, a sentence of probation is **recommended** if . . . ."
§5B1.1(b)	"A sentence of probation **may not be imposed** in the event . . . ."	"A sentence of probation is **not recommended** in the event . . . ."
§5B1.1 App. N. 1	" . . . the guidelines **authorize**, but do not require, a sentence of probation . . . ."	" . . . the guidelines **recommendation includes**, but do**es** not require . . . ."

Provision	Current Text (text-at-issue in bold)	Defenders' Proposed Text (proposed revision in bold)
§5B1.1 App. N. 2	"Where the applicable guideline range is in Zone C or D . . . the guidelines do not **authorize** a sentence of probation."	"When the applicable guideline range is in Zone C or D . . . the guidelines do not **recommend** a sentence of imprisonment."
§5B1.1 Background	"The court **may** sentence a defendant to a term of probation . . . unless . . . a term of imprisonment is **required** under §5C1.1 . . . . Section 5B1.1(a)(2) . . . under which a 'straight' probationary term is **authorized** and those where probation is **prohibited.**"	"The court may sentence impose term of probation **a sentence consistent with the guidelines** unless . . . a term of imprisonment is **recommended** under §5C1.1 . . . . Section 5B1.1(a)(2) . . . under which a 'straight' probationary term is **consistent with the guidelines' recommendation** and those where probation is **not recommended**."
§5B1.2(a)	"When probation is imposed, the term **shall** be:"	"When probation is imposed the term **should** be:"
§5C1.1(b)	"If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment **is not required**, . . . "	"If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required **to conform with the guidelines' recommendation**, . . . "

Provision	Current Text **(text-at-issue in bold)**	Defenders' Proposed Text **(proposed revision in bold)**
§5C1.1(f)	"If the applicable guideline range is in Zone D . . . the minimum term **shall** be satisfied by a sentence of imprisonment."	"If the applicable guideline range is in Zone D . . . the minimum term **should** be satisfied by a sentence of imprisonment."
§5C1.1 App. N. 2	"the court **is not required to impose a sentence of imprisonment** . . . ."	"**a sentence** is not required to **include** imprisonment **in order to conform with the guidelines' recommendation**, . . ."
§5C1.1 App. N. 3	" . . . the court **has three options**:"	"the court has three options **to conform to the guidelines recommendation:**"
§5C1.1 App. N. 4	"the court **has two options**"	"the court has two options **to conform to the guidelines recommendation:**"
§5C1.1 App. N. 4	"The preceding example illustrates a sentence that satisfies the minimum term of imprisonment **required by** the guideline range."	"The preceding example illustrates a sentence that satisfies the minimum term of imprisonment **recommended by** the guideline range."
§5C1.1 App. N. 8 (as renumbered in the Proposal)	"where the applicable guideline range is in Zone D . . . the minimum term **must be satisfied by** a sentence of imprisonment . . . ."	"where the applicable guideline range is in Zone D . . . **the guidelines recommend only** a sentence of imprisonment . . . ."

Provision	Current Text **(text-at-issue in bold)**	Defenders' Proposed Text **(proposed revision in bold)**
§5D1.1(a)(2)	"The court **shall order** a term of supervised release . . . when a sentence of imprisonment of more than one year is imposed."	"The court **should order** a term of supervised release . . . when a sentence of imprisonment of more than one year is imposed."
§5D1.1 App. N. 1	"Under subsection (a), the court **is required to** impose a term of supervised release . . . ."	"Under subsection (a) the court **should** impose a term of supervised release . . . ."
§5E1.2(a)	"The court **shall** impose a fine in all cases . . . ."	"The court **should** impose a fine in all cases . . . ."
§5G1.1(c)	"In any other case, the sentence **may be imposed** at any point within the applicable guideline range . . . ."	"In any other case, **the guidelines recommend a** sentence at any point within the applicable guideline range . . . ."
§5G1.1 Commentary	"For example . . . the sentence **required** by the guidelines under subsection (a) is 48 months . . . ."	"For example . . . the sentence **recommended** by the guidelines under sub-section (a) is 48 months . . . ."
§5G1.3(a)	" . . . the sentence for the instant offense **shall** be imposed to run consecutively . . . ."	"the sentence for the instant offense **should** be imposed to run consecutively . . . ."
§5G1.3 App. N. 1	"Under subsection (a), the court **shall** impose . . . ."	"Under subsection (a) the court **should** impose . . . ."

Provision	**Current Text** **(text-at-issue in bold)**	**Defenders' Proposed Text** **(proposed revision in bold)**
§5G1.3 App. N. 4(E)	"subsection (d) does not **authorize** . . . ."	"subsection (d) does not **recommend** . . . ."
§7B1.3(a)(1)	" . . . the court **shall** revoke probation or supervised release."	"the court **should** revoke probation or supervised release."
§7B1.3(d)	"at the time of revocation **shall** be ordered . . . ."	"at the time of revocation **should** be ordered . . . ."
§7B1.3(e)	" . . . it **shall** increase the term of imprisonment . . . ."	"it **should** increase the term of imprisonment . . . ."
§7B1.3(f)	" . . . **shall** be ordered to be served consecutively . . . ."	" . . . **should** be ordered to be served consecutively . . . ."
§7B1.4 App. N. 4	" . . . **shall** run consecutively . . . ."	" . . . **should** run consecutively . . . ."
§7B1.5(a)	" . . . no credit **shall** be given . . . ."	" . . . no credit **should** be given . . . ."
§7B1.5(b)	Same as above	Same as above
§7B1.5(c)	Same as above	Same as above

PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 3, 2025

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, December 19, 2024

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) submits these comments to the Commission's proposed amendments regarding: (1) the career offender guideline and the categorical approach; (2) the application of §2K2.1 to machine gun conversion devices; (3) a *mens rea* requirement for the enhancement under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers; (4) a circuit split as to when the enhancement for physical restraint under §2B3.1(b)(4)(B) applies; (5) a circuit split on whether a traffic stop is an intervening arrest when calculating criminal history under §4A1.2(a)(2); and (6) simplifying the guidelines by removing most departure provisions.

I. The Career Offender Guideline and the Categorical Approach

Over the past year, the Commission has sought input on revising the career offender guideline, and the PAG has appreciated the opportunity to provide feedback during roundtable discussions with Commission staff and other stakeholders. The Commission has proposed significant revisions to the definitions contained in the career offender guideline and the approach employed to determine whether a prior conviction qualifies as a predicate offense. The PAG addresses: (1) the proposed definition of controlled substance offense; (2) the proposed conduct-based approach and definition of crime of violence; and (3) the use of sentence length to limit the convictions that can be relied upon as predicate offenses.

A. Revising the Definition of Controlled Substance Offense

The PAG supports revising the definition of controlled substance offense to exclude state drug offenses and limiting its scope to specific federal drug statutes. First, such a revision is consistent with the text of 28 U.S.C. § 994. Section 994(h) only requires a sentence near the statutory maximum if a defendant has two or more prior felony convictions for specific enumerated offenses under the federal Controlled Substances Act, the Controlled Substances Import and Export Act, and provisions governing the Maritime Drug Law Enforcement Act.[1] Congress's mandate does not contemplate applying the career offender guideline to those with prior state drug convictions. Thus, the proposed amendment revising the definition of controlled substance offense is consistent with the text of § 994(h).

Second, Congress's decision to only include federal drug trafficking priors in § 994(h) is logical as federal drug convictions typically involve far more serious conduct than state drug convictions. Federal drug prosecutions tend to involve a much higher quantity of controlled substances, larger amounts of money being transacted, and large drug trafficking organizations rather than individuals. Federal drug prosecutions often target large-scale suppliers. State prosecutions, on the other hand, often target individual dealers standing on the corner (or sitting in a car) and selling personal use amounts directly to consumers. As state convictions often reflect less serious conduct, it makes sense to amend the career offender guideline to target those with prior federal drug trafficking convictions rather than street level dealers.

Third, the proposed revision is consistent with the Commission's 2016 study recognizing that the career offender guideline is inappropriate for drug trafficking only offenders: "Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive."[2] Defendants categorized as career offenders based solely on drug trafficking offenses had lower recidivism rates than other career offenders — indeed drug trafficking only career offenders had relatively similar recidivism rates as non-career offenders.[3] The Commission's 2016 report also found that the average sentence imposed on career offenders who only had drug trafficking offenses was well-below the career offender guideline range, and approximated what the non-career offender guideline range would have been.[4] By reducing the number of defendants subject to the career offender guideline, the proposed revision more accurately reflects the empirical recidivism and sentencing data documented in the Commission's 2016 report.

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[1] *See* 21 U.S.C. § 841; 21 U.S.C. §§ 952(a), 955 & 959; 46 U.S.C. § 70501 *et seq*.

[2] *See* U.S.S.C., *Report to the Congress: Career Offender Sentencing Enhancements* at 3 (2016) ("2016 Career Offender Report"), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[3] *See id*. at 40-41.

[4] *See id*. at 3.

Fourth, data suggest that the proposed revision of the definition of controlled substance offense would reduce, though not eliminate, racial disparity. The Department of Justice has stated that career offender guidelines can result in sentences that are lengthy and produce "a clear racial disparity in application."[5] This disparity is reflected in the data from Fiscal Year 2022 when 57.7% of defendants subjected to the career offender enhancement were Black while only 25.2% of all federally sentenced defendants were Black.[6] Excluding state drug prior convictions from the career offender guideline while including some actual-conduct crimes of violence reduces the number of Black defendants subject to the enhancement to 47.7%.[7] This data suggests that redefining controlled substance offense under the career offender guideline to include only federal drug trafficking offenses would reduce, though not eliminate, racial disparity.

The proposed revision to the definition of controlled substance offense includes federal statutes that are not specifically listed in § 944(h). The PAG urges the Commission to define controlled substance offense using only the specific statutes listed in § 994(h). This is consistent with the statutory text. In addition, the other statutes listed are not drug trafficking offenses, such as the possession of a tablet making machine under 21 U.S.C. § 843(a)(6), or include behavior that can be prosecuted under 21 U.S.C. § 841 (such as 21 U.S.C. §§ 856 and 860 and 18 U.S.C. § 924(c)). The offenses enumerated by Congress cover all of this conduct, so there is no need for the guideline definition to include any statute not listed in § 994(h).

In sum, the PAG supports the Commission's proposed amendment to the definition of controlled substance offense under §4B1.2, limiting prior drug convictions to those offenses specified in § 994(h).

B. Revising the Definition of Crime of Violence

1. *The Continued Importance of an Elements-Based Approach*

The PAG understands the concerns of various stakeholders regarding the difficulties of using an elements-based approach, the categorical approach and the modified categorical approach, to determine whether a prior conviction constitutes a crime of violence. Despite these difficulties in application, the reasons for an elements-based approach have been repeatedly endorsed by the Supreme Court:

> [A]n elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a

[5] *See* Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice to U.S.S.C. at 27 (Feb. 27. 2023), available at page 457 of public comment: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

[6] *See* U.S.S.C., *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background* at Slide 5 (Jan. 10, 2025), available at: https://www.ussc.gov/education/videos/2025-career-offender-data-briefing.

[7] *See id*. at Slide 23.

> defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to" — or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.[8]

As recently as last year, the Court again recognized that documents underlying prior convictions, including *Shepard* documents, can be "prone to error" when it comes to non-essential, non-elemental, facts.[9]

The need for an elements-based approach applies not just to recidivist statutes like the Armed Career Criminal Act, but also to the career offender guideline. While the Supreme Court has not directly held that the categorical approach must apply to sentencing guidelines, every Circuit Court of Appeals has applied the categorical approach to the guidelines.[10] Going beyond the elements necessary for a prior conviction to look at the way a prior offense was committed invites uncertainty and unreliability in how the guideline is applied. The actual conduct underlying a prior offense is often not clear from the documents that are available for the court's review. Moreover, documents, such as criminal complaints, affidavits supporting arrest warrants, or plea memoranda, often reflect only the police or prosecution's version of how the underlying offense occurred. For strategic reasons or in the context of plea bargaining, a defendant and counsel may choose not to contest alleged facts that simply are immaterial to the elements of the offense or the ultimate outcome of the case. Going beyond the elements of the offense would allow a sentencing court to rely on such unsound alleged facts.

For all of the reasons described above, the PAG recommends that the Commission maintain an elements-based approach (the categorical approach) in applying the career offender guideline. The PAG also offers the following comments regarding the proposed amendment.

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[8] *Mathis v. United States*, 579 U.S. 500, 512 (2016) (quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)); *see also Taylor v. United States*, 495 U.S. 575, 601-602 (1990).

[9] *See Erlinger v. United States*, 602 U.S. 821, 841 (2024) ("The risk of error may be especially grave when it comes to facts recounted in *Shepard* documents on which adversarial testing was unnecessary in the prior proceeding.") (citation and quotation marks omitted).

[10] *See, e.g., United States v. Rabb*, 942 F.3d 1, 3 (1st Cir. 2019); *United States v. Scott*, 990 F.3d 94, 104 (2d Cir.) (en banc), *cert. denied*, 142 S. Ct. 397 (2021); *United States v. Bullock*, 970 F.3d 210, 214–15 (3d Cir. 2020); *United States v. Carthorne*, 726 F.3d 503, 511 (4th Cir. 2013); *United States v. Zuniga*, 860 F.3d 276, 284 (5th Cir. 2017); *United States v. Camp,* 903 F.3d 594, 599 (6th Cir. 2018); *Adams v. United States*, 911 F.3d 397, 405 (7th Cir. 2018); *United States v. Brown*, 1 F.4th 617, 619–20 (8th Cir. 2021); *United States v. Barragan*, 871 F.3d 689, 713–14 (9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 535 (10th Cir. 2017); *United States v. Gandy*, 917 F.3d 1333, 1339 (11th Cir. 2019); *United States v. Sheffield*, 832 F.3d 296, 314 (D.C. Cir. 2016).

2. *An Alternative Definition for Crime of Violence*

The Commission proposes a fully conduct-based approach and defines a crime of violence far more expansively than the current definition.[11] The proposed definition appears to include any prior conviction, even a conviction for a clearly non-violent offense such as fraud, retail theft, criminal trespass or criminal mischief, in which any of the defendant's conduct, not just the conduct underlying the offense of conviction, involved the use of force or any of the other conduct described in proposed §4B1.2(b)(1). Such a definition, completely divorced from the actual statute of conviction, would make every prior conviction a potential predicate offense requiring an investigation into the underlying conduct alleged and how it was described in the prior court proceeding. With this approach, a defendant charged with robbery but convicted only of retail theft can be subject to the enhancement. Similarly, a defendant charged with bank robbery but convicted only of fraud or bad checks can be subject to the enhancement. The proposed definition is over-inclusive and makes it impossible for defense counsel to advise clients on their potential sentencing exposure. To address these concerns, the PAG offers the following suggestions.

a. Combining an Elements-Based Approach with a Conduct-Based Approach

In defining crime of violence, the Commission should continue to rely on the elements-based definition in the current §4B1.2(a)(1) ("the elements clause"). There has been significant litigation settling what offenses are covered by that definition and counsel, probation officers and judges are accustomed to the application of the elements clause. Under the current proposed amendment, counsel, probation officers, and judges will still have to employ the categorical approach when applying other guidelines that use the terms crime of violence and controlled substance offense. Thus, it appears that the motivation for the proposed amendment is not so much the administrative difficulty of using the categorical and modified categorical approaches, but rather, to capture the anomalous case where the defendant's actual conduct underlying a prior conviction clearly involved the use of physical force but the statute of conviction did not require the use of physical force. The Commission could capture these cases by expanding the definition of the current enumerated offense clause, §4B1.2(a)(2), to include offenses in which the defendant's *actual conduct underlying the conviction* involves the use of force and would satisfy the elements or means of any of the enumerated offenses. This maintains the categorical approach in applying the elements clause, but allows for a conduct-based approach in applying the enumerated offense clause.

Take, for example, a defendant with a prior conviction for robbery of a motor vehicle in Pennsylvania. The language of the statute itself does not require the use, attempted use, or

[11] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 5-7 (Dec. 19, 2024), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20241230_rf_proposed.pdf.

threatened use of physical force against the person of another.[12] Robbery of a motor vehicle in Pennsylvania also does not fit the generic definition of robbery. Under the alternative approach proposed in the paragraph above, however, a sentencing court could look to the actual conduct underlying a defendant's conviction of Pennsylvania robbery of a motor vehicle. If that conduct involved the use of force and met the elements of generic robbery, then it would qualify as a prior crime of violence for purposes of the career offender guideline.

The PAG believes that this approach will significantly limit the number of cases in which parties will have to investigate the conduct underlying prior convictions, while capturing the anomalous cases in which a defendant committed a violent offense akin to those listed under the enumerated offense clause, but which would be excluded under a pure categorical approach.

b. Relying Solely on the Conduct Underlying the Offense of Conviction

The current proposed amendment imports the definition of relevant conduct from §1B1.3 to define the conduct that could be considered in determining whether a prior offense is a crime of violence. Determining such conduct on a historical basis, sometimes looking back over a decade, presents administrative challenges. Conduct that is irrelevant to proving the elements or means of the crime of conviction is not subject to challenge or testing by the parties. The police and/or prosecution may include allegations of such conduct in their charging document and the accuracy of these allegations is unlikely to be tested during the litigation of the case simply because they are not relevant to the charge of conviction. The only conduct that should be considered for determining whether a prior conviction constitutes a crime of violence is the conduct that underlies the offense of conviction – that is, the conduct that serves as the basis for the elements or the means of completing the prior offense of conviction.

c. Excluding the Charging Document as a Source of Information

Given the inaccuracies contained in charging documents, the PAG believes that charging documents alone should not be used to establish the conduct underlying a prior conviction. The allegations in the charging document can be based solely on the statement of a single witness without any assessment of that witness's credibility or reliability. At the time that the charging document is filed, the defense has had no opportunity to challenge the allegations in the charging document. Out of all sources of information listed in proposed §4B1.2(b)(4), the charging document is the least reliable. While the charging document may help inform what specific subsection of a divisible offense a defendant was previously charged with when using the modified categorical approach, the allegations contained within the charging document cannot be considered reliable for purposes of a conduct-based approach. For all the reasons described by the Supreme Court in *Mathis*, *Descamps*, *Taylor*, and *Erlinger*, the Commission should not permit the prosecution to rely on a charging document alone to establish a prima facie case that a prior conviction constituted a crime of violence.

[12] The offense is defined as: "[a] person commits a felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle." 18 Pa. Cons. Stat. § 3702(a).

d. Excluding Inchoate Offenses

The PAG urges the Commission to exclude inchoate offenses, including conspiracy, attempt, and aiding and abetting, from the definition of crime of violence. These inchoate offenses often involve no violence at all on the part of the defendant. A conspiracy offense is based on an agreement only and does not require any actual violence.[13] An attempt is based on a substantial step only and the substantial step does not have to involve violence or the use of force.[14] And aiding and abetting can occur after the violence has already been completed.[15]

Inchoate offenses should not be included in the definition of crime of violence because they are inherently less serious than the completed offense and reflect a lower level of harm than the related substantive offense.[16] Under the common law, all conspiracy offenses were treated as *misdemeanors* in recognition of the fact that an agreement to commit an offense is fundamentally different than committing the offense itself.[17] Recognizing that inchoate offenses should be treated more leniently than substantive offenses, the North Carolina General Assembly directs that attempts and conspiracies are to be punished "one class lower than the felony [the defendant] conspired [or attempted] to commit."[18] Similarly, someone in North Carolina who

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[13] *See United States v. Dennis*, 826 F.3d 683, 689 (3d Cir. 2016) (defendant convicted of conspiracy to commit robbery in a reverse stash house sting where the defendant participated in a walk-through and rehearsal of a robbery but never actually committed a robbery or used force against any individual); *see also United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 828 (2024) (holding that inchoate offenses like conspiracy are included in the definition of controlled substance offense).

[14] *See United States v. Williams*, 531 Fed.App'x 270, 271-72 (3d Cir. July 19, 2013) (defendant convicted of attempted Hobbs Act robbery by recruiting and meeting with others to plan a robbery, driving to the location of the planned robbery, and then expressing frustration when the robbery was called off by others).

[15] *See United States v. Troupe*, No. 2:22-CR-18-3 (D. Vt.) (defendant who drove others to scene of robbery where drug dealer was shot and killed and who drove away from the scene was convicted of aiding and abetting the use of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c))).

[16] *See United States v. Robinson*, 547 F.3d 632, 638-39 (6th Cir. 2008) ("conspiracy is an inchoate offense that needs no substantive offense for its completion" and culpability for conspiracy must be distinguished "from culpability for the substantive offenses of co-conspirators"); *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) ("An attempt to commit a crime . . . is recognized as a crime distinct from the crime intended by the attempt"); *United States v. Trevino*, 720 F.2d 395, 399 (5th Cir. 1983) ("culpability [for an inchoate offense] is based on a defendant's intent rather than on the consummation of the underlying offense").

[17] *See* Wayne R. LaFave, 2 Subst. Crim. L., Ch. 12, § 12.4(d) (3d ed. 2017).

[18] *See* N.C. Gen. Stat. Ann. §§ 14-2.4(a) & 14-2.5; *see also* Ohio Rev. Code Ann. § 2923.01(J)(2) (punishing conspiracy as "[a] felony of the next lesser degree than the most serious offense that is the object of the conspiracy" for felonies excluding murder, aggravated murder or an offense for which the maximum penalty is life imprisonment).

solicits another to commit a felony or serves as an accessory after the fact to such a felony is punished two classes lower than one who commits the corresponding substantive felony.[19] Because inchoate offenses are inherently less serious than the substantive offense, the PAG proposes that they be excluded from the definition of crime of violence.

The current proposal, which is completely conduct-based, appears to require a defendant to personally engage in the use of force in order for a prior conviction for an inchoate offense to be included as a crime of violence.[20] Yet, by including relevant conduct, the current proposal then expands crime of violence to include inchoate offenses in which the use of force may have been planned or "counseled" but never committed at all or not committed by the defendant.[21] In order to avoid capturing defendants who never personally committed the use of force, or in which no force was ever actually used, inchoate offenses should not be included in the definition of crime of violence.

C. Restrict Qualifying Prior Convictions Based on Sentence Length

The PAG supports the Commission's proposal to limit prior convictions based on sentence length. The career offender guideline, which results in sentences close to the statutory maximum sentence, should only apply to those defendants who have the most serious prior convictions. Sentence length can be a proxy for the seriousness of a prior conviction. Thus, it is logical, both for controlled substance offenses and crimes of violence, to restrict the applicability of the career offender guideline based on the sentence length of the prior conviction.

Under § 994(h), the Commission maintains the authority to do this. The Commission currently defines "two or more prior felonies," as set forth in § 994(h), as "two prior felony convictions" in §4B1.2(c). Section 4B1.2(c), in turn, restricts the application of the career offender guideline to those prior convictions that are counted as separate sentences under §4A1.1. Thus, the Commission already exercises the authority to count only prior convictions that are within a specific time period and are counted as separate sentences. Restricting application of the career offender guideline to cases where a defendant has prior convictions in which significant sentences were imposed is a similar and permissible exercise of the Commission's authority.

Of the options presented on how to limit prior convictions based on sentence length, the PAG recommends the sentence-served approach in Option 3A. Given the differences in sentencing practice among the states, a sentence-served approach is the most accurate proxy for the seriousness of the prior offense. In some jurisdictions that have parole and require a sentencing judge to impose a minimum and maximum term when imposing a term of imprisonment, the judge may impose a sentence of 2-23 months' imprisonment and grant immediate parole at 2 months, thus leaving the defendant to serve 21 months on parole. In a jurisdiction without parole, that exact same sentence would be imposed as 2 months of imprisonment followed by 21 months of probation. These two sentences are the same sentence – the defendant serves two

[19] *See* N.C. Gen. Stat. Ann. §§ 14-2.6 & 14-7.

[20] *See* §4B1.2(b)(2), Proposed Amendments at 6.

[21] *See* §4B1.2(b)(3), Proposed Amendments at 6.

months in prison and serves 21 months on supervision in the community. In the first example, however, the defendant would receive three criminal history points, while in the second example the defendant would only receive two criminal history points. To avoid such disparities based solely on the vagaries of how different states impose their sentences, the PAG believes that it would be appropriate to limit prior convictions based on the sentence actually served.[22]

Congress has recognized that sentence-served rather than sentence-imposed more accurately reflects the seriousness of a prior offense. In the First Step Act, Congress defined a prior "serious drug felony" and "serious violent felony," which trigger recidivist mandatory minimum sentencing provisions, in part as a prior offense for which the defendant "served a term of imprisonment of more than 12 months."[23] Thus, Congress contemplated that it is more appropriate to use sentence-served rather than sentence-imposed when determining when to increase a sentence based on prior criminal history.

Further, relying on sentence-served rather than sentence-imposed would not create an administrative challenge. The sentence served is a regular calculus in criminal cases due to the First Step Act. Current Presentence Investigation Reports ("PSRs"), in describing a defendant's criminal history, include the date a defendant was paroled on a prior conviction. This information, already included in the PSR and necessary to determine whether a prior conviction is counted under §4A1.2(e)(1), is the only information needed to determine how much time a defendant served on a sentence.

In sum, the PAG supports Option 3A, which relies on sentence-served to determine which prior convictions trigger application of the career offender guideline. If the Commission chooses to limit prior convictions by sentence-imposed rather than sentence-served, then the PAG urges the Commission to adopt a greater sentence cutoff, such as five years imposed rather than three years or one year, to avoid inadvertently sweeping in less serious prior convictions from states with different sentencing practices.

II. Machine Gun Conversion Devices under §2K2.1

The Commission proposes amending §2K2.1 to expand the definition of firearm to include machinegun conversion devices (MCDs). "MCDs are devices designed to convert weapons into fully automatic firearms."[24]

Currently, §2K2.1 uses two definitions of firearm depending on the subsection at issue. One definition comes from the Gun Control Act (GCA), 21 U.S.C. § 921(a)(3); the other from the National Firearms Act (NFA), 26 U.S.C. § 5845(a). The NFA definition of firearm includes MCDs, whereas the GCA definition does not. At the outset, the PAG notes that those subsections of §2K2.1 that address the most serious firearms offenses use the broader definition

[22] To that end, the PAG proposes amending the definition of "sentence of imprisonment" under §4A1.2(b)(1) to refer to sentence served rather than sentence imposed.

[23] *See* 21 U.S.C. §§ 802(58), (59).

[24] *See* Proposed Amendments at 34.

of firearm, while provisions involving less serious offenses employ the narrower definition under the GCA.

The proposed amendment has two options, and both achieve equivalent results. Option 1 defines firearm to include any firearm described in either the GCA or the NFA. Option 2 expands the definition of firearm to include firearms described in both the GCA and the NFA in specific subsections: §§2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c). In effect, both proposed options expand the definition of firearm so that all provisions of §2K2.1 will apply to firearms and MCDs.

The PAG recommends that the Commission not revise §2K2.1 at this time. The concerns that prompted this proposed amendment do not appear to be supported by sentencing data, and the PAG objects to treating an MCD, alone, like a firearm. Treating MCDs like firearms will exacerbate the inequality and proportionality issues already inherent in this guideline.

The primary reason animating this proposal is the "significant recent proliferation" of MCDs and the increased danger to bystanders and law enforcement that they pose.[25] The Commission's statistics, however, show that MCDs are involved in very few cases. In Fiscal Year 2023, of the 380 offenses sentenced under §2K2.1, only 4.5% involved MCDs. The vast majority – 95.5% of cases – did not.[26] And even if the number of cases involving MCDs has risen from 1% to 4.5% since Fiscal Year 2019,[27] these cases still only account for a small fraction of the overall number of cases sentenced pursuant to §2K2.1. The PAG recommends holding off on amending §2K2.1 until data shows that cases involving MCDs are a statistically significant percentage of the cases sentenced under this guideline.

Similarly, concerns about the proliferation of home-made MCDs, such as those made on 3-D printers, or of defendants possessing large numbers of MCDs, also lack support in the data. In Fiscal Year 2023, 92.1% of the MCDs involved in §2K2.1 cases were purchased by the defendant, not made using a 3-printer or other materials.[28] And in the majority of cases involving MCDs that were affixed to a firearm, 82.3%, the defendant possessed only one MCD.[29] These statistics undermine the popular narrative that the streets have been flooded by home-made devices that easily convert legal firearms into fully automatic machineguns. Because MCDs are an issue in a small fraction of cases, and an even smaller fraction of these

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[25] *See id*.

[26] U.S.S.C., *Public Data Briefing, Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices* at Slide 5 (Jan. 2025) ("MCD Data Briefing"), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf.

[27] *See id*. at Slide 6.

[28] *See id*. at Slide 18.

[29] *See id*. at Slide 11.

cases involve home-made MCDs or multiple MCDs, the PAG does not support expanding the guideline definition of firearm to include MCDs.

Further, as noted above, the current guideline already treats cases involving MCDs more seriously. The broader, NFA definition of firearm is applied to the most serious offenses described in the guideline: those which involve the use of semi-automatic weapons, or weapons specified by the NFA.[30] The remaining provisions of the guideline, including the specific offense characteristics and cross-reference, use the narrower definition of firearm found in the GCA.[31] Thus, the guideline already addresses concerns about the problems associated with MCDs, particularly when these devices are used in connection with the most serious offenses.

Counting an MCD as a firearm raises a host of fairness and proportionality concerns. It is simply unfair to treat a gun part, which is incapable of causing any harm by itself, the same as a fully functioning handgun, rifle, or shotgun. The MCD has no value as a piece of equipment unless it is attached to a firearm. For the same reasons, an MCD should not be counted as a firearm, for example under §§2K2.1(b)(1) & (b)(5)(C). What if a defendant possesses no actual firearms, but possesses multiple MCDs? It would be an absurd result to count each MCD as a firearm. And, where an MCD is attached to a firearm and used to commit an offense, the current guideline already addresses this by assigning an increased base offense level. The additional lethality of an MCD is factored into the guideline and additional specific offense characteristics are not necessary to account for the seriousness of an offense involving an MCD.

Finally, the PAG is concerned that these proposed amendments will exacerbate the documented disparate impact of this guideline.[32] Commission data shows that cases with MCDs involve younger and minority defendants. The average age of defendants who possessed MCDs was 28 years old, whereas the age of defendants sanctioned under §2K2.1 in offenses that did not involve MCDs was 35 years old. Further, a higher percentage of defendants of color are charged with and convicted of offenses involving MCDs than those charged or convicted of non-MCD cases.[33] Given this data, these proposed amendments seem likely to disproportionately impact younger and minority defendants.

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[30] *See* §§2K2.1(a)(1), (3), (4), & (5).

[31] *See generally* §§ 2K2.1(b)(1)-(9).

[32] *See, e.g.,* Statement of M. Carter Before the U.S.S.C. Public Hearing on Firearms Offenses at 5-11 (Mar. 7, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD1.pdf.

[33] Data shows that 81.5% of offenses involving MCDs were committed by black or Hispanic defendants, compared to 74.9% of offenses involving non-MCD offenses. Only 15.6% of MCD cases involve white defendants. *See* MCD Data Briefing at Slide 7.

For these reasons, the PAG recommends that the Commission not amend §2K2.1 at this time, in order to collect more data about the prevalence of MCD-involved offenses and to address concerns raised by treating MCDs, which are gun parts, as though they are firearms.

III. A Mens Rea Requirement for §2K2.1(b)(4)(B)

The PAG writes in support of Part B of the proposed amendment to §2K2.1(b)(4), which establishes a *mens rea* requirement for the enhancement for stolen firearms and firearms with modified serial numbers. This provides consistency across all sections of this enhancement, since §2K2.1(b)(4)(B)(ii) contains a knowledge requirement. There is no principled basis to draw a distinction between the subsections of this enhancement.

The PAG reasserts that *mens rea* is and should remain the underpinning for degrees of culpability in any advanced criminal justice system, as it has been historically since the foundation of our criminal code. The concept of *mens rea* is older than the country itself and its importance was highlighted by Blackstone, who stated: "Indeed, to make a complete crime, cognizable by human laws, there must be *both a will* and an act. … And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."[34] This is a cornerstone of our criminal justice system, which requires that the government prove a culpable criminal state of mind to commit an illegal act before a person's liberty can be taken away. Without the *mens rea* requirement, individuals are penalized when they do not have the knowledge, intent or culpable mental state with respect to the acts for which they are more harshly punished.

In practice, this enhancement allows a defendant's guidelines sentencing range to be enhanced even if the defendant had no knowledge that a firearm was stolen or had a modified serial number. There is no rationale for imposing harsher sentences on individuals who did not possess the knowledge that a firearm was stolen or contained a modified serial number, because there is no deterrent effect for a person who had no knowledge of these circumstances in the first place. The absence of a *mens rea* requirement here makes the enhancement a trap for the uninformed and offers zero deterrence.

The Commission asks for comment on whether evidentiary issues arise in proving *mens rea* in firearms cases. In the PAG's experience, the government has ample experience proving *mens rea* for similar issues in order to establish convictions for a number of firearms offenses.[35] And here, the government is only required to prove *mens rea* by a preponderance of the evidence, rather than the more exacting standard in a criminal prosecution. There is nothing inherently

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[34] William Blackstone, 4 Commentaries at 20-21 (1769) (emphasis supplied).

[35] *See, e.g.*, *United States v. Staples*, 511 U.S. 600, 619 (1994) (requiring that government prove that defendant knew that the weapon he possessed had characteristics that made it a machinegun in order to establish a conviction under 26 U.S.C. § 5861(d)); *United States v. Howard*, 214 F.3d 361, 363 (2d Cir. 2000) (requiring that government prove that defendant knew that firearm was stolen in order to establish conviction for unlawfully possessing a stolen firearm under 18 U.S.C. § 922(j)).

more challenging in proving *mens rea* for these enhancements than when the government prosecutes any other firearms offense.

For these reasons, the PAG urges the Commission to adopt a *mens rea* requirement for these enhancements.

IV. Physical Restraint under §2B3.1(b)(4)(B)

The robbery guideline applies a 2-level enhancement if any person was physically restrained.[36] The question before the Commission is whether a person is physically restrained when restricted from moving at gunpoint but not otherwise immobilized through physical measures. Because the term "restrained" is modified by the term "physically" in the guideline text, the Commission should clarify that the 2-level increase applies only in cases where a person's movement is restricted through physical contact. Thus, the PAG supports Option 2, which is consistent with the plain language of the robbery guideline as currently written.

A majority of the appellate courts that have addressed this issue have found that the 2-level enhancement applies only when the defendant restricts movement by physical contact. For example, the D.C. Circuit has recognized that "[t]he required restraint must, as the language [of the guideline] plainly recites, be physical."[37] This view is shared by six of the Circuit Courts of Appeal – the D.C. Circuit, plus the Second, Third, Fifth, Seventh and Ninth Circuits.[38]

The minority view, that "physical restraint" can be accomplished simply by pointing a gun, is fundamentally flawed because it writes out of the guideline the word "physically." As Judge Rosenbaum explained in a recent concurring opinion:

> Indeed, if the framers of the guideline wanted it to apply whenever "any person was... restrained" in either a physical or a non-physical way, they wouldn't have included the qualifier "physically." But the guideline contains the modifier "physically" before "restrained." That adverb has meaning. And by its plain meaning, "physically restrained" should not include psychologically or emotionally "restrained." After all, "[i]t is a cardinal principle of statutory

[36] *See* U.S.S.G. §2B3.1(b)(4)(B).

[37] *United States v. Drew,* 200 F.3d 871, 880 (D.C. Cir. 2000).

[38] *See United States v. Anglin,* 169 F.3d 154, 164-165 (2d Cir. 1999) (the plain meaning of the words of the guideline require that the restraint be physical); *United States v. Bell,* 947 F.3d 49, 57 (3d Cir. 2020) ("we should consider the plain meaning of the word 'physical' and therefore adopt the requirement that the restraint involve some physical aspect."); *United States v. Garcia,* 857 F.3d 708, 713 (5th Cir. 2017) ("'physical' is an adjective which modifies (and hence limits) the noun 'restraint'" such that physical restraint is required) (citation omitted); *United States v. Herman,* 930 F.3d 872, 875 (7th Cir. 2019) ("If the Guideline had been meant to apply to all restraints, it would have said so; instead it specifies *physical* restraints."); *United States v. Parker,* 241 F.3d 1114, 1118 (9th Cir. 2001) (to constitute physical restraint, "Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down.").

construction that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[39]

Permitting the enhancement to apply without actual physical restraint has at least three other deep flaws. First, if the enhancement is allowed to apply when a gun is pointed, then "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises."[40] The more logical interpretation is for the enhancement to apply only in the case of actual physical restraint because "physical bounding adds another dimension to the intimidation a victim of an armed robbery endures."[41]

Second, this approach is inconsistent with the guideline definition of "physically restrained," which specifies that the restraint must be forcible and further defines the term by reference to three examples: being tied, bound or locked up.[42] Although this list is not exhaustive, the examples it contains are "meaningful signposts."[43] Simply pointing a gun is "materially different from the Guideline examples" such that incorporating gun pointing into the list amounts to disregarding the list itself.[44] Pointing a gun is a common act that occurs during an armed robbery and surely, if the Commission had intended for that act to constitute physical restraint, it would have included gun pointing in the application note.

Third, this approach is unworkably complex. The Circuits that allow the enhancement based on gun pointing do not agree on when or how it should be applied. The First Circuit applies the enhancement when a gun is pointed "at close range."[45] The Sixth Circuit applies the enhancement when the gun pointing results in the victim being moved to a different place or lying down on the floor.[46] The Tenth Circuit applies the enhancement when the gun pointing is accompanied by verbal commands or standing in front of the exit door.[47] The Eleventh Circuit applies it when the gun is pointed in a way that allows the victim "no alternative but compliance."[48] Finally, the Fourth Circuit applies the enhancement "broadly" to encompass any

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[39] *United States v. Deleon,* 116 F.4th 1260, 1267 (11th Cir. 2024) (Rosenbaum, J., concurring) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (additional citation omitted).

[40] *Anglin,* 169 F.3d at 165.

[41] *Deleon,* 116 F.4th at 1267 (Rosenbaum, J., concurring).

[42] *See* §1B1.1 n.(1)(L).

[43] *Garcia,* 857 F.3d at 712.

[44] *See Anglin,* 169 F.3d at 164.

[45] *See United States v. Wallace,* 461 F.3d 15, 34 (1st Cir. 2006).

[46] *See United States v. Howell,* 17 F.4th 673, 692 (6th Cir. 2021).

[47] *See United States v. Miera,* 539 F.3d 1232, 1235 (10th Cir. 2008).

[48] *See Deleon,* 116 F.4th at 1263 (citation omitted).

instance when the defendant points a gun at a victim.[49] Sticking to the plain language of the guideline avoids this unnecessary complexity.

In the PAG's view, Option 2 is consistent with the language of the guideline, comports with the majority view, and avoids the significant application challenges presented by the minority of circuits.

The Commission also asks whether, in implementing Option 2, the robbery guideline itself should be amended or whether it would be preferable to only amend application note 1(L). The PAG believes that amending the application note rather than the guideline may be preferable because it would result in consistency among the various guideline provisions that call for an enhancement for physical restraint by reference to the application note.

V. Traffic Stops and Intervening Arrests

The Commission proposes an amendment to resolve a split among Circuit Courts of Appeal on what qualifies as an intervening arrest under the single sentence rule for calculating criminal history under §4A1.2(a)(2). The single sentence rule defines when multiple prior sentences are considered a single sentence, or separate sentences. When there is an intervening arrest, sentences are to be treated separately, even if the charges resulting in the sentences are contained in the same charging document or the sentences are imposed on the same day.

The guidelines do not define arrest. The majority of appellate courts have held that an intervening arrest requires a formal, custodial arrest, and that a traffic stop is not an intervening arrest.[50] One outlying circuit, however, has held that a traffic stop is an intervening arrest.[51]

The Commission's proposed amendment clarifies that an:

> "Intervening arrest," for purposes of this provision, requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.[52]

The PAG agrees with the Commission's narrowed definition of arrest. In the PAG's view, arrests should be limited to situations where an accused person is informed that s/he is under arrest and transported to the police station, or booked into jail. Thus, an intervening arrest

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[49] *See United States v. Dimache,* 665 F.3d 603, 607 (4th Cir. 2011).

[50] *See* Proposed Amendments at 54 (citing cases).

[51] *See United States v. Morgan*, 354 F.3d 621, 624 (7th Cir. 2003).

[52] *See* Proposed Amendments at 55.

should be dependent on two things: (1) a formal arrest; (2) that occurs at some point before the commission of a second offense.

The PAG supports the Commission's proposed amendment and suggests the following changes:

> An intervening arrest requires a formal, custodial arrest and is ordinarily indicated by any of the following: informing the accused that s/he is under arrest; transporting the accused to the police station; or booking the accused into jail. A noncustodial encounter with law enforcement, such as a traffic stop where either a citation or summons is issued, is not an intervening arrest.

This narrowed application is consistent with common usage, case law, and the context and purposes of the guidelines.

A. Common Usage

The Commission's proposed approach squares with the definition of arrest: "[a] seizure or forcible restraint, esp. by legal authority" or "[t]he taking or keeping of a person in custody by legal authority."[53] This also reflects common understanding of an arrest. In the PAG's experience, people stopped and ticketed for routine traffic violations, such as speeding; failing to stop for a school bus, a light or a stop sign; or following too closely, do not consider themselves to have been arrested.

B. Case law

Supreme Court jurisprudence provides ample support for the differing treatment of those who are formally arrested and those who are issued a citation after a law enforcement encounter. For example, in the Fourth Amendment context, concerns for officer safety and preservation of evidence authorize warrantless searches incident to a formal arrest.[54] But this exception to the warrant requirement does not apply to cases where a citation is issued after a traffic stop.[55] Thus, *Knowles* declined to treat the issuance of a traffic citation as a formal, custodial arrest.

There also is a distinction between a formal arrest and the issuance of a citation in the Fifth Amendment context. Where law enforcement stops a driver, questions him or her and asks the driver to perform field sobriety tests, law enforcement is not required to provide *Miranda* warnings because at that point, the driver is not in custody. At a traffic stop, a motorist expects "that he may . . . be given a citation, but . . . most likely will be allowed to continue on his way," unlike a person under formal arrest.[56]

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[53] *See Black's Law Dictionary* 124 (11th ed. 2019).

[54] *See, e.g., United States v. Robinson*, 414 U.S. 218, 226, 236 (1973).

[55] *See Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

[56] *See Berkemer v. McCarty*, 468 U.S. 420, 437, 434 (1984).

C. The Context and Purposes of the Guidelines

The purpose of §4A1.2 is to reflect the seriousness of a defendant's criminal history, while, at the same time, not overstate it. A defendant's criminal history would be overstated if an intervening formal arrest for a serious offense were treated the same as convictions where a summons or citation were issued for minor offenses, such as jaywalking or driving without a license. Such a result would be at odds with a central tenet of the guidelines rubric to not overstate the seriousness of a defendant's criminal history.

For these reasons, the PAG supports the proposed amendment with its recommended revisions.

VI. Simplifying the Guidelines

Consistent with its proposal from last year, the Commission proposes to simplify the Guidelines Manual by removing most departures. One of the purposes of this amendment is to better reflect current sentencing practice, and this proposal is supported by practitioners' experience as well as sentencing data about the frequency of departures and/or variances. The Commission asks for comment on four issues, which the PAG addresses below.

A. Issues for Comment: Nos. 1 & 3

During the last amendment cycle, the Commission proposed simplifying the guidelines by reducing the sentencing process from three steps to two and by reclassifying departure provisions as factors that may be relevant to sentencing under 18 U.S.C. § 3553(a).[57] The PAG endorsed the adoption of a two-step process, but opposed the reclassification of departure provisions as sentencing factors on several grounds.[58]

First, that prior proposed approach, far from simplifying the sentencing process, would complicate it by conflating the guidelines calculation with the entirely separate § 3553(a) analysis required by statute. Second, we noted in our comment that empirical evidence clearly demonstrates that guideline departure factors are rarely utilized in the real world of federal criminal sentencing. Furthermore, while most of the departure provisions set forth in the guidelines authorize an upward departure, as a practical matter courts depart or vary upward in only a tiny fraction of cases. In our view, then, converting guideline departures into sentencing

[57] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines at 123-125 (Dec. 26, 2023) (2024 Proposed Amendments), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

[58] *See generally* Letter from the PAG to U.S.S.C. at 26-31 (Feb. 22, 2024) ("PAG 2024 Letter"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=245.

factors that are heavily weighted in favor of upward departures would have the effect of importing an unwarranted upward bias into the § 3553(a) analysis.[59]

In addition, we noted in last year's comment, and emphasize once more, that the conversion of departures into sentencing factors blurs the line between the Commission's statutory role and the statutory role of sentencing courts.[60] As this cycle's proposed amendment correctly explains, the Commission's authority is cabined by the provisions of § 994.[61] In contrast, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[62] The incorporation of suggested sentencing factors into the guidelines themselves thus may exceed the Commission's statutory authority and intrude on the purview of the sentencing courts.

During the last amendment cycle, the PAG endorsed the proposed change from a three-step to a two-step sentencing process, but requested that the Commission "[d]elete all departure provisions in Chapters Two, Three, Four, and Five."[63] The PAG is gratified that this is the approach that the Commission has elected to take in this amendment cycle and believes it is the correct one. In addition to avoiding the infirmities discussed above, this approach reflects actual sentencing practice. Since *Booker*, the reality is that judges have largely abandoned the guideline departure regime in favor of variances.

In the nearly two decades since *Booker*, the three-step process has become a quaint fiction. A few judges pay lip service to the consideration of departures, but most leapfrog right over that second step to consideration of § 3553(a) factors. Empirical data reflects this reality. In Fiscal Year 2023, for example, only 4.3% of sentenced defendants received a departure on a departure ground other than §§5K1.1 or 5K3.1. By contrast, 33.1% of defendants received a variance in 2023.[64] The fact that the proportion of variances has increased over time from 16% of cases sentenced in 2009 to nearly a third of all cases in 2023 illustrates the overwhelming preference of

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[59] *See id.* at 27.

[60] *See id*.

[61] *See* 2025 Proposed Amendments at 60 & proposed §1A1.1, Commission's Authority.

[62] *Concepcion v. United States*, 597 U.S. 481, 492 (2022) (citation and quotation marks omitted).

[63] *See* PAG 2024 Letter at 27, 30.

[64] *See* U.S.S.C., *2023 Sourcebook of Federal Sentencing Statistics* ("2023 Sourcebook"), Table 29, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table29.pdf.

sentencing judges to employ variances as the basis for non-guidelines sentences rather than traditional guideline departures.[65]

In the PAG's view, the proposed amendment, by deleting all departure provisions except for §§5K1.1 and 5K3.1, does nothing more than ratify current practice. Moreover, as we have previously pointed out, while most departures in the current Guidelines Manual are upward departures,[66] most departures actually granted are downward departures.[67] Upward departures are vanishingly rare and require prior notice.[68] Arguably, then, the current guideline departure regime at least nominally benefits our clients. Even so, we believe that it is in the interest of every stakeholder in the criminal justice system to streamline and simplify the sentencing process and to recognize the realities of sentencing practice. Consequently, the PAG supports the amendment as proposed.

The PAG does not support the consolidation and preservation of deleted departure provisions in a new Appendix or some other format. In our view, the existence and availability of prior versions of the guidelines containing the deleted provisions make such an exercise unnecessary.

B. Issues for Comment: No. 2

The Commission seeks comment on whether this proposal is consistent with its authority under 28 U.S.C. §§ 994 & 995 and other federal laws, and with Congressional directives, such as those contained in the 2003 PROTECT Act, 18 U.S.C. § 2252A. The Commission has broad authority to promulgate and amend the guidelines.[69] Indeed, the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section."[70] Importantly, the statutory guidance that authorizes and guides the Commission's work does not include any mandate that the Commission include bases for reductions from otherwise applicable guidelines. Accordingly, the Commission's proposal to simplify the guidelines falls squarely within its authority to revise the guidelines considering the experience of stakeholders involved in the sentencing process and

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[65] *Compare* 2023 Sourcebook, Figure 8, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Figure08.pdf *with* U.S.S.C., *2018 Sourcebook of Federal Sentencing Statistics* ("2018 Sourcebook"), Figure 8, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Figure08.pdf.

[66] *See* PAG 2024 Letter at 29.

[67] *See* 2023 Sourcebook, Table 29.

[68] *See id.*; *see also* F.R.Cr.P. 32(h) (requiring sentencing court to provide notice that it is considering a departure from the guideline range that has not been identified in the PSR or by the parties).

[69] *See* 28 U.S.C. §§ 994(a), (o).

[70] *See* 28 U.S.C. § 994(o).

the extensive data on sentencing that it has collected over years. In the PAG's view, the Commission's ability to amend the Guidelines Manual to appropriately reflect the actual practices of courts and practitioners throughout the country goes to the heart of the Commission's statutory mandate. The PAG believes that the Commission's proposed revisions in §1A1.1 accurately reflect its authority to enact guidelines and amendments.[71]

With respect to Congressional directives such as those contained in the PROTECT Act, the PAG submits that the Commission's decision to remove departures does not contradict this law, or any other directive regarding departures. In passing the PROTECT Act and other statutes that reference departures, Congress was operating within the structural framework already established by the Commission – namely, a system of mandatory guidelines with limited departures on specific, permissible grounds. In *Booker*, the Supreme Court held that this structural framework violates defendants' jury trial rights. Indeed, in *Booker* the Supreme Court noted the following about guideline departures:

> At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most.[72]

The fact that departures were largely unavailable in the "mine run" of cases was the very basis upon which the Supreme Court invalidated the guidelines as they then existed. As we all know, the Supreme Court's remedy for this constitutional infirmity was to make the guidelines "effectively advisory"[73] and to emphasize that the bases upon which courts can vary from those advisory guidelines are essentially limitless.[74] In this context, it would turn statutory construction on its head to suppose that statutes that rested upon a sentencing framework that subsequently has been found unconstitutional by the Supreme Court somehow mandate that that framework be maintained.

Even in the current sentencing world, with its extant departures and three-step process, sentencing courts are permitted to vary downward or upward from the correctly calculated guideline range after consideration of the sentencing factors under § 3553(a), even in cases in which the PROTECT Act would prohibit a departure. The bottom line is that courts may vary on § 3553(a) grounds, whether or not the Guidelines Manual contains departure provisions. We cannot emphasize enough that the proposed amendment does not change current sentencing practice. We urge the Commission to ratify this reality and to adopt the proposed amendment.

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[71] *See* 2025 Proposed Amendments at 60 & proposed §1A1.1, Commission's Authority.

[72] *United States v. Booker*, 543 U.S. 220, 234 (2005).

[73] *See id.* at 245.

[74] *See Concepcion*, 597 U.S. at 492.

C. Issues for Comment: No. 4

The Commission also asks for comment on whether background information related to departures should remain in the commentary to various guidelines, such as application note 27 to §2D1.1, which contains information about the nature and impact of certain drugs. For all the reasons discussed above, it is the PAG's view that explanatory provisions that support bases for guidelines departures should be excised along with the departure provisions themselves. As we explained in our previous comment, "[a]ny attempt to list some of the infinite possibilities of factors that may bear on the § 3553(a) analysis inherently risks elevating the listed factors above others" and we urge the commission to "steer clear of offering guidance to courts that could be viewed as elevating some statutory factors over others."[75]

D. Additional Considerations

The PAG notes that deletion of guideline departures from the manual will necessitate a revision of the Statement of Reasons form ("SOR"). While we support the deletion of departure provisions from the Guidelines Manual and oppose their inclusion as sentencing factors on the grounds discussed above, we recognize the value in continuing to capture longitudinal data relating to the use of those departures as sentencing factors by sentencing courts. Accordingly, the PAG recommends that in revising the SOR form, the Commission include as sentencing factors the "Reasons for Departure" currently set forth in part V(C) of the SOR, and that the Commission continue tracking and reporting the reliance upon these factors by sentencing courts. Continuing to capture sentencing courts' reliance upon "legacy" departure grounds as sentencing factors will permit the Commission and other stakeholders in the federal criminal justice system to make apples-to-apples comparisons of pre- and post-amendment sentencing data.

VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

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[75] *See* PAG 2024 Letter at 30.

PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

The Honorable Carlton W. Reeves
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Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the proposed amendments issued on December 19, 2024.

Career Offender

POAG's focus as these amendments were discussed was aimed at finding a process that is fair and workable, yet also establishes a process that does not produce arbitrary results. The structure and intent of the proposed amendments represents an overarching intention to amend the current process to ensure that those identified as career offenders constitute individuals whose criminal histories include serious offenses, such as controlled substance offenses and crimes of violence. While the proposed amendment thankfully includes several options and subsections for consideration, the interplay of those interconnected options created an added challenge in building supportive consensus among the circuit representatives. POAG's position related to each option is discussed below, starting with the conduct-based approach, changes to serious drug offense, and changes to point qualification for predicate offenses. POAG's considerations below identified concerns related to workability and application of the conduct-based approach, causing the further loss of support in other areas where changes had been suggested. As the problems with the conduct-based approach were revealed, it became difficult to support the other parts of the amendment.

POAG overwhelmingly does not support the proposed amendment that would define the term "crime of violence" based on the defendant's own offense conduct. This would include relevant

conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. Many members of POAG endorsed the idea of holding defendants accountable for their conduct and, in previous submissions, POAG has advocated for such an approach. However, POAG endorses the proposed change to the definition of crime of violence under the force clause by including the definition of force (i.e., force capable of causing physical pain or injury to another person) and believes that the proposed crime of violence definition covers the conduct it is intended to capture (i.e. an arson offense, as proposed at USSG §4B1.2(b)(1)(E)). POAG also appreciates the Commission's recognition of the difficulty in determining what qualifies as crimes of violence under the categorical and modified categorical approach. However, POAG has significant concerns with the amendment as written and does not believe this simplifies or solves the issue regarding crime of violence determination.

First, POAG believes that the new crime of violence definitions that center on the defendant's conduct rather than the elements of the offense will result in a new area of uncertainty and may present additional application issues. Currently, all circuits have guiding caselaw as to what does and does not qualify as a crime of violence under either the force clause or as an enumerated offense. The definitions listed in USSG §4B1.2(e) that were added under the 2024 amendments have provided clarity, consistency, and assistance with application. Shifting from an elements-based approach to a conduct-based approach will require the Court to determine if the defendant's conduct rises to the level of violence that is required under the new definitions. Each determination made by the Court will be as unique as the case before them. As such, POAG is concerned that the individualized nature of this approach will result in "mini-trials," as well as ongoing litigation both at sentencing and on appeal, in determining if prior convictions qualify as a crime of violence for the purpose of applying a career offender enhancement. Additionally, the litigation that results will have holdings that are largely case specific, producing less useful guidance than a holding focused on the elements of the offense. The uncertainty and application difficulties are of significant concern.

The prospect of expanding the sentencing hearing to include resolving these matters for each and every potential predicate offense raises many additional concerns. While at times, the current structure of the career offender guideline produces results that are counterintuitive, the results are at least predictable. A defendant that pleads guilty to an offense has, with the assistance of his legal counsel, some understanding of the guideline range they can expect to face when entering that plea. That understanding would be substantially diminished if a conduct-based approach were in place. Many of the factors that would determine the outcome would hinge upon prosecutorial discretion, availability of *prima facie* documents, availability of reported and historical evidence, availability of victim testimony, and the Judge's interpretation of the available evidence. These different factors create a high degree of indeterminacy in the outcome of applicability, such that a defendant could not reasonably know whether he or she were likely to be a career offender at the

time they enter their guilty plea. Presently, probation officers are likely the first stakeholders to obtain documentation on prior convictions. Such records may not be made available to defense counsel until the initial disclosure of the presentence report, thereby blindsiding defense counsel and defendants upon reviewing the presentence report and predicate offense records. Absent a continuance, the defendant, defense counsel, and the government would have 35 days to prepare for the hearing. The parties would likely need to gather more information about the defendant's conduct from documents and have time to see what witness testimony is available. Further, there would be an increased expenditure of judicial resources and time at the sentencing hearing. A sentencing that takes approximately half an hour to an hour could now be several hours long. Alternatively, prosecutors could decide that they will not pursue the enhancement despite the evidence supporting it due to other factors. Regardless of the rationale, such a decision would still increase disparity.

Another issue in shifting to a conduct-based approach that POAG has identified is the discrepancy in availability of the permissible documents listed to make a *prima facie* showing amongst districts. There is also a concern that some charging documents may not adequately capture the defendant's violent conduct as some charging documents are innately vague and becoming more automated. There is a consensus amongst POAG that some of the other permissible documents, such as the jury instructions, judge's formal rulings of law, and plea colloquies tend to be either largely unobtainable or difficult to acquire, which would limit the number of defendants who qualify as career offenders. Furthermore, after a prima facia showing is made, POAG is concerned over the additional documents the Court can rely on to determine whether a prior conviction is a crime of violence. If after a prima facia showing is made and the Court can expand its consideration to other forms of evidence or documentation, there is a concern amongst POAG that prior convictions that are not necessarily violent in nature but included some form of violent conduct during or after the commission of the offense charged, might be considered a "crime of violence" through this new approach. This may unintentionally negatively impact defendants who would not ordinarily be considered career offenders. For example, Criminal Complaints, Affidavits, and arrest reports may reflect violent conduct but that conduct was not charged or was otherwise dismissed as part of plea negotiations. An example POAG members discussed was a Grand Theft conviction which involved the defendant assaulting a store clerk or another patron during or while fleeing from the scene of the theft offense. Consequently, POAG foresees this would lead to relitigating prior convictions, arguments surrounding facts rather than elements, and would not adequately resolve the "odd" and "arbitrary" results of utilizing the categorical and modified categorical approach, trading the oddity of outcomes based on statutory construction for that of disparity based on availability of documents.

POAG also notes that, as written, the shift to a conduct-based analysis would be limited to USSG §4B1.2, and the current elements-based approach would be moved to other guidelines, such as USSG §2K2.1. Currently, there is one definition of crime of violence in the guideline manual and it is listed under USSG §4B1.2. The new conduct-based approach would introduce both new

definitions and a new approach in determining what constitutes a crime of violence as there would be no changes to the elements-based approach under those other Guidelines or the elements-based approach in determining a violent felony under the Armed Career Criminal Act at USSG §4B1.4. POAG believes that having different definitions and methodologies, depending on which guideline is being used, promotes inconsistency, complication, and confusion, which is contrary to the Commission's efforts of simplification. Further, the resulting case law would be divided between the two different processes, compounding the complexity of tracking the correct application of one definition with two different approaches to the application.

POAG also discussed the Commission's proposal to revise the definition of "controlled substance" in USSG §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. POAG acknowledges that this approach would allow for an easier and more-straightforward application of the Guideline. Caselaw in several Circuits already prohibits the counting of certain controlled substance offenses as qualifying prior convictions. This includes instances where the state offense is broader than the guideline definition because it addresses the possession with intent to sell or deliver or purchase of substances not covered by the Federal Controlled Substances Act (CSA), marijuana convictions, or attempted crimes. Some examples are as follows: The Second Circuit held that New York's definition of cocaine is categorically broader than its federal counterpart, see *United States v. Minter*, 80 F.4th 406 (2nd Cir. 2023) and also that Attempted Criminal Sale of a Controlled Substance in the 3rd Degree is not a controlled substance offense because New York's controlled substances schedule included naloxegol, which was removed from the federal schedules promulgated under CSA, see *United States v. Gibson*, 55 F.4th 153 (2nd Cir. 2023); the Fifth Circuit found that prior marijuana convictions were no longer predicates, see *United States v. Minor*, 121 F.4th 1085 (5th Cir. 2024); the Sixth Circuit found that attempt crimes such as offers to sell do not qualify as predicates under the career-offender enhancement, see *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), and also held that it was plain error to apply career offender designation where the predicate offense prohibited "offers to sell controlled substances," see *United States v. Cavazos*, 950 F.3d 329 (6th Cir. 2020); the Seventh Circuit held that the Illinois definition of cocaine, which includes positional isomers, was overbroad compared to the CSA, see *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020); and the Ninth Circuit found that an Arizona statute including hemp in the marijuana definition was facially overbroad, as hemp no longer falls under the federal CSA, see *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021).

Circuits such as those mentioned above are already familiar with certain prior state drug offenses being excluded for consideration of the career offender enhancement. However, in receiving feedback from probation officers across districts and discussions within POAG, it is still of great concern if all state drug offenses are excluded with consideration strictly limited to controlled substance offenses under the federal drug trafficking statutes. It is noted that the conduct involved in state drug offenses is often similar, if not the same, as the conduct involved in federal drug offenses. Therefore, it seems arbitrary and inconsistent to limit controlled substance offenses to

only federal convictions while moving to capture a conduct-based approach for crimes of violence. Additionally, reducing the number of predicates that qualify as a controlled substance offense will impact how often a defendant with a single crime of violence predicate will qualify as a career offender and, consequently, drastically reduce the total number of defendants who qualify as career offenders.

Such an approach may also have unintended consequences in rural and tribal areas and smaller counties, where due to a lack of resources or crimes committed on federal land, cases are disproportionately prosecuted federally. If the Commission moves forward with only counting federal drug trafficking offenses towards career offender, it will disproportionately impact defendants in these areas, likely resulting in higher levels of punishment concentrated in those population groups and rural areas.

Furthermore, POAG previously raised the issue that there is a high downward variance rate amongst career offender cases. If less defendants qualify as career offenders under this amendment, it may have bearing on a sentencing judge's decision to impose variances, or the amount of variance, if they no longer believe that the offense level and criminal history category is overstated. If certain offenses are disqualified from career offender eligibility, especially with a defendant who has incurred multiple convictions for state controlled substance offenses, we may see judges accounting for that aggravating conduct in fashioning a just sentence.

POAG has previously advocated for the career offender guideline to include at least one crime of violence. If this amendment is adopted in whole, fewer individuals will qualify on the basis of a controlled substance offense and more individuals will qualify based upon a prior conviction for a crime of violence, thereby increasing the focus of the career offender analysis on individuals with violent histories. Capturing individuals with violent histories in the career offender analysis would be in line with the Commission's findings in the Recidivism of Federal Offenders Released in 2010 that reflects that those individuals with violent offenses had a higher rate of rearrest than those with exclusively controlled substance offense instant offenses and predicate offenses (Recidivism of Federal Offenders Released in 2010). It may be an easier and more direct method to explore a requirement that either the underlying offense or one of the qualifying predicates be a crime of violence.

While we appreciate the Commission's efforts to simplify the career offender guidelines and reflect the seriousness of the predicates, POAG unanimously voted against all three options presented in the amendments and recommends that no changes be made to the point-system currently in place. Regarding Option 1 (Limitation applicable to both "crime of violence" and "controlled substance offense"), and specifically Suboption 1A, prior convictions to sentences receiving points under §4A1.1(a) [or (b)], POAG felt it presented an ease and practicality of application, where the same rules of application apply to both controlled substance offenses and crimes of violence. However, POAG was still not in favor of this proposed amendment because it

eliminated considering convictions that garnered one point under subsection (c). POAG believes this would limit a large pool of individuals with serious felony drug convictions that would have otherwise counted towards career offender. Specifically, POAG observes that, in certain regions and especially more populated cities, serious drug offenses may receive more lenient sentences given the number of prosecutions needing to be processed in these very busy courts. Although in theory, an offense garnering one point seems like it should involve a less serious controlled substance offense, this is frequently not the case. Different jurisdictions view the seriousness of charges differently and the method in which they impose sentences also differ and may rely on variables such as size of court, number of cases, prosecutorial resources, custodial resources, and other issues. Therefore, offenses that garner one point may still be as serious as offenses that resulted in two or three points and should not be completely disqualified from the analysis.

POAG was also not in favor of Suboption 1B (Limitation applicable only to "crime of violence"). While felony convictions for controlled substance offenses that fall under §4A1.1(c) may be considered, it limits the number of eligible defendants who have sustained felony crime of violence convictions. As mentioned above, based on statistical research conducted by the Commission, there is a higher rate of recidivism amongst violent offenders. Therefore, we would not be in favor of limiting the number of crimes of violence convictions that may be considered for the career offender enhancement.

With regard to Suboptions 2A and 2B and utilizing sentence imposed as part of the analysis, it seems arbitrary to select a certain sentence when a felony conviction carries a punishment of one year or more. Similar to what POAG has shared already, jurisdictional norms again come into play with regard to the sentence imposed, making the sentence imposed an unreliable metric for capturing the seriousness of the offense. Additionally, if the conduct of the defendant is an important metric in predicting recidivism, why then limit the consideration of that conduct based on a sentence imposed structure? We are not in favor of this approach and do not believe that this change would capture the group of individuals the career offender guideline is meant to identify. As mentioned above, we would also not be in favor of omitting convictions that fall under §4A1.1(c) from the analysis.

In terms of Suboptions 3A and 3B, POAG was unanimously not in favor of any options that used the sentence served approach. In many cases, determining the amount of time served could be impossible due to restrictions in the availability of this information or records that pertain to it, leaving concerns that the career offender guideline would rarely be used or disparately applied based on availability of records. Determining the amount of time served becomes even more difficult to decipher when there are multiple sentences being served at one time. Also, unlike publicly available court records, records pertaining to incarceration are not necessarily available to the public and vary per correctional system. The time a defendant serves on a sentence can also have more to do with correctional resources than the sentencing court's measurement of the degree of seriousness of the offense. POAG believes the time-served approach would not adequately

capture individuals with more severe criminal histories, who would otherwise be exposed to greater levels of punishment under the career offender guideline. Additionally, utilizing a time-served approach to determine career offender eligibility would be contrary and inconsistent with the method already used throughout the Guidelines of a sentence-imposed approach to determine criminal history points.

POAG is appreciative of the Commission's efforts to simplify the Guidelines, especially with regards to the career offender guideline by shifting away from the categorical approach. POAG acknowledges that a conduct-based approach appears to be more of a "common sense" solution; however, for the reasons stated above, the amendments as proposed pose their own set of application issues and legal challenges. POAG encourages the Commission to consider re-evaluating the most recent career offender approach from 2023 that, with some additional guidance and refinement, could produce a more workable approach.

Firearms

(A) Machinegun Conversion Devices

POAG overwhelmingly supports the proposed amendment to revise USSG §2K2.1 to include additional enhancement(s) for Machinegun Conversion Devices (MCDs). These include devices which are commonly referred to as a "Glock switch," "auto sear," or "Glock auto sear," among other labels. These MCDs present an extraordinary threat to public safety, as they can be readily and inexpensively made using 3D printing technologies and will quickly turn a semiautomatic firearm into a fully automatic weapon. These devices are generally small, easily concealable, and non-serialized. Moreover, POAG has received feedback that districts have seen a sharp increase in the production, possession, and distribution of MCDs; and the data from the Commission supports this observation. See the Commission's Public Data Briefing, Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices, dated January 13, 2025 ("the Commission's Data Briefing").

Regarding Option 1, POAG believes that amending the definition of "firearm" applicable to §2K2.1 would provide consistency in the definition of "firearm" between the Guidelines and under Federal Statutes. However, simply incorporating the statute of 26 U.S.C. § 5845(a) to the definition of a firearm may also produce unintended application issues and disparities. This is because a MCD can be affixed to a semiautomatic firearm, can be found in close proximity to a semiautomatic firearm, or can be a standalone device, and using the definition alone would provide confusion as to whether an affixed MCD has the same weight as a standalone MCD. Further, POAG was split on the inclusion of MCDs to certain specific offense characteristics, as further provided below.

POAG unanimously supports Option 2, but had various positions regarding each specific offense characteristic, as detailed herein:

Subsection 2K2.1(b)(1) Based on the Number of Firearms

POAG unanimously supports expanding §2K2.1(b)(1), to include firearms under 26 U.S.C. § 5845(a), which would increase the offense level if the offense involved three or more firearms.

POAG had a lengthy discussion regarding how MCDs should be factored when calculating the number of firearms depending on whether the MCD was affixed to a semiautomatic firearm, in close proximity to a semiautomatic firearm, or a standalone MCD. Ultimately, the majority felt that a treating each MCD as the equivalent to one firearm, regardless of the circumstances, was reasonable to account for the increased danger of the MCD. The one-to-one ratio also provides the most workable outcome given the available evidence in a case. Investigative reports vary in quality and detail and do not always provide clear information to support if the MCD was fully affixed or compatible with the semiautomatic firearm in close proximity. Essentially, this one-to-one valuation will provide less disparity among defendants based on the degree of detail provided by law enforcement investigation.

POAG believes that treating a MCD affixed to a firearm as one firearm for purposes of subsection (b)(1), and treating a MCD located in close proximity to a semiautomatic firearm and the semiautomatic firearm as two firearms for purposes of subsection (b)(1) would result in an unjust outcome because the affixed MCD is arguably more dangerous due to the firearm having fully automatic capabilities. Additionally, the MCD affixed to the firearm could also be readily separated to be sold or attached to different firearm.

The Commission's Public Data Briefing supports this one-to-one valuation. Specifically, 82.3% of offenses involving affixed firearms included only one MCD affixed to a firearm. In cases when there is only an affixed MCD and a firearm, there would be no increase in the offense level under subsection (b)(1), as the offense must involve three or more firearms for an enhancement to be applicable. By contrast, more than 50% of cases involving only standalone MCDs involved three or more. The majority of those standalone MCDs fell between 3 to 24. Surprisingly, for cases involving 25 or more standalone MCDs, there were no affixed MCDs noted. See, the Commission's Data Briefing.

If the Commission does expand the definition of firearm, POAG requests that additional clarifying language be included in the guideline to specify the weight that should be given to an affixed MCD, a standalone MCD, or a MCD in close proximity to a semiautomatic firearm. While POAG believes a MCD should be treated as a separate firearm in all circumstances, the Commission can provide clarity on this issue with additional guidance.

Subsection 2K2.1(b)(4) Stolen Firearms, Modified Serial Number, or Non-serialized Firearms

POAG is unanimously opposed to including the definition of 26 U.S.C. § 5854(a) to subsection USSG §2K2.1(b)(4), which addresses stolen firearms, firearms with a modified serial number, or non-serialized firearms.

POAG was unanimously opposed to expanding the definition of firearm under USSG §2K2.1(b)(4)(B)(ii) or the inclusion of a new specific offense characteristic in that subsection. This is a unique circumstance because of how universally the "ghost gun" enhancement would be applicable to MCDs as opposed to other semiautomatic firearms. MCDs are generally privately made and not marked with a serial number. This increase will apply regardless of whether the MCDs is standalone or if the MCD is affixed to a serialized firearm. POAG observes that the Guidelines take into account the type of firearm used in an offense when assessing a base offense level. The base offense level for offenses involving firearms described in 26 U.S.C. § 5845(a) are greater than for offenses involving other firearms. For example, a firearm not marked with a serial number that is possessed by a defendant who is a prohibited person would score a base offense level of 14 (or lower if the defendant is a non-prohibited person convicted of certain listed offenses). To account for the firearm not being marked with a serial number, the defendant would then receive a four-level enhancement under USSG §2K2.1(b)(4)(B)(ii). On the other hand, if a firearm under 26 U.S.C. § 5845(a) is included in USSG §2K2.1(b)(4)(B)(ii), a defendant who possessed a MDC, which is generally not marked with a serial number, would receive a base offense level of 18 and then receive a further four-level increase under USSG §2K2.1(b)(4)(B)(ii). With the difference in the base offense levels, the Commission has already acknowledged the dangerousness and deadliness of 26 U.S.C. § 5845(a) firearms.

Finally, some of the SOCs under §2K2.1(b)(4) are not generally applicable to MCDs. Since MCDs are generally not serialized, it would be difficult to trace and determine if the MCD was stolen. In the rare situation where there is a proof of theft, the extent of that conduct may better be addressed through other means such as a higher end sentence within the advisory range or a variance. Similarly, since MCDs are generally not serialized, the enhancement for a modified serial number would not apply.

Subsection 2K2.1(b)(5) Trafficking in Firearms

A slight majority of POAG supports the expansion of §2K2.1(b)(5) to include an increase based on the trafficking of firearms as defined in 26 U.S.C. § 5845(a). POAG recognizes that this subsection captures a particular harm that is different from the harm captured by the number of firearms at USSG §2K2.1(b)(1). POAG discussed that subsection (b)(5)(B) and (C) targets the trafficking in firearms which the defendant knows or has reason to believe, would be used for a nefarious purpose, or to an individual with a more serious criminal history. Those in favor of the increase pointed to the increased danger of trafficking MCDs and, in those circumstances, believe the dangers warrant some additional increase.

Those opposed to the expansion of §2K2.1(b)(5)(B) and (C) believe that where defendants are trafficking in standalone MCDs, such that the trafficking conduct would not currently be captured under (b)(5) provisions, those defendants are likely to possess multiple standalone MCDs. Therefore, those defendants would already receive a significant increase under (b)(1) that would sufficiently capture a defendant's culpability. It was discussed that in cases involving numerous standalone MCDs (such as 25 or more as previously noted in the discussion of (b)(1)), the purpose of the possession of those MCDs was to traffic the MCDs to others or use them for some other nefarious purpose. As such, some members of POAG felt that an increase under (b)(1) and (b)(5)(B) or (C) was "double-counting."

If the Commission does expand the definition of firearm, POAG requests that additional clarifying language be included in the guideline to specify the weight that should be given to an affixed MCD, a standalone MCD, and an MCD in close proximity to a semiautomatic firearm. This is especially important in this subsection, as trafficking in one firearm versus two firearms could increase the offense level by either two levels under USSG §2K2.1(b)(5)(B), or five levels under USSG §2K2.1(b)(5)(C), if the other factors in those subsections are met. For instance, if a defendant transferred an affixed MCD to an individual who the defendant knew or had reason to believe intended to use or dispose of the firearm unlawfully, the defendant could receive a two-level increase under USSG §2K2.1(b)(5)(B) if the affixed MCD and semiautomatic firearm is considered one firearm, or the defendant could receive a five-level increase under USSG §2K2.1(b)(5)(C) if the affixed MCD and semiautomatic firearm is considered two firearms.

Subsection 2K2.1(b)(6)(A) and (B) Transportation Outside of the United States/Possession/Use in Connection with Another Felony Offense and (c)(1) Cross Reference

A slight majority of POAG supports the expansion of the firearms definition to USSG §§2K2.1(b)(6)(B) and (c)(1). POAG discussed that in most cases where these enhancements or cross-reference would apply, the MCD would be affixed to a semiautomatic firearm so the expansion would not have an overall impact. POAG discussed that the issue is when there is a standalone MCD.

POAG members in favor of the expansion in (b)(6)(B) and (c)(1) believe that the dangerousness of the MCD is not adequately captured elsewhere if the MCD was used in connection with another felony offense.

POAG members opposed to the expansion in (b)(6)(B) and (c)(1) believe that a standalone MCD is not inherently dangerous, and the inclusion of this expansion may lead to litigation to determine if a standalone MCD facilitated, or had the potential of facilitating, another felony offense. For example, if a standalone MCD was located near drug trafficking activities, but no semiautomatic firearm was located, there may be an argument that although an operable firearm was not present, the presence of a standalone MCD is indicative that a semiautomatic firearm capable of accepting the MCD was possessed in connection with the other felony activity. There is already a circuit split

regarding the treatment of firearms near drug trafficking activities, and the inclusion of standalone MCDs may exacerbate this disparity.

The cross reference at (c)(1) generally functions the same at subsection (b)(6)(B) but requires the firearm to be cited in the offense of conviction. For the reasons provided herein, POAG members took the same position as the treatment for subsection (b)(6)(B).

Further, the majority of POAG was in favor of including the definition of 26 U.S.C. § 5845(a) to subsection USSG §2K2.1(b)(6)(A) which applies if the defendant possessed the firearm while leaving or attempting to leave the United States or had reason to believe it would be transported outside of the United States. POAG's general consensus is that this applies in very limited circumstances, which is consistent with the Commission's Data Briefing (the application of this subsection would have potentially applied to 16 cases in fiscal year 2023). Further, POAG recognizes that the transportation of MCDs outside of the United States, particularly to areas that involve a lot of violence and firearm offenses, is concerning.

Subsection 2K2.1(b)(7) Recordkeeping Offense

POAG noted that USSG §2K2.1(b)(7) would likely not apply to MCDs because MCDs are generally illegal to possess, so it is unlikely that records would be kept regarding these firearms. However, if the Commission is adopting the expanded definition of firearms to include firearms under 26 U.S.C. § 5845(a) to all other provisions, POAG does not oppose the inclusion of this proposed amendment for consistency and simplification purposes.

Additional Guidelines to Include in the Body of the Guideline

POAG is appreciative of the Commission's efforts to move the commentary into the Guidelines themselves, as POAG members noted challenges to the commentary. POAG overwhelmingly supports moving the definitions in the commentary to the main body of the Guideline.

Concerns were raised that an unintended impact of moving only one definition of "firearm" from the commentary to the Guideline would be to seemingly weaken the remaining commentary of USSG §2K2.1 and the overall commentary of the Guidelines. By drawing these terms into the main body of the Guideline, much of the remaining commentary may be able to be brought in as clarifying any perceived ambiguities.

An example of a current challenge to the commentary recently was presented in a Felon in Possession of a Firearm case. The government's position was that the language in USSG §2K2.1(a)(4)(B) "the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine" is unambiguous under *Kisor v. Wilkie*, 588 U.S. 558 (2019), and thus the commentary need not be applied. Specifically, the defendant possessed a .45 caliber semiautomatic handgun with eight rounds of ammunition. The police report did not provide any

information on the capacity of the firearm's magazine. The government argued for a base offense level of 20 pursuant to USSG §2K2.1(a)(4)(B). Their opinion was that if the firearm had the capability to accept a large capacity magazine, regardless of the type of magazine possessed or the weapon's proximity to a high-capacity magazine, the increased base offense level should apply. See, USSG §2K2.1, comment. (n.2).

POAG anticipates similar arguments to the definitions such as "controlled substance offense" and "crime of violence" as provided in USSG §2K2.1, Application Note 1, and "prior felony offense" as provided in USSG §2K2.1, Application Note 10, which refer to Chapter 4 of the Guidelines.

POAG recommends the Commission continue to examine the commentary to the guidelines and proactively address those being challenged as expanding the Guideline by moving such commentary into the main body of the guideline.

(B) *Mens Rea* Requirement

POAG understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement for stolen firearms. It may not be readily apparent that a gun is stolen, and it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen. POAG observed that, unlike "ghost guns," every stolen firearm involves an actual victim. A *mens rea* requirement would better reflect the increased culpability of a defendant who knew that a firearm was stolen compared to a defendant who was unaware. However, POAG unanimously is opposed to including the *mens rea* requirement of "willfully blind" or "consciously avoided knowing" without further guidance as to what is necessary to apply that standard.

POAG observed that a definition regarding the phrase, the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that…" has been the reason for many objections since its introduction in the 2023 Guidelines Manual. It has been extremely difficult for probation officers to be able to determine what is meant by "willfully blind" or "consciously avoided knowing," and, therefore, these terms have been left to the interpretation of sentencing judges without any uniformity. This has made supporting the increase for a firearm which was not otherwise marked with a serial number under USSG §2K2.1(b)(4)(B)(ii) very difficult. POAG discussed that the enhancement is vague and has led to disagreement as to when it should be applied. Further, there has been disparity among districts in applying this enhancement, as sometimes it is only applied if the defendant has agreed to this enhancement in a plea agreement.

Adding this language to the specific offense characteristic related to possessing a stolen firearm without adding definitions would further exacerbate the problem. The only other section of the Guidelines where terms related to willful blindness or conscious avoidance of knowledge are used is under USSG §2D1.1(b)(13)(B) regarding representing or marketing a drug containing fentanyl (represented or marketed as a legitimately manufactured drug another mixture or substance

containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug). POAG recognizes that similar concerns regarding the *mens rea* are addressed in the proposed amendments published on January 24, 2025 (See page 104). POAG encourages the Commission to make uniform changes or clarifications to these terms of definitions to both guidelines.

POAG was unanimously opposed to a *mens rea* requirement attached to a firearm that had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. Although the fact that a firearm has a missing, altered, or obliterated serial number is generally readily apparent from the firearm itself, under the proposed language, the defendant would have to have knowledge that the serial number is illegible to others. If the Commission does apply this *mens rea* requirement, POAG is concerned that this will cause the application to decrease drastically and will become, for all practical purposes, inapplicable.

Moreover, to promote consistency between the two enhancements in question, POAG suggests the Commission consider leaving the guideline as is for now and instead revisit the "ghost gun" enhancement and amend it back to a strict liability standard or otherwise amend the *mens rea* requirement.

Additional Considerations

POAG is concerned that the guideline does not have a mechanism to account for when a firearm or MCD is being produced or manufactured. POAG believes that additional consideration is needed regarding whether offense level enhancements are needed for individuals who produce or manufacture firearms and MCDs but may not specifically be held accountable for trafficking under USSG §2K2.1(b)(5). As noted previously, with a 3D printer, a person could inexpensively and readily produce a large quantity of MCDs for distribution. The Guidelines should capture the aggravating factors related to someone who chooses to produce these dangerous items.

POAG also discussed that a defendant possessing a standalone MCD may still be eligible for the zero-point offender reduction under USSG §4C1.1, which uses the more general definition of a firearm under USSG §1B1.1. POAG believes that additional consideration is needed if the general definition of firearm under USSG §1B1.1 should include MCDs.

Circuit Conflicts

(A) Circuit Conflict Concerning the "Physically Restrained" Enhancement at USSG §2B3.1(b)(4)(B)

POAG agrees that the circuit split related to the "Physically Retrained" enhancement at USSG §2B3.1(b)(4)(B) needs to be addressed by the Commission. As the Commission noted, there is a

circuit conflict concerning whether the 2-level "physically restrained" enhancement at USSG §2B3.1(b)(4)(B) should be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to USSG §1B1.1 (Application Instructions, "Physically restrained" means forcible restraint of the victim such as be being tied, bound, or locked up). The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement, while the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits have held that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. Notably, however, the Eleventh Circuit, in concurring opinions, recently brought into question whether the prior holdings on this issue should be revisited *en banc*. See *United States v. DeLeon*, 116 F.4th 1260 (11th Cir. 2024). Additionally, the Ninth Circuit has had caselaw on both sides of this issue. See *United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001) and *United States v. Albritton*, 622 F.3d 1104 (9th Cir. 2010). The nature of the circuit split, and even the fact that at least one circuit has signaled a need to revisit the issue and another circuit has cases supporting nuanced interpretations of the same language, all speak very clearly to the need for the adoption of one of the versions of this amendment.

Three options were presented as possible responses to this circuit conflict by amending the enhancement at USSG §2B3.1(b)(4)(B). The first two options align with the positions presently taken by the two sets of circuits, respectively. The third option would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at USSG §2B3.1(b)(4)(B).

The majority of POAG is in favor of Option 3 and believes this option would capture the trauma suffered by victims whose movement is restrained in manners that fall short of actual physical contact while recognizing that harm may not rise to the level suffered by those who are actually "physically" restrained or bound. So often, the types of physical restraint that fall short of actual physical contact involve a threat to the victim's life to overcome that victim's individual will or autonomy. The just outcome that the guidelines endeavor towards would best be served by capturing that harm in some fashion.

While POAG supports Option 3, there were still some members who expressed concern that the language may not capture all the conduct involved in the supplanting of the victim's will. There have been situations in which persons have been moved to another location by means of gunpoint or a weapon (but not "abducted"), and this may not be adequately captured by the amendment. POAG, therefore, suggests the amendment, in (B), read, "if any person's freedom of movement was restricted *or any person's movement was directed,* through means other than…."

The majority of POAG supports Option 3, because they believe it more adequately captures the harm to the victim. However, a minority of POAG proposed a carve out to the Option 3 language

that disallows an application under USSG §2B3.1(b)(4)(C) if the defendant has already received an enhancement related to "otherwise used" a firearm or "discharged" a firearm. This is because when the defendant is already receiving an enhancement for leveling the firearm at a victim or discharging the firearm in proximity to the victim, it appears that action has already effectively restrained the victim. However, the majority of POAG disagreed with this carve out. The "otherwise used" enhancement can also encompass more than just pointing the firearm. It can include using the firearm to strike the victim. Additionally, while a defendant may point a firearm at a victim, the victim could choose not to comply, demonstrating they are not restrained. POAG further observed that the defendant has engaged in two different actions and that the (b)(2) special offense characteristic captures a separate harm than what is captured at the proposed USSG §2K2.1(b)(4)(C). The majority of POAG was also more comfortable with this potentially similar conduct only resulting in a single level increase. Such an increase appropriately acknowledged that there is an extra harm in restraining someone's movement or procuring their movement upon threat of violence.

There are a minority of POAG whose circuits' case law currently aligns with, or, until recently aligned with, Option 1. Those Circuit Representatives favor Option 1 because it provides clear guidance and ease of application, and it would continue to capture all situations in which a victim's movement is restricted. The minority that voiced interest in the noted carve out language in Option 3 had similar argument against the adoption of Option 1.

However, some POAG members noted that the harm suffered by a person who is forced to move at gunpoint, or whose path of escape is blocked, could be greater than those who are bound or physically moved.

None of POAG favored Option 2, which would require physical contact or confinement, as POAG unanimously believes Option 2 fails to address the trauma suffered by those whose movement is restricted by other means. A victim who was instructed at gunpoint under fear of serious bodily injury or death to engage in some action, inaction, or movement would have nothing within the guideline structure to capture the harm caused to them by the defendant. Without the guidance from the Commission on this issue, the outcome would continue to result in disparity. Courts would either sentence within the guideline range, without reflecting the harm to the victim in the offense level, or try to capture the conduct through variances commensurate with their perception of the harm. POAG believes the Commission has a more just outcome with the adoption of either Options 1 or 3.

After much deliberation, POAG maintains a recommendation for Option 3 and proposes the slight revision of the language.

With respect to the issue for comment, POAG unanimously agreed the Commission should amend all other relevant guidelines to mirror the approach taken by the proposed amendment to USSG §2B3.1. In general, POAG favors consistency throughout the Guideline definitions.

(B) Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)

POAG appreciates the Commission's efforts to define "arrest" for "intervening arrest" purposes when calculating a defendant's criminal history score under Chapter 4 of the Guidelines. Section 4A1.2(a)(2) sets forth the single sentence rule which provides that "[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest." The term "arrest," as it appears in USSG §4A1.2(a)(2), is not defined within the context of USSG §4A1.2 when determining if multiple prior sentences are counted as one single sentence or as separate sentences.

As recognized in the proposed amendments, most circuits hold that "a formal, custodial arrest is required," and that "a citation or summons following a traffic stop does not qualify." POAG overwhelmingly supports the proposed amendment, which seeks to align with this approach and provides a more specific definition of "intervening arrest."

POAG is concerned, however, that the proposed language "A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest" may cause more confusion as to what is considered an "intervening arrest." This is because the term "traffic stop" is broad and can either mean a routine traffic stop which results in a criminal traffic citation, or a traffic stop which results in an investigation and more serious charges. In either circumstance, a defendant may not be formally arrested and instead receive a warning, citation, or summons that will result in court intervention at a later date. If the Commission's intent is to only exclude traffic citations, then POAG recommends that the Commission include the alternative language, "The issuance of a written traffic citation alone is not an intervening arrest."

POAG also discussed instances when other noncustodial encounters with law enforcement were not initiated from a traffic stop and did not result in a formal arrest. In those circumstances, it is unclear from the proposed amendment when an "intervening arrest" occurred. POAG members received feedback that criminal histories are reflecting an increase in citation and summons cases for offenses that did not commence from a traffic stop but from more serious conduct such as theft or drug possession. It is also noted that non-felony offenses occurring on federal land, military bases, and on tribal land usually result in the issuance of citations or a summons instead of a formal arrest. Without guidance, districts are using inconsistent "arrest" dates. Some districts use the date of the citation/summons as the "arrest" date, while other districts use the date of first appearance in court as the "arrest" date. Further, in some cases, law enforcement reports are unavailable or purged, and a formal arrest cannot be confirmed.

POAG believes the Commission should address what, in the absence of an "arrest," may be used for purposes of USSG §4A1.2(a)(2), to establish sufficient criminal justice intervention. For noncustodial encounters with law enforcement, even though the defendant is not "arrested," one could conclude that, at minimum, his or her first appearance in court on the charge is appropriate notice to the defendant so as to serve as an equally sufficient intervening event.

POAG also discussed challenges that may arise based on the new definition of a formal arrest. This may occur if a defendant is in custody on other matters and is served a writ or a summons while he is in custody. Furthermore, the new definition may have the unintended result of treating persons who are temporarily detained as having an intervening arrest. This may include situations in which a defendant is temporarily detained at the scene of a crime, even if the defendant is not arrested at the scene, or if the defendant is brought to the police station for questioning and then released without being booked.

Based on the above concerns and discussion, the majority of POAG suggested, as an alternative to the proposed amendment, that the following be added to the definition of a formal arrest, "If an arrest date cannot be determined, or a defendant is not arrested, the defendant's first known appearance in court on the offense may be used."

Simplification

Consistent with POAG's February 2024 submission, POAG continues to overwhelmingly support the simplification of the three-step sentencing process. In essence, the proposed amendment alters the process to mirror the existing practice the Courts primarily utilize in determining the ultimate sentence, thereby removing the extraneous step to give consideration to formal departures and, instead, relying on the Court's already existing discretion to consider those same departure factors under 18 U.S.C. § 3553(a).

Removing the "additional considerations" section from the previous version of the amendment results in a further refined simplification of the sentencing process. However, a minority of POAG members were in favor of the 2024 amendment cycle's proposal that maintained various prior departures as "additional considerations." Those members take note of the fact that each departure was developed in response to an identified need as part of prior amendment cycles and maintaining those prior amendments as "additional considerations" allows them to continue to serve as an available reference. Also, members of POAG observed that some of the current departures were implemented because they constitute outlier circumstances, but in other cases they were implemented because there was not an agreement on how to incorporate those factors in the guidelines themselves. The loss of the "additional considerations" section of the Guideline Manual will result in the loss of an area for compromise wherein an issue is important enough to be addressed but not so weighty a consideration to warrant becoming a specific offense characteristic or enhancement to the base offense level. With this thought in mind, if this amendment is adopted, in order to maintain their historical relevance, some suggested that previous departures could be memorialized in an Appendix to the Guideline Manual. While others noted that the prior Guideline Manuals are readily available through online resources, the minority expressed concern that the use of those older guidelines as a resource would diminish over time.

Despite the aforementioned, a majority of POAG favors the removal of the "additional considerations" section. POAG observes that many of the departures were relevant at the time they

were developed as they were the only available avenue to impose a sentence outside of the guideline system. That is no longer the case and has not been the case for over 20 years. The current proposal's removal of "additional considerations" simplifies the guidelines and relies on the Court's existing practice of referring to the factors outlined in 18 U.S.C. § 3553(a). POAG members noted that not only does this amendment simplify the process, but it also clarifies the record. The factors that support a departure are often overlapping with the factors that support a variance, given that the departure factors are effectively encompassed within 18 U.S.C. § 3553(a). Rather than requiring that courts attempt to compartmentalize the record to clarify which factors support a departure and which factors support a variance, relying solely on variances simplifies the record and allows the Court to clearly state the basis for the sentence on the Statement of Reasons.

Further, in addition to retaining Substantial Assistance to Authorities at USSG §5K1.1 and Early Disposition Programs, relocated to the newly created USSG §3F1.1, some members of POAG also recommend retaining some variation of USSG §5K2.23 (Discharged Terms of Imprisonment). Departures under USSG §5K2.23 are presently the only avenue within the Guidelines Manual by which the Court can fashion a reasonable punishment in circumstances where the defendant has already served a term of incarceration on a sentence that qualifies as relevant conduct for the instant offense. These provisions not only provide a mechanism to account for duplicate terms of incarceration imposed for the same conduct, but they also create a record that the discharged term of imprisonment was considered in fashioning the sentence for the instant offense. Therefore, it is recommended that the Guidelines Manual retain the function of USSG §5K2.23 by relocating those same provisions to Chapter 5, Part G (Implementing the Total Sentence of Imprisonment) as a factor to consider when determining the sentence, rather than consider those same factors as a departure motion. This alteration would allow such considerations to continue to be a clear part of the record. Such an amendment would allow the Court to consider the amount of time served on a related discharged term of imprisonment in fashioning a reasonable sentence at the time sentence is imposed, thereby distinguishing the process under Chapter 5, Part G, from the Bureau of Prisons' exclusive authority to grant credit for time served after the sentence has been imposed.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
February 2025

United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
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Washington, D.C. 20002

Voting Members
Honorable Natasha K. Anderson
Manny Atwal
Meghan Bishop
Neil Fulton
Jami Johnson
Honorable Gregory Smith
Carla R. Stinnett

February 5, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
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Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on December 19, 2024, and published in the Federal Register on January 2, 2025. See 90 Fed. Reg. 128 (January 2, 2025); see also 28 U.S.C. § 994(o).

Proposed Amendment No. 1—Career Offender

In August 2024, the Commission identified as one of its policy priorities "[s]implifying the guidelines and clarifying their role in sentencing" particularly noting an intent to revise "the 'categorical approach' for purposes of the career offender guideline." The Commission proposes that § 4B1.1 be amended to address recurrent criticism of the categorical approach set forth in the career offender guideline.

TIAG supports the portion of the proposed amendment to § 4B1.1 that would define "controlled substance offense" in a way that excludes state drug offenses from the scope of its application but has concerns that new definition insufficiently mitigates the harsh application of the career offender guideline

with respect to low-level Indian defendants residing in Indian Country, all of whom are subject to federal and tribal—but not state—jurisdiction. For this reason, TIAG supports Option 3, which would limit qualifying prior convictions only to convictions that resulted in a sentence for which the defendant served five years or more in prison and that are counted under § 4A1.1(a).

TIAG has serious concerns about the portion of the proposed amendment that redefines "crime of violence." TIAG believes this portion of the proposed amendment needs additional study and further data development to understand its scope and its potential consequence to Native people and Native communities. TIAG is deeply concerned that the limited data included in the Commission's Data Background materials on the amendment[1] strongly suggest that the proposed amendment may have significantly disproportionate impact on tribal populations and may result in unjustified disparities between tribal and non-tribal defendants.

In attempting to interpret the information contained in the Data Background, TIAG is concerned that the information contains identifiable gaps and limitations such that the true effect of the proposed amendment is likely to be greater than projected and may ultimately result in the application of unduly punitive sentences that have a disparate impact on Indians in Indian country.

Because of the limited nature of the data provided, TIAG possesses insufficient information to make concrete suggestions as to how the disparate impact in Indian Country could be mitigated. TIAG generally supports the Commission's efforts to revise the sentencing guidelines to reduce reliance on the categorical approach if it is possible to identify a method that does not result in an unjustifiable disparate impact on Native American defendants.

a. Exclusion of state drug offenses.

TIAG supports the elimination of the reliance on state drug offenses as predicates for the career offense enhancement and views this portion of the proposed amendment as consistent with the Congressional mandate set out in.

[1] United States Sentencing Commission, Individuals Sentenced Under § 4B1.1, Proposed Amendment Data Background (hereinafter "Data Background").

28 U.S.C. § 994(h)(2)(B). Generally speaking, federal drug offenses are more serious than state drug offenses, and the existence of two prior federal controlled substance offenses is a more reliable indicator of serious criminal conduct. Elimination of reliance on prior state convictions will significantly reduce the application of the career offender enhancement to low-level individuals who may be selling or sharing small amounts of drugs to support a personal habit. TIAG notes that the large-scale incarceration of such low-level offenders is a burden to individuals, families, communities, and taxpayers and remedying this would be of benefit to our communities.

That said, TIAG believes it is important to note that because virtually all drug felonies committed by Indians in Indian Country are subject to exclusive federal jurisdiction, the elimination of reliance on state priors will not have the same impact with Indian defendants as it does with other defendants. While the purpose of the elimination of priors is to mitigate the harsh application of the career offender enhancement to low-level participants, Native defendants who reside in Indian Country could continue to have countable drug convictions for low-level offenses that would never have been prosecuted against a non-native person in federal court. For this reason, TIAG supports Option 3: limiting qualifying offenses to those for which the individual served more than five years in prison.

TIAG believes Option 3 strikes the right balance in identifying and harshly punishing individuals involved in moving large quantities of drugs onto and around the reservation, while simultaneously protecting low-level operatives—frequently addicts themselves—from unduly harsh penalties that are both unfair to the individual and wasteful of government and taxpayer resources.

TIAG arrived at the 5-year exclusion by looking at both the Guidelines drug tables and the mandatory minimum laws, particular with respect to meth, which remains the drug we see most commonly on reservations. Both the federal mandatory minimum sentence laws and the drug tables envision relatively high penalties for very low quantities of meth, and a five-year exclusion would likely be necessary to avoid ensnaring these lower-level individuals.

b. Elimination of the categorial approach.

TIAG understands the Commission's desire to reduce reliance on the categorical approach and is familiar with the widespread criticism of that approach from many constituencies. TIAG, however, believes that the Commission's "actual conduct" proposal is overinclusive, suffers from significant problems with administrability, is likely to significantly increase the number of defendants subject to the career offender enhancement, and may have disproportionate, unjustified, and unforeseen effects on Indian defendants in particular.

As an initial matter, TIAG notes that the Data Background strongly suggests that Native defendants will be disproportionately impacted by the proposed amendment. A continuing concern of TIAG is that the racial data does not break out either Indians in Indian Country defendants or Native American defendants as a class—placing such populations in the "other" category. TIAG perceives that Native Americans (and its subset of Indians in Indian Country) are likely a major component of the "other" category. According to the Data Background, in fiscal year 2022, 1.9% of the individuals receiving an enhancement under § 4B1.1 were identified as "other." Under the proposed amendment, that number would increase to over 6%,[2] a significant increase that is not explained. Native Americans make up approximately 2% of the population of the United States and account for approximately 2.9% of the federal prison population.[3] To the extent that under the proposed amendment Native American individuals would be represented within the career offender population at rates three times higher than their rates within the general population, and two times higher than their rates within the Bureau of Prisons population, the amendment warrants further study.

In sum, TIAG is concerned that the Data Background obscurely identifies what is likely a hugely disproportionate effect of the proposed amendment on

[2] Data Background at 30.

[3] Federal Bureau of Prisons, Inmate race, (Feb. 1, 2025), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. It is worthy of note that the statistics kept by the Bureau of Prisons do not routinely breakout Indian inmates who have been convicted for crimes arising in Indian Country.

Native Americans but does not sufficiently tease out data that is sufficient for TIAG to understand why the increase of incarnation rates for Native Americans will occur and whether it is justifiable by differential conduct.

TIAG had additional concerns based on the data that has been included as it is tied to prior convictions that have been previously coded by the Commission as relating to robbery, aggravated assault, murder, child abuse, forcible sex offenses, or "other violent offenses." In making this analysis we are concerned that the Data Background substantially understates the true impact of the proposed amendment. The proposed definition of what constitutes a "crime of violence" is quite expansive and appears to permit classification of offenses as "crimes of violence" based on a broad swath of documents, including charging documents and potentially "offense conduct" descriptions located in presentence reports.

In our experience, we see that many convictions for regulatory and other non-violent offenses, such as violations of 18 U.S.C. § 922(g), originally included within the charging document an allegation of some behavior that would convert these non-violent and/or regulatory crimes into "crimes of violence" under the Commission's proposed definition. Yet, when a defendant is not convicted of the ancillary behavior described in a charging document, it is often because the allegation was determined to be not well founded and/or readily provable. Many allegations set forth in charging documents never rise above the level of probable cause and the abandonment of those allegations in a subsequent plea may well recognize a failure of proof on the particular issue. Punishing a defendant for these sorts of unconvicted allegations by raising the specter of including them in the category of "crimes of violence" years after the fact raises fundamental questions of fairness, equity, and accuracy.

Similar problems exist with the probable use of presentence reports—which under the proposed amendment may be deemed to constitute "the judge's formal rulings of law or finding of fact"—to prove prior conduct. In TIAG's collective experience, the "Offense Conduct" portion of federal presentence reports often represents little more than a summary of the allegations taken from law enforcement materials with little review or editing. This section of the report is rarely revised in response to objections as many

judges decline to rule on the objections, stating that the court will not give weight to or consider germane to sentencing the factual issues raised by objector. Whether the objections are noted in the judgment or in a supplement to the presentence report is a matter of widely divergent practices in the district courts. Under the current system, defendants and defense counsel have had legitimate tactical reasons not raise objections to the offense conduct provisions in presentence reports unless prevailing on the objection would change the offense level or impact the likelihood of receiving a lesser sentence. TIAG is aware that many attorneys currently counsel defendants not to dispute or object to parts of the offense conduct that may not be entirely accurate in order avoid a perception that they are making only a grudging acceptance of responsibility.

TIAG believes these concerns are aggravated by reality that these documents are now going to be used in a way that was unforeseen at the time of the original sentencing. It is very likely that defense counsel would have proceeded much more aggressively to correct the offense conduct descriptions in presentence reports if they had anticipated that the documents would be employed to determine career offender status which has the very real potential to increase a sentence, sometimes by orders of magnitude.

TIAG recognizes that the Commission likely anticipated some of these concerns and has explicitly left open the ability of defendants to litigate the designation of prior offenses, but this process can be expensive, burdensome, and sometimes hampered by the age of the prior convictions. This is even more difficult for many Indians residing in Indian Country. Many reservations are physically remote, and circumstance of history has left many Native communities isolated, insular, and often deeply suspicious of outsiders. These suspicions are not unfounded given the historic interactions between the dominant culture and the Indian Nations. It is notoriously difficult to investigate incidents that have occurred on Indian reservations as very few witnesses and local residents are willing to openly share the information they have with people from the outside. These features of tribal communities make them notoriously difficult to navigate even for federal law enforcement officers and investigators who have had a long-standing presence in the community.

The collateral consequences of these investigatory difficulties are likely to fall hardest on Native defendants who are often represented by private counsel under the Criminal Justice Act. These CJA lawyers repeatedly report difficulty in finding investigators who are both willing to travel to these remote areas to investigate and who are sufficiently culturally aware to acquire necessary cooperation from witnesses and others with relevant knowledge. Given the trust issues that often exist in Native communities, investigators without ties into the community are often hampered in their investigations because repeated contacts are frequently necessary to obtain information from the community. Likewise, in the current federal fiscal environment judges are reluctant to approve funding for multiple trips to speak with the same witnesses in an effort to build trust. These concerns are likely to be aggravated and more frequent when the investigation relates to sentencing issues. Thus, evidentiary proceedings to establish sentencing facts will be more complicated for Indian Country defendants.

TIAG is concerned that the proposed amendment may have unintended consequences in the plea-bargaining process. Professional competence will require defense counsel representing persons with two or more prior felony convictions to do extensive investigation prior to counselling the defendant to enter into a plea agreement. At a minimum it will require counsel to review all relevant Shepherd documents and follow up on identified risk once the documents are reviewed. Without this sort of review, it will be impossible to counsel a client regarding sentencing exposure and evaluating the real risk of being treated as a career offender. Often these documents are old, difficult and costly to obtain, and not in the possession of the United States. TIAG is also concerned because these documents are frequently more difficult for defendants to receive as the responding courts and agencies frequently prioritize requests made by government agents and agencies.

TIAG is also concerned with the possibility that the broad definition of "crime of violence" as used in the proposed amendment may increase the risk that conduct that is not serious enough to warrant the imposition of a penalty as severe as Career Offender status may be captured. The aggravating factor in a conviction for "aggravated assault," may, for example, have been predicated

on the identity of the victim and not the dangerousness of the conduct. Relatively non-injurious behavior such as spitting or pushing may be classified as "aggravated assault" if victim is a member of a protected class such as a police officer, a minor, or an otherwise vulnerable person.

The Data Background supports the idea that many offenses that sound quite serious are punished relatively more lightly than one might expect based solely on the name of the offense. More than half of all prior convictions for all enumerated offenses other than robbery, murder, and forcible sex offenses received sentences of less than three years.[4] It is reasonable to assume that a defendant sentenced to less than 2 years for aggravated assault, which nearly half of all defendants are, has engaged in conduct less serious than some might imagine based solely upon the name of the offense.

TIAG is aware that one of the criticisms of the categorical approach as it is currently constructed is the occasional absurd result, such as a conclusion that certain murder offenses may not be crimes of violence under the categorical approach.[5] We note, however, that as a practical matter this absurdity is far less likely than the possibility that an individual defendant would acquire two prior convictions for less serious crimes that might not ordinarily be viewed as crimes of violence. Put another way, people who commit the most serious violent offenses are generally incarcerated for a very long time. Thus, they are less likely to accumulate a third offense that may lead to their designation as a career offender. TIAG believes that the reach of the proposed amendment is disproportionately likely to reach people convicted of less serious offenses for which they received correspondingly shorter sentences.

TIAG believes that not counting convictions that resulted in a defendant actually serving less five years could significantly reduce the risks that TIAG has identified, but we have not seen the underlying data such that we are confident in concluding that this limitation would ameliorate our concerns such that we

[4] Data Background at 26.

[5] Much of this criticism comes in the context of litigation over 18 U.S.C. § 924(c), which is outside the Commission's purview.

can currently support the amendment. TIAG understands and appreciates the Commission's desire to reduce the reliance on the categorical approach. That said, we think that greater study and data development is necessary prior to final determination on the categorical approach. We are willing to participate in any further study or data development necessary to fully understand the implications of the proposed amendment.

Proposed Amendment No. 2—Firearms Offenses

Part A of the proposed amendment addresses the application of machinegun conversion devices (MCD) which are commonly referred to as switches. An MCD is designed to convert a conventional firearm to a fully automatic firearm, commonly known as "machineguns."

TIAG does not support the proposed amendment. TIAG believes that the proposed amendment unnecessarily complicates § 2K2.1 by adding to the definition of a firearm to encompass 26 U.S.C. § 5845(a). The result is to make an MCD count as a firearm. We believe that this approach raises questions that could invite the creation of a circuit split. The confusion rests in whether when an attached part should be counted as a separate firearm as an MCD. TIAG opposes adding 26 U.S.C. § 5845(a) to the guideline.

TIAG recognizes that having a MCD attached to a firearm renders the firearm more dangerous, but that increased danger is already captured in the guideline calculation. When an MCD is attached it is a machinegun, and the base offense level (BOL) is increased. The increased base offense recognizes the dangerous nature of the attached MCD and it is not necessary to amend § 2K2.1. Because of this, TIAG does not support counting an MCD as a separate firearm for the purposes of calculating the number of firearms. We believe an attached MCD to a firearm should be counted as one firearm rather than two firearms.

Part B of the proposed amendment includes a *mens rea* requirement for enhancements under § 2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers.

TIAG supports the proposed amendment that includes a *mens rea* requirement. We are if the opinion that Adding the language "if the defendant

knew, was willfully blind to the fact or consciously avoided knowing." will alleviate evidentiary challenges. Proving willful blindness in other cases has been done by looking at the circumstances and is appropriate in cases involving stolen firearms and those with modified serial numbers.

Proposed Amendment No. 3—Circuit Conflicts

Part A: "Physically Restrained" Enhancement §2B3.1(b)(4)(B)

The Commission has identified a circuit split as to whether the "physically restrained" enhancement found at § 2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the definition set forth in the Commentary to § 1B1.1(Application Instructions). TIAG advocates for the adoption of Option 2 which provides that the 2-level enhancement only applies to cases in which a "person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape."

TIAG views Option 2 as a clear, administrable standard that avoids overbroad application of the physical restraint enhancement. We note that the presence of a firearm already triggers an enhancement and in many of the cases where a gun is present, its presence is adequately addressed by application of the firearm enhancement. TIAG is sensitive to the reality that the presence of a firearm can be highly coercive, yet, it does not necessarily follow that a physical restraint has occurred. A person under duress from a weapon may deterred from moving, but that deterrence is distinct from being physically prevented from movement. Since the guidelines already account for the presence of the firearm, the application of physical restraint enhancement in the run-of-the-mine case risks an overscoring that would be tantamount to double-counting.

TIAG is also concerned that increasing the reach of the "physically restrained" enhancement at § 2B3.1(b)(4)(B) will have an inordinate impact on Indian Country sentencing. It is worth noting that because of the Major Crimes Act and the Assimilative Crimes Act, most ordinary street crime in Indian Country is prosecuted in the Federal Courts. In addition, many Native cultures

have a more intrinsic relationship to firearms—one in which firearms are a necessary and appropriate tool. In a culture which emphasizes hunting, fishing, animal husbandry, and protection of persons and livestock from predation, firearms are often ubiquitous. In these environments the presence or display of a firearm does not equate to a restraint of freedom of movement in the same way that it might in the more dominant culture. In those cases in which the display of a firearm is more menacing or threatening, the issue may more properly addressed by balancing the sentencing factors under 18 U.S.C. § 3553(a).

Part B: Traffic Stop as "Intervening Arrest" for purposes of determining when multiple prior sentences should be counted separately.

The Commission has identified a circuit split on whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single sentence rule"). Part B proposes to adda provision to § 4A1.2(a)(2) which clarifies that an "intervening arrest" requires a "formal, custodial arrest."

TIAG supports the proposed amendment which requires a formal arrest. TIAG is concerned that the broader interpretation found in the minority view as expressed in United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003), increases the risk of undue disparity in Indian Country where frequent law enforcement encounters for minor traffic infractions are more likely to find their way into the federal sentencing record. Many Indian Nations exist on reservations that are remote, which increases the likelihood that a traffic stop will result in deprivations of liberty short of a full custodial arrest for reasons of officer safety.

Proposed Amendment No. 4—Simplification of the Three-Step Process

Consistent with its August 2024 identification of a policy priority for the current amendment cycle of "[s]implifying the guidelines and clarifying their role in sentencing" and "possibly amending the *Guidelines Manual* to address the three-step process," the Commission has again proposed an amendment

that would revisit the three-step process for sentencing calculation that has existed since *United States v. Booker*, 543 U.S. 220 (2005). The familiar three-step process requires the sentencing court to (1) calculate the appropriate guideline range and determine the sentencing options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) consider the Commission's statements and guidance related to departures and specific personal characteristics that might warrant consideration in imposing a sentence; and (3) consider the applicable factors found in 18 U.S.C. § 3553(a).

In recognition of the decline of the use of guideline-based departures under step two of the three-step process in favor of variances under step three by sentencing courts post-*Booker*, the Commission seeks comment on Part B of the proposed amendment which would remove the second step in the three-step process, as forth in subsection (b) of § 1B1.1(Application Instructions), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.

TIAG believes that there are many reasons why departures have fallen into less favor with many sentencing courts. Among them are the more stringent standard of review (*de novo* as a question of law) to guidelines determinations as opposed to the standard of review applied to a consideration of the sentencing factors found in 18 U.S.C. § 3553(a) (abuse of discretion). In addition, the requirement that the court give notice that it is contemplating a departure as found in Rule 32(h), Fed. R. Crim. P., whereas no such obligation is found in imposing a variance under 18 U.S.C. § 3553(a), likely plays at least some role.

TIAG supports the simplification of the three-step process. The advisory group believes that Proposed Part B will in some ways conform the manual to what had become a general practice in many district courts, will reduce the number of reversible errors arising from the different standards of review applied to departures and variances, and will provide sentencing courts with guidance in arriving at an appropriate sentence under the properly calculated guidelines and the sentencing statutes. TIAG generally supports the decision to remove language in the December 2023 proposal which would have recast the

departures as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a).

Notwithstanding the advisory group's support of the proposal, we are concerned about the unique issues related to tribal court convictions that would need to be addressed if this proposed revision is adopted by the Commission. §§ 4A1.2 and 4A1.3 relate to a long-standing debate about how to handle convictions in tribal courts. Much of the difficulty arises out of the broadly variant methods of operation across the tribal courts of the 574 federally recognized Indian Nations. Section 4A1.1 provides that tribal convictions are generally not scored but cross-references to § 4A1.3 which provides that tribal convictions can for the basis for an upward departure. Application Note 2(C) "Upward Departures Based on Tribal Court Convictions" is particularly important because it sets forth various factors that are relevant and should be considered by the sentencing court in deciding how to treat tribal convictions. Among the relevant factors are whether the defendant was represented by counsel, had the right to a trial by jury, was afforded due process under the United State Constitution or the Indian Civil Rights Act of 1968, Public Law 90-284 as amended, whether the tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111-211, and whether the defendant had already had points scored for the same conduct in another jurisdiction based on application of the separate sovereigns doctrine. Given that many district judges rarely see tribal court convictions, TIAG strongly believes that the *Guidelines Manual* needs to provide this information of how to consider tribal convictions under an 18 U.S.C. § 3553(a) analysis of criminal history. Whether the application note is moved from its current placement to either the Application Note in the commentary to § 4A1.1 or otherwise set forth in the *Guidelines Manual* is not so important as that the language be retained somewhere in the book.

As to the Commission's request for comment on whether the revision is consistent with the provisions of 28 U.S.C. §§ 994 and 995, the TIAG believes that the specific reference in § 994(a)(2)(w)(B) which directs Chief District Judges to ensure that sentencing statements include ". . .the reason for any departure from the otherwise applicable guideline range which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission" is adequately resolved

by a direction that the sentencing court set forth its reasons for a variance from the guidelines on the statement of reasons. Likewise, the TIAG believes that the concerns related to the PROTECT ACT will be adequately addressed by variances and in the cases applicable, the mandatory minimum sentences. Once again, the issue is adequately addressed by clear direction that the statement of reasons should include a fulsome explanation of the reasons for a sentence that varies from the applicable guidelines range.

TIAG takes no position on whether the historic provisions should be included in a new appendix to the *Guidelines Manual*.

Sincerely yours,

Ralph R. Erickson

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 3, 2025

United States Sentencing Commission
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Washington D.C. 20008-8002

RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines

Dear Members of the Commission:

Introduction

The Victims Advisory Group ("VAG") appreciates the opportunity to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our views reflect detailed consideration of the proposals by our members who represent a diverse community of victim survivor professionals from throughout the nation. Our current members work with a variety of crime victim survivors in all levels of litigation and include: crime victims, victim lawyers from non-profit organizations, private lawyers, former federal and state prosecutors, victim advocates on local and national levels, and retired federal probation officers.

Three propositions always underline the VAG's consideration of the Commission's proposals and the VAG's duty to provide to the Commission its views on the Commission's

activities and work. First, victim survivors are harmed by criminal offenders and seek to have that harm righted in a fair and just manner. Second, victim survivors are important stakeholders in the federal criminal court process, possessing federal legal rights under the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, that must be respected and enforced. Third, will the proposed amendments, if approved by the Commission, be applied retroactively which application will reopen victim survivor wounds from the harm suffered, require victim survivor notification and the right to be heard, and may undermine victim survivor faith in the fairness, justice and finality of the federal criminal court process?

The Guidelines must reflect the bedrock principle of our sentencing system of individualized sentencing which accurately captures for both offenders and victim survivors the nature of the offense, the character of the offender, and the scope of the harm caused.

From these bases, the VAG respectfully submits our comments for your consideration.

CAREER OFFENDER

The VAG agrees with the Commission that the "categorical approach" is unwieldy and has led to "odd" and "arbitrary" results. *See, e.g., U. S. v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *U. S. v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring).

The VAG supports determining whether a prior offense constitutes a "crime of violence" by looking at a defendant's actual offense conduct, rather than the elements of the state crime by which it is charged.

The VAG disagrees, however, with the Commission's suggested solution. A deluge of litigation will result from the Commission's proposed narrowing of § 4B1.2, leading to the very arbitrary outcomes the Commission seeks to dispel.

1. **"Controlled Substance Offense" Definition § 4B1.2**

The VAG advises the Commission to not adopt its proposed exclusion of state controlled substance offenses from the § 4B1.2(a) definition of "Controlled Substance Offense."

The Commission asserts that many stakeholders recommended the exclusion of prior state controlled substance offenses. These stakeholders must be among the fold whose goal is

the simple decrease of penal consequences for criminal offenders. Significantly, the Commission does not explain how excluding prior State offenses will help the sentencing court assess the true character of the offender when imposing a lawful sentence for the current offense. Instead, the Commission's proposed exclusion creates two separate and unequal categories of offenders with prior drug convictions: (1) those whose prior "actual conduct" may be ignored as long as they were convicted in a state court; and (2) those whose prior "actual conduct" must be considered if they were convicted in federal court.

This creation of two separate categories of defendants appears to lack any rationale. It will result in the very sorts of "odd" and "arbitrary" outcomes that the Commission seemingly seeks to avert. The exclusion of state drug offenses undermines the Commission's stated interest in establishing an "actual conduct" standard. Similarly situated offenders who have committed the same underlying conduct (e.g., possession with intent to distribute controlled substances) but who were convicted in different jurisdictions will be subject to separate and unequal sentencing standards. Those who, by luck or chance, were prosecuted in State court rather than federal court will get the unfair windfall of being spared from the career offender enhancement. Meanwhile, offenders who have committed fewer prior drug offenses but whose prior offenses were federally prosecuted will be subject to higher sentencing schemes. The VAG imagines that even the many stakeholders that recommended exclusion of state court drug offenses would not be in favor of federal offenders being disproportionately punished by virtue of the venue in which they were charged.

As important stakeholders with recognized statutory rights in the federal criminal court process, victims deserve fair, just and predictable outcomes in the criminal justice process. Communities, also real victims of the burgeoning drug pandemic, are equally victimized by dangerous drugs, like fentanyl and methamphetamine, regardless of whether the drug traffickers were previously convicted in state or federal court. The Commission's proposed segregation into two categories of drug offenders will subvert the principles of parity among similarly situated offenders, leading to diminished faith of victims in the court process.

The proposed exclusion of prior state controlled substance offenses does not just affect current controlled substance abuse sentences but eliminates those prior State offenses from §

4B1.1 Career Offender consideration in any current federal prosecution, regardless of the type of crime, thereby also impacting a wide range of victims.

Additionally, the exclusion of State controlled substance offenses calls into question the use of the term "felony" throughout the Guidelines. "Felony" is defined as "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year", U.S.S.G. § 2B2.3, App. n. 1. ""*Felony conviction*" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed," U.S.S.G. § 2K1.3, App. n. 2(C). These two definitions do not exclude state crimes. The proposed amendment of § 4B1.2, however, does. Apparently recognizing this incongruity, the Commission proposes striking the defining words "federal or state" before the word "conviction" from its existing definition of "Prior Felony Conviction" (currently defined at § 4B1.2(e)(4) with the proposed new definition at § 4B1.2(d)). This proposed fix removes clarity about the meaning of a "conviction", leaving it vague and open to litigation. This proposed fix also will make the proposed amendment internally inconsistent since the definition in proposed § 4B1.2(d) will be different from the definition in § 2K1.3, App. n.1 2(C) by that omission of "federal or state," although both definitions appear in the same proposed amendment.

As to the effect on prosecutions, the VAG envisions that the exclusion of prior state drug convictions from the § 4B1.2 definition of "controlled substance offense" may lead federal prosecutors to decline to prosecute repeat drug traffickers if the defendant's prior convictions were limited to state offenses. With no "Career Offender" consideration available in a federal prosecution, federal prosecutors may consider those prosecutions not worthwhile, pushing them to state prosecutors with lesser resources.

The VAG strongly recommends that the proposed amendment to exclude prior state drug offenses from the § 4B1.2 definition of "Controlled Substance Offense" be rejected. The proposed exclusion undermines the interests of justice and creates two separate and unequal classes or categories of offenders.

2. § 4B1.2: "Crime of Violence" Definition

As noted above, the VAG, on behalf of victims who have been harmed, fully supports the Commission adopting a definition of "crime of violence" that will focus on the defendant's "actual conduct" in the prior offense rather than the "categorical approach" which focuses on a legal analysis of the different elements of the statutory section under which a defendant was previously convicted.

a. The Definitions of "Force" and "Actual or Threatened Force"

The VAG observes that the Commission makes a distinction in its proposed language between the definitions of "force" and "actual or threatened force," which definitions affect victims. In proposed § 4B1.2(b)(1), the proposed language includes a parenthetical in the definition of "force" at § 4B1.2(b)(1)(A): "The use, attempted use, or threatened use of physical force *(i.e., force capable of causing physical pain or injury to another person)* against the person of another[.]" (emphasis added). In no other place in the Guidelines does the VAG find that the Commission attaches this limitation of "force capable of causing physical pain or injury to another person" to the use of the word "force."

This wording certainly comports with the United States Supreme Court's definition of "physical force" in *Stokeling v. United States*, 139 S. Ct. 544 (2019). But it is slightly broader than the Commission's description of "actual or threatened force" in its definition of "Robbery," which is defined in the 2024 Guidelines Manual § 4B1.2 as "force that is sufficient to overcome a victim's resistance." *See* § 4B1.2(e)(3) and § 2L1.2, App. (n.2), which wording also comports with *Stokeling*.[1]

The current § 4B1.2(e)(3) wording the Commission now proposes to carry over for new language for § 4B1.2(b)(1)(C): "The phrase "actual or threatened force" refers to force that is

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[1] This clause was added to § 4B1.2(e)(3) and § 2L1.2, App. (n.2), as part of an approved amendment redefining "robbery" by the Commission's 2023 amendments to Career Offender. [Proposed Amendments to the Sentencing Guidelines, January 12, 2023, Proposed Amendment: Career Offender, Part B, p.19-22], citing *Stokeling v. United States*, 139 S. Ct. 544 (2019). *Stokeling* concludes that: "[P]hysical force," or "force capable of causing physical pain or injury," *Johnson [v. United States]*, 559 U.S. [133], at 140, 130 S.Ct. 1265 [2010], includes the amount of force necessary to overcome a victim's resistance. " *Stokeling*, 139 S. Ct. 544, 555.

sufficient to overcome a victim's resistance." This wording is also replicated in the new definition of "Robbery" in proposed amendments for: § 2K1.3, App. (n.2(A)(ii)(IV)); § 2K2.1, App. (n. 3(A)(ii)(IV)); § 4A1.2(p)(2)(D); § 4B1.4, App. (n. 3(A)(ii)(IV)); § 5K2.17, p.s., App. (n. 1(B)(iv)); and § 7B1.1, p.s., App. (n. 2(B)(iv)).

Stokeling, supra, with its reference to *Johnson v. United States,* addresses the common law definition of "physical force." The VAG believes that the Commission's adoption of these common law definitions should provide sentencing courts with adequate direction to guide the courts' determination of the defendant's actual conduct in crimes of violence. The VAG also wants to be certain that the adoption of these definitions in no way shifts the focus to whether the victim of a prior offense suffered physical pain or sufficiently resisted the offender's criminal conduct.

b. Sexual abuse of a minor and statutory rape § 4B1.2(b)(1)(b)

The VAG strongly discourages the exclusion of certain acts of sexual abuse of a minor and statutory rape from the proposed definition of "crime of violence" in § 4B1.2(b)(1)(B). That proposed section reads:

> (B) A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). *However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

Proposed § 4B1.2(b)(1)(B) (emphasis added).

The VAG's reading of 18 USC §2241(c) is that section applies only to minors under the age of twelve (and would therefore exclude all sexual abuse and statutory rape against minors ages 12 to 17) and further is limited to sexual acts occurring only in the "special maritime and territorial jurisdiction of the United States or federal prison." The Commission offers no rationale as to why sexual abuse of a minor and statutory rape offenses, other than those fitting in these narrow 18 USC §2241(c) parameters, should be excluded from the definition of "crime

of violence" for Career Offender purposes under § 4B1.2(b)(1)(B). This proposed exclusion is harmful to victims and should not be part of the Guidelines.

To best respect victims of sexual offenses, fully address the Commission's desire to include victims of sexual abuse of a minor and statutory rape, and to properly hold accountable defendants with prior sex offense convictions, the VAG asks the Commission to adopt the following modification to proposed § 4B1.2(b)(1)(B):

> (B) A sexual act or sexual contact with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent), and includes ~~However,~~ conduct constituting sexual abuse of a minor and statutory rape. ~~is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

With this suggested change, VAG will support an amendment creating new § 4B1.2(b)(1)(B).

c. **§§ 4B1.2(b)(2) and (3)**

The VAG has no objection to the proposed amendments for §§ 4B1.2(b)(2) or (3), regarding Covered Inchoate Offenses and Determination of Whether an Offense is a "Crime of Violence," respectively.

d. **§ 4B1.2(b)(4)**

The VAG asks the Commission to make an addition of "Police reports, trial transcript or other documents, with an opportunity for the defendant to object to their reliability" to the proposed § 4B1.2(b)(4), Sources of Information, from which the government may make a prima facie showing that a prior offense is a "crime of violence." Proposed § 4B1.2(b)(4) reads:

> (4) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence," the

> government may only use the following sources of information from the record:
>
> (A) The charging document.
>
> (B) The jury instructions and accompanying verdict form.
>
> (C) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
>
> [(D) The judge's formal rulings of law or findings of fact.
>
> (E) The judgment of conviction.
>
> (F) Any explicit factual finding by the trial judge to which the defendant assented.]
>
> (G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

Proposed § 4B1.2(b)(4).

The suggested addition will provide a more comprehensive actual conduct view of prior convictions, with an opportunity for the defendant to object to the documents' reliability. The VAG's concern is that the proposed description of "Sources of Information," to make a *prima facie* showing is too restrictive, focusing on records that may not exist in certain jurisdictions. Additionally, the proposed § 4B1.2(b)(4) list is intended for a categorical or modified categorical approach, which this proposal is designed to move away from when not required by statute, like the Armed Career Criminal Act (ACCA), 18 U.S.C. 924.

The Commission's proposed list expands on the list from *Shepard v. United States*, 544 U.S. 13 (2005):

> We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

544 U.S. 13, 26.

Shepard addresses application of the categorical approach to determine whether, for purposes of the ACCA, the defendant's prior state burglary convictions met the requirement of

a violent felony. As a categorical approach case, the Commission may differentiate *Shepard* from the Commission's proposed actual conduct analysis of the sources of information upon which the government may use to make a *prima facie* showing that a prior conviction is a "crime of violence." Given that the Commission proposes inclusions of bracketed subsections (D), (E) and (F), the Commission appears already willing to expand the *Shepard* list.

Since the Commission's actual conduct proposal is not an ACCA categorical approach, the VAG suggests that there may be room to consider these other sources of information. Justice O'Connor, in dissent in *Shepard*, would have found, in absence of the listed sources, that the complaint application and police report, which were present in the court record, corroborated the criminal complaint and that the defendant did not deny that his prior guilty pleas were consistent with the facts detailed in those documents. *Shepard*, 544 U.S. 13, 30-35, (O'Connor, J., dissenting).

The VAG is not asking for mini-trials as to whether prior convictions are crimes of violence in actual conduct analysis. Rather, the VAG simply is asking for an expansion of the sources of information that can be used for a *prima facie* showing that furthers the Commission's actual conduct direction.

The VAG recognizes that, within the context of statutory interpretation of the ACCA, *Shepard* further ruled "The rule of reading statutes to avoid serious risks of unconstitutionality, see *Jones [v. United States, 526 U. S. 227]*, at 239, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea." *Shepard*, 544 U.S. 13, 25-26. Since the Commission's actual conduct proposal is not governed by the ACCA, this statutory interpretation concern may not have direct application.

The VAG asks the Commission to include the addition. In doing so, proposed § 4B1.2(b)(4) will help victims by stopping some violent recidivists avoid additional punishment based solely on the record keeping of where they were convicted of prior crimes of violence.

3. **§ 4B1.2(c): Limiting Prior Convictions to Sentences Receiving Points under §4A1.1**

The Commission offers no explanation for restricting the current language of § 4B1.2(c), which begs a question of the reason for proposed Options 1, 2 and 3, with their included sub-

options. The VAG, consequently, asks the Commission to reject each option. The VAG finds that each of the three proposed options undermine the sentencing court's ability to accurately capture the character of the offender being sentenced by imposing far-reaching exclusions of prior convictions that otherwise properly may be considered by the sentencing court.

Options 2 and 3 exclude the consideration of a defendant's prior convictions based not on the defendant's prior actual conduct but only on the length of sentence imposed or the length of sentence served for that prior conviction. With these exclusions, the sentencing court is precluded from considering a defendant's actual conduct underlying those prior convictions and will consequently lack a full picture of the defendant's character, a consideration that is required under 18 U.S.C. § 3553(a)(1). Victims and communities will be harmed and will question why the courts lack concern over a repeat offender.

Sub-options 1B, 2B and 3B each treat defendants with prior controlled substance convictions differently than defendants with prior crime of violence convictions without explanation for the difference.

The VAG respectfully asks the Commission to reject all three options.

FIREARMS OFFENSES

The VAG supports a sentencing scheme that holds accountable those convicted of firearms offenses and deters future offenders. Indeed, such purposes are enshrined in federal statute. *See*: 18 U.S.C. § 3553(a)(2)(A) (just punishment); (B) (deterrence); (C) (public safety). Mass shootings in the United States continue to skyrocket, deeply affecting communities and families. Accordingly, the VAG supports the Commission's proposed amendment regarding Machinegun Conversion Devices.

A. Machinegun Conversion Devices.

The VAG supports both options of the Commission's proposed amendment regarding Machinegun Conversion Devices (MCDs).

The Commission explains that currently § 2K2.1 does not cover MCDs as the "firearm" definition in § 2K2.1, comment., (n. 1), only references firearms described in 18 U.S.C. § 921(a)(3), which does not include MCDs.

Option 1 will correct this problem in § 2K2.1 by including a reference to 26 U.S.C. § 5845(a), which does covers MCDs, in its definition of "firearm": "For purposes of this guideline, "firearm includes any firearm described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)." Proposed § 2K2.1.

Option 2 alternately will correct the problem by specifying firearms are "(as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a))" in Proposed §§ 2K2.1(b)(1), (4), (5), (6), (7) and (c).

Upon the Commission's suggestion that Option 2 has the equivalent result of Option 1 but highlights the policy decision as to whether the definition expansion applies to all relevant provisions, the VAG prefers Option 2 which appears to offer the more detailed application.

***B. Mens Rea* For Stolen Firearms And Firearms With Modified Serial Numbers**

The VAG notes that this proposed amendment to 2K2.1(b)(4) is handled in a slightly different form in Part A, Option 2, above. If Part A, Option 2, is approved then there seems no need for this Part B.

On the other hand, if Part A, Option 1, is approved, or Part A, Options 1 and 2 are not approved, the VAG will defer to the Commission on this Part B.

CIRCUIT COURT CONFLICTS

A. Circuit Conflict Concerning the "Physically Restrained" Enhancement at §2B3.1(b)(4)(B)

The VAG urges the adoption of Option 1, amending § 2B3.1(b)(4)(B) to reflect the sensible interpretation proffered by the First, Fourth, Sixth, Tenth, and Eleventh Circuits, which have held that restricting a victim from moving at gunpoint qualifies for an enhancement. *See, e.g., United States v. Wallace*, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, "at close range," and was commanded to "look straight ahead into the gun and not to move"); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where "two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery"); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit

has "rejected the notion of a 'physical component' limitation as inapt" and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); *United States v. Miera*, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); *United States v. Deleon*, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier").

Because the direct threat of serious bodily injury or death achieves the same ends as the physical restraint through bondage or force (incapacitation of the victim through coercion), Option 1's proposed amendment best mirrors the drafters' intent and achieves greater justice and protection for crime victims.

B. **Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)**

The VAG will defer to the Commission as this proposed amendment does not appear to have substantial impact for victims.

SIMPLIFICATION OF THREE-STEP PROCESS

The Sentencing Commission seeks comment on its proposed amendment eliminating sentencing "departures," [2] the middle step of the current three-step process the Guidelines

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[2] "Departure" is defined:

> "***Departure***" means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure. "***Downward departure***" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the

provide to assist federal sentencing courts impose proper sentences. By eliminating departures, the Commission will reduce the Guidelines to a two-step process. First, the court calculates the applicable guideline range and determines the kind of sentence. Second, the court will "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."

The 2024-2025 Simplification proposal is identical in its end to the Commission's 2023-2024 Simplification proposal to eliminate departures, although there are vast differences in their means to that end.

As a threshold matter, the VAG is not opposed to the concept of simplifying the Guidelines. Making it easier for federal courts to navigate sentencing guidelines is in the interest of crime victims. [3] Victims need to know that sentences imposed are proper and fair while accounting for the gravity of the offense suffered by the victims.

Pursuant to the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, crime victims are afforded a number of rights regarding federal sentencing. Among these are: the right to protection, § 3771(a)(1); the right to be reasonably heard § 3771(a)(4); the reasonable right to confer with the attorney for the government, § 3771(a)(5); the right to full and timely restitution, § 3771(a)(6); the right to proceedings free from unreasonable delay, § 3771(a)(7), and the right to be treated with fairness and with respect for their dignity and privacy, § 3771(a)(8). To honor these rights, any simplification must be characterized by certain components: (1) clarity and transparency and (2) retention of current protections of victim survivor rights and interests.

> guideline sentence. "***Depart downward***" means grant a downward departure.
> "***Upward departure***" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "***Depart upward***" means grant an upward departure.

Guidelines § 1B1.1, App. n. 1(F).

[3] Victims are persons "directly and proximately harmed as a result of the commission of a Federal offense." Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(e)(2).)

The VAG completely agrees with the Commission that, as an aspect of sentencing, "District courts are [...] required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant[.]" New proposed language § 1B1.1, Background. This proposed wording fits squarely with the broad statutory requirement that:

> "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

18 U.S.C. § 3661.

With these principles in mind, and like last year, the VAG must advise the Commission that it does not support the current proposal as written. First, because the VAG believes that the current proposal removes critical guidance for the sentencing courts to fully and carefully consider "the nature and circumstances of the offense and the history and characteristics of the defendant," as required by 18 U.S.C. § 3553(a)(1). The removal of critical guidance will undermine victim survivor rights and victim survivor sense of a fair and just process. Second, the VAG believes that some of the Commission's proposed eliminations from the Guidelines are outside the Commission's legal authority and directly contradicts Congress.

A. The Proposed Amendment Removes Critical Guidance for the Sentencing Courts.

The VAG follows the Commission's concern that post-*Booker* [*United States v. Booker*, 543 U.S. 220 (2005)] courts have been using departures provided under step two of the three-step process with less frequency and in favor of variances.[4] The second step of the three-step process is the consideration of departures. The Commission believes that since departures are less frequently used that eliminating departures will simplify the Guidelines.

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[4] A "departure" is considered different from a "variance." A "variance" in the Guidelines three-step process is described as "a sentence that is outside the guidelines framework" after departures are considered. *See Irizarry v. United States*, 553 U.S. 708, 709-716 (2008).

However, the primary approach in this proposal appears to be the elimination of every section and every sentence in which the word "departure' appears. In VAG's opinion, this broad scale approach also removes critical guidance from the Guidelines for the sentencing courts to consider fully and carefully "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). Part of the VAG's concerns for this year's proposals are driven by concerns raised last year so we will start there.

1. The 2024 Simplification Proposal

Last year, the Commission's Simplification proposal included deleting the second step of the three-step process outlined in §1B1.1(b), which directly implicated Chapter 5, Parts H and K. The proposal then reclassified the majority of Chapter 5, Parts H and some of Part K, as a list of names in a new proposed § 6A1.2(a), designated as Factors Relating to Individual Circumstances (Policy Statement). That proposed § 6A1.2(a) read "In considering the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1), the following factors may be relevant:" and then simply listed twenty-one factors by name with no explanation. Gone were the explanation as to how those factors may be considered relevant by the sentencing court. As an example, the VAG cited to proposed §6A1.2(a)(2) and (3) listed factors "Education" and "Vocational Skills", respectively, and then contrasted how the current Guidelines § 5H1.2, entitled Education and Vocational Skills, described their potential relevance:

> Education and vocational skills *are not ordinarily relevant in determining whether a departure is warranted*, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
>
> Education and vocational skills may be relevant in *determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.*

§ 5H1.2 (emphasis added).

Were the Commission to remove the departure clause of the first paragraph, the wording still gives courts explicit guidance that: (1) education and vocational skills may be

relevant if a defendant has misused his training or education to facilitate a crime; and (2) they may be relevant to determining conditions of release or probation and public safety. That text clearly provides the sentencing court with guidance on how to apply the relevant information, and not just for consideration of a term of supervised release or probation. It also helps protect victims as it gives the court guidance as to the relevancy for sentencing of the misuse of training or education and for the consideration of public safety. However, last year's proposed Chapter 6 simply listed Education and Vocational Skills by name alone as characteristics that *"may be relevant"* without any guidance regarding how to consider that relevance.

Another example the VAG cited last year is Drug or Alcohol Dependence. The Guidelines currently state:

> Drug or alcohol dependence or abuse ordinarily *is not a reason for a downward departure.* Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)).

§ 5H1.4 (emphasis added).

Last year's proposed Guideline § 6A1.2(a)(7) simply listed "Drug or Alcohol Dependence" without any further explanation. Like Education and Vocational Skills, were the Commission to remove the departure clause, the wording still gives the sentencing court explicit guidance as to the correlation between drug and alcohol dependence and the increased propensity to commit crime. This may be a relevant factor of importance to a judge applying 18 U.S.C. § 3553(a)(1). While substance abuse programs may seem like common sense, maintaining the explanation of that correlation between substance abuse and crime also gives the court a context for protecting victims from future crime.

While these are just two examples, similar discussion may be had with most other Chapter 5, Parts H and K, factors listed in last years proposed § 6A1.2(a).[5]

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[5] *See* Age (§ 5H1.1); Mental and Emotional Conditions (§ 5H1.3); Diminished Mental Capacity (§ 5K2.13); Physical Condition (§ 5H1.4); Gambling Addiction (§ 5H1.4); Previous

Significantly, many § 5K2 criteria were included in last year's proposed § 6A1.3, Factors Relating to the Nature and Circumstances of the Offense (Policy Statement) *with* explanations as to how they may be relevant, these included Death (§ 5K2.1); Extreme Physical Injury (§ 5K2.2); Extreme Psychological Injury (§ 5K2.3); Abduction or Unlawful Restraint (§ 5K2.4); Extreme Conduct (§ 5K2.8); Weapons and Dangerous Instrumentalities (§ 5K2.6); Semiautomatic Firearms Capable of Accepting Large Capacity magazine (§ 5K2.17); Property Damage or Loss (§ 5K2.5); Disruption of a Governmental Function (§ 5K2.7); Public Welfare (§ 5K2.14); Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§ 5K2.24); Criminal Purpose (§ 5K2.9); Victim's Conduct (§ 5K2.10); Lesser Harms (§ 5K2.11); Coercion or Duress (§ 5K2.12); Dismissed or Uncharged Conduct (§ 5K2.21); Voluntary Disclosure of Offense (§ 5K2.16); Discharged Terms of Imprisonment (§ 5K2.23); and Violent Street Gangs (§ 5K2.18).

Why guidance to relevancy was provided for last year's proposed § 6A1.3(a), Factors Relating to the Nature and Circumstances of the Offense (Policy Statement), but not for § 6A1.2(a) Factors Relating to Individual Circumstances (Policy Statement), was not explained.

2. <u>The 2025 Simplification Proposal</u>

The significance of looking at last year's proposal is that the VAG was deeply concerned that the Commission ineffectively moved important 5H criteria to a new Chapter 6 without providing any explanation as to its relevance for the sentencing court's consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

Instead of correcting that problem, this year's Simplification proposal goes in the opposite direction and entirely deletes Chapter 5, Part H. In so deleting, factors that Congress

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Employment Record (§ 5H1.5); Family Ties and Responsibilities (§ 5H1.6); Lack of Guidance as a Youth and Similar Circumstances (§ 5H1.12); Role in the Offense (§ 5H1.7); Degree of Dependence Upon Criminal Activity for a Livelihood (§ 5H1.9); Military Service (§ 5H1.11); Civic, Charitable or Public Service (§ 5H1.11); employment Related Contributions (§ 5H1.11); Record of Prior Good Works (§ 5H1.11); Aberrant Behavior (§ 5K2.20).

delineated in 28 U.S.C. 944(d) [6] that the Commission historically considered to be relevant for the sentencing court's consideration of the history and characteristics of the defendant, are now gone.

A few Chapter 5, Part H, factors, Substance Abuse (current § 5H1.4), Mental and Emotional Conditions (current § 5H1.3), Education and Vocational Skills (current § 5H1.2) and Employment Record (current § 5H1.5), with significantly narrowed language and applied only to determining terms of probation or supervised release, appear in new proposed wording to §§

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[6] 28 U.S C. 944(d) reads:

> **(d)**The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents [sic] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—
> **(1)** age;
> **(2)** education;
> **(3)** vocational skills;
> **(4)** mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
> **(5)** physical condition, including drug dependence;
> **(6)** previous employment record;
> **(7)** family ties and responsibilities;
> **(8)** community ties;
> **(9)** role in the offense;
> **(10)** criminal history; and
> **(11)** degree of dependence upon criminal activity for a livelihood.
>
> The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

5B1.1 and 5D1.1. *See* new proposed § 5B1.1. App. n. 3(B), (D), (E) and (F), and new proposed § 5D1.1, App. n. 3(E), (F) and (G).

While probation and supervised release may be appropriate and important aspects of sentencing, by limiting these considerations to only probation or supervised release considerations, the Guidelines implicitly send a message that these factors, and the others now entirely eliminated, are no longer relevant to the sentencing court's 18 U.S.C. 3553(a)(1) consideration. This despite the broad nature of the information that a court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Without the Guidelines guidance from Chapter 5 Part H, even if clauses using the word "departure" were struck, considerations of factors relating to "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), will be completely open to each judge and will result in disparities harmful to victims and outside the Commission's avowed purpose "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. 3553(a)(6).

Equally disturbing is the proposal to delete §§ 5K2.0 through 5K2.24, [7] most of which contain information relevant to crimes committed on victims and all of which are directed to "the nature and circumstances of the offense." *See* 18 U.S.C 3553(a)(1). The VAG recognizes that Chapter 5, Part K, is entitled "Departures," of which the Commission wants to be rid. The VAG acknowledges that some of these grounds are described in current Part K as proper to consider for "upward departures." But the grounds themselves address information that will be helpful to the sentencing court in its 18 U.S.C 3553(a)(1) consideration of the "the nature and circumstances of the offense" even were the word "departure" removed.

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[7] This deletion includes: Death (§ 5K2.1); Extreme Physical Injury (§ 5K2.2); Extreme Psychological Injury (§ 5K2.3); Abduction or Unlawful Restraint (§ 5K2.4); Property Damage or Loss (§ 5K2.5); Weapons and Dangerous Instrumentalities (§ 5K2.6); Disruption of a Governmental Function (§ 5K2.7); Extreme Conduct (§ 5K2.8); Criminal Purpose (§ 5K2.9); Victim's Conduct (§ 5K2.10); Lesser Harms (§ 5K2.11); Coercion or Duress (§ 5K2.12); Diminished Capacity (§ 5K2.13); Public Welfare (§ 5K2.14); Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (§ 5K2.17); Violent Street Gangs (§ 5K2.18); Aberrant Behavior (§ 5K2.20); Dismissed or Uncharged Conduct (§ 5K2.21); and Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§ 5K2.24).

The VAG is concerned that this deletion will disproportionately affect victim survivors. The continued existence of these grounds will remind judges that such aggravating aspects of a case are relevant and may be considered as relevant by them under 18 U.S.C. §3553(a). These grounds contextualize what are primarily victim-centered aspects of the nature and circumstances of the offense. Their deletion, as proposed, just like the proposed deletion of Chapter 5, Part H, implicitly sends a message that these grounds are no longer relevant to the sentencing court's 18 U.S.C. 3553(a)(1) consideration. This despite the broad nature of the information that a court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Without the Guidelines guidance from Chapter 5 Part K, even if clauses using the word "departure" are struck, consideration of factors relating to "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), will be completely open to each judge and will result in disparities harmful to victims and outside the Commission's avowed purpose "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. 3553(a)(6).

In 2022, the Commission announced that simplification was a long-term goal. In 2023-2024, the Commission made its first Simplification proposal, to which it received much input, but ultimately failed to approve. The changes made for the 2024-2025 proposal are more disturbing to the VAG for how they will affect victims. More study by the Commission is requested. Instead of providing greater guidance for the courts in sentencing, the VAG believes the current Simplification proposal, as written, provides less guidance and will lead to sentencing disparities.

With less guidance from the Guidelines, a victim's CVRA rights to meaningfully confer with the attorney for the government in a case, and to be meaningfully heard at sentencing, will be lessened as the Assistant United States Attorney will be less able to predict how the court may sentence.

The VAG respectfully asks the Commission to not adopt this Simplification proposal.

C. The Commission Lacks Legal Authority for Some of this Proposed Amendment

The Commission requested comment on its authority to adopt this Simplification amendment to the Guidelines. Just as last year, the VAG believes the Commission lacks the authority to make certain changes.

The Commission has a legal duty when promulgating its guidelines and policy statements to be "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. 994(a). [8]

In 2003 Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). Congress was expressly concerned that judges inappropriately departed downward in cases involving children and sexual violence. To address this problem, Congress bypassed the Commission and legislatively diminished the abilities of courts to engage in such a practice which disproportionally affected women and girls and favored men. Not only did Congress pass legislation statutorily designed to prevent courts from doing so, but Congress also drafted direct amendments to the Sentencing Guidelines.

The Guidelines reference the PROTECT Act in §5K2.0, Background:

> As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid. [9]

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[8] This clause, broadening the scope of statutory compliance by the Commission, was amended into 18 U.S.C 994(a), by Sec. 401(k) of the PROTECT Act, *infra.*

[9] § 5K2.0, Background.

Specifically, through the PROTECT Act Congress directly amended the Policy Statements found at §§ 5K2.0(b), 5K2.13(4), 5K2.20(a) and added in its entirety 5K2.22. [10] The 2025 Simplification proposed amendment deletes all of these § 5K2 (Policy Statement) direct legislative amendments. The VAG opines that this deletion is beyond the Commission's legal authority since deletion of legislatively direct amendments to the Guidelines is not "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). The VAG believes that Congress must act to eliminate these statutory requirements before the Commission may. Leaving the direct legislative amendments in place, as required by 28 U.S.C. § 994(a), while deleting others will make the Guidelines confusing and prompt litigation in federal criminal cases.

The VAG respectfully asks the Commission to not adopt this Simplification proposal at this time to allow further research and possible discussion with Congress.

Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission, share victim perspectives on the sentencing process and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Advisory Group Members

[10] *See* Backgrounds for §§ 5K2.0, 5K2.13, 5K2.20 and 5K2.22.

February 3, 2025

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments for the 2025 Amendment Cycle

Dear Judge Reeves,

FAMM was founded in 1991 to pursue a broad mission of creating a more fair and effective justice system. By mobilizing communities of incarcerated persons and their families affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing and corrections reform. FAMM has been an active advocate with the U. S. Sentencing Commission since our founding by submitting public comments, participating in hearings, and meeting with staff and commissioners.

The Sentencing Guidelines are so much more than the name suggests. The Guidelines touch countless individuals and families, including many of our members – over 75,000 people nationwide. We welcome the opportunity to comment on the proposed amendments announced by the Commission in December 2024.

I. *Proposed Amendment 1 – Career Offender*

The image conjured by the label "career offender" often bears little or no resemblance to the many individuals who receive enhanced sentencings under that label. Take, for example, the case of Paul Fields.

Paul Fields illegally sold marijuana while he was traveling around the country following bands as a "deadhead." Mr. Fields received a 15 ½ year sentence for growing 256 marijuana plants. He had zero history of violence. But according to the federal government, Mr. Fields was a "career offender" because he had two prior convictions for nonviolent drug offenses sustained in state courts. One of the convictions involved merely 34 grams of marijuana.[1]

[1] *U.S. v. Paul S. Fields*, No. 2:10cr17, *Sentencing Memorandum* 2, ECF 12 (July 22, 2010).

At the time of sentencing, his defense counsel argued that "there has been no effort by the Sentencing Commission to grade . . . the felony offenses that will trigger the career offender status."[2] Counsel explained that as to Mr. Fields' case:

> a defendant previously convicted of possessing with the intent to distribute 34 grams of marijuana as one of two predicate offenses is punished for manufacturing over 100 marijuana plants just as severely as the defendant previously convicted of possessing with the intent to distribute 500 grams of cocaine as one of two predicate offenses.[3]

This was particularly acute in a case like Mr. Fields', whose two predicate convictions were in state court for possession of nominal amounts of marijuana. Those marijuana offenses "increase[d] by a factor of eight what he would otherwise be looking at with the current offense."[4] Had Mr. Fields not been a "career offender" he would be serving no more than two years in prison; the "career offender" guideline added 13 years to his sentence.

Mr. Fields knew that he broke the law. And he understood what he did was wrong. But he never felt like the punishment fit the crime. President Obama agreed – he commuted Mr. Fields' sentence in January 2017.

Mr. Fields' story is unfortunately common. A 2016 report from the Sentencing Commission reveals that many people convicted of drug offenses with nonviolent criminal records are punished under the career offender guideline, serving lengthy prison sentences that carry huge costs for taxpayers and do not serve the purposes of punishment.[5]

The career offender directive has been around for a long time. What was originally conceptualized as a congressional amendment directing sentencing courts to impose a stiff penalty for "career criminals"[6] ultimately became a congressional directive to the Commission. Thus, the Commission is obliged to provide for a guideline range "at or near" the statutory maximum for recidivists.[7] For some time now, the Commission has been wrestling with how to comply with this directive while also creating a fairer career offender guideline.[8] Although it believes that recidivists should receive enhanced punishment, the Commission has observed that "in practice, determining which prior convictions should result in substantially increased sentences raises complex policy issues."[9]

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[2] *Id.* at *Sentencing Transcript*, ECF 21.
[3] *Id.* at *Sentencing Memorandum*, ECF 12 at 2.
[4] *Id.* at *Sentencing Transcript*, ECF 21.
[5] USSC, Report to the Congress: Career Offender Sentencing Enhancements (2016) ("2016 Career Offender Report), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.
[6] *See S. Rep. No. 98–225, at 175 (1983) reprinted in 1984 U.S.C.C.A.N. 3182; see also U.S. Sentencing Commission*, Report on Career Offender 2016.
[7] 28 U.S.C. § 994(h).
[8] *See generally* 2016 Career Offender Report.
[9] *Id.* at 7.

The Commission's 2016 report demonstrated that the current career offender guideline misses the mark:

- Nearly 75 percent of all career offenders in 2014 were convicted of drug offenses;
- Because they spend so long in prison, career offenders make up fully 11 percent of the federal prison population;
- While they receive very long sentences, these sentences are often below those called for by the career offender guideline – only 27.5 percent of career offenders today receive the recommended career offender sentence; these reductions are often sought by the government;
- Career offenders who committed an instant or prior crime of violence have more serious and extensive criminal histories and commit crimes at a higher rate than career offenders with only drug trafficking offenses; and
- Federal law and the sentencing guidelines currently contain a variety of definitions of what constitutes a crime of violence or a violent felony, including for offender purposes. These different approaches lead to confusion in the application of laws that depend on the definitions.[10]

In the proposed amendments, the Commission has advanced several changes to the career offender guideline to address some of the underlying issues highlighted by this data, while remaining faithful to its statutory obligation.

FAMM comments below on some of the specific aspects of the proposal. But before we do, *we urge the Commission to only adopt changes to the career offender guideline that will reduce the overall number of people who are subject to the stiff penalties that follow*. Any proposal that increases the number of people who will receive a sentencing range under the career offender guideline should be rejected. Whittling down the impact of this overly punitive guideline is imperative. The career offender guideline was designed to deter and punish only the most recalcitrant recidivists, but in practice, sweeps up many people who simply do not make careers of crime – people like Paul Fields.

A. Changes to definition of "controlled substance offense" – eliminating prior state drug offenses

For some time now, the Commission has aimed to reduce the impact of the career offender guideline on drug offenses. In 2016, the Commission concluded that "drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline."[11] The Commission called on Congress to restructure the career offender directive, but Congress did not do so. That does not, however, mean the Commission is without options to narrow the impact of the career offender guideline on drug trafficking offenses.[12]

[10] *Id.*
[11] 2016 Career Offender Report at 27.
[12] *Id.*

Eliminating the use of prior state drug offenses as a predicate for the career offender guideline is a smart proposal that achieves multiple goals. First, it reduces the reliance on state convictions, convictions that are not always a good proxy for culpability. Second, it responds to stakeholder concerns about how complex application of the career offender guideline is and, in so doing, resolves an intractable circuit split.

i. State drug offenses are not a good proxy for defining a "career offender"

In our experience, and as evidenced by Mr. Fields' story, state drug convictions likely involve less serious drug offenses than those prosecuted at the federal level.[13] These state and local drug prosecutions often criminalize very small quantities of a controlled substance. As such, prior convictions for controlled substance offenses are not a good proxy for the people Congress intended to punish with the career offender directive.[14]

Moreover, Congress did not direct that predicate offenses include state drug convictions. The directive refers to a drug predicate as "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.1"[15] The Commission adopted state drug offenses although they are not referenced in the statutory directive.[16] Thus, the Commission has no obligation to include state drug offenses in the federal career offender guideline. This should be enough for the Commission to eliminate state drug priors. But there are also good policy reasons for doing so.

State drug convictions likely involve smaller quantities of drugs, and these offenses are more likely to sweep in people with a history of substance abuse. People with a history of substance abuse may find themselves repeatedly impacted by the criminal justice system because

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[13] *See* Alexi Jones & Wendy Sayers, *Arrest, Release, Repeat*, The Prison Policy Institute (Aug. 2019) ("Ultimately, our analysis confirms that people who are repeatedly arrested and jailed are arrested for lower-level offenses, have unmet medical and mental health needs, and are economically marginalized. Arrest and incarceration of these individuals neither enhances public safety nor addresses their underlying needs. Our findings underscore the need to redirect dollars wasted on repeatedly jailing people toward public services that prevent justice involvement in the first place: education, employment assistance, public health, medical and mental health services."), https://www.prisonpolicy.org/reports/repeatarrests.html.

[14] *See supra* n. 6.; *see also* USSC, *Fifteen Years of Guideline Sentencing*, *An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) ("The career offender guideline thus makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

[15] 28 U.S.C. § 994(h).

[16] For more detailed information on the Commission's authority to exclude state drug offenses *see* Federal Defenders Comment to USSC, Controlled Substance Offense and Career Offender at 23 (March 2023).

of a mental health condition, rather than an economic aim to traffic large quantities of drugs.[17] According to the 2016 Bureau of Justice Statistics, 49% of people in state prisons have a diagnosed substance use disorder, as compared to 31.8% in federal prisons.[18]

Relying on state drug offenses also exacerbates the racial disparities that result from the career offender guideline. Surveys have demonstrated that drug use between black and white communities is roughly the same.[19] People who use drugs often purchase drugs from people of their own race.[20] And yet, 62% of people in state prisons for drug offenses are people of color.[21] Thus, when the federal guidelines incorporates state drug offenses, it is incorporating this "baked-in" racial disparity in state drug offenses.

Finally, augmenting a federal sentence based on a crime that was not punished at the federal level defies basic principles of federalism.[22] Surely Congress wanted the Guidelines to assure near-maximum sentences only for those with federal convictions, where Congress had control over the federal legislative priorities. Moreover, relying on only federal drug convictions assures that federal prosecutorial standards were met for these convictions. State and local prosecution standards and practices may vary by jurisdiction and bake in unwarranted variance to a federal system that strives to be uniform.

ii. Excluding state drug offenses would simplify application of the career offender guideline pertaining to controlled substance offenses and resolve a circuit split

Today, in a case with two predicate state controlled substance offenses and an instant offense that meets the career offender definition under §4A1.2, a court must undergo the categorical approach to determine whether the state controlled substance offenses can be used to increase the federal sentence.[23] Much ink has been spilled over determining which state drug offenses can serve as a predicate for the career offender enhancement. The Commission has received feedback about how complex the application of §4A1.2(b) has been.[24] Excluding state drug offenses directly responds to stakeholder concerns and eases application of this guideline.

Finally, it has the benefit of resolving a circuit split. In recent years, as the Commission well knows, an intractable circuit split has emerged over the question of whether the definition of

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[17] *See supra* n. 13 (observing that over half of people arrested multiple times reported a substance use disorder compared to 36% of people arrested just once and 7% of people who were not arrested but reported a substance us disorder in the past year).
[18] Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than they Treat It* (Jan 30, 2024), https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/.
[19] Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* (Nov. 2023), https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.
[20] *Id.*
[21] *Id.*
[22] *See United States v. Townsend*, 897 F. 3d 66 at 71 (2d Cir. 2018) (discussing the *Jerome* presumption).
[23] *See, e.g.*, *United States v. Descamps*, 570 U.S. 254 (2013).
[24] USSC, *Proposed Amendments to the Sentencing Guidelines* (2024).

"controlled substance offense" looks to federal law or relevant state law.[25] Most recently, the Supreme Court denied certiorari in a case that could have resolved the split, because "[i]t is the responsibility of the Sentencing Commission to address this division."[26] The Court recognized that "the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences."[27] We agree. The split also results in conflicting sentencing guideline ranges across the country, something the Commission is instructed to avoid.[28]

The Commission is well within its authority to exclude prior state drug offenses in the career offender enhancement. There are wise policy reasons for doings so. Moreover, by eliminating the use of state controlled substance offenses, the Commission resolves the circuit split, simplifies the process, and helps "ensure fair and uniform application of the Guidelines."[29] We hope the Commission will approve this proposal.

B. Crime of Violence definition

FAMM and other groups who represent impacted individuals have long supported the categorical approach, despite its complex application.[30] The categorical approach has been a "necessary evil" to help the crime of violence ("COV") definition be sufficiently narrow and lessen its reach on our members.

As stated at the outset of these comments, FAMM is focused on the injustices at a human level resulting from the career offender guideline and urges the Commission to only adopt changes that will lower the overall number of people sentenced under this provision. Moreover, the definition of COV should ensure that only the most culpable defendants are impacted by the enhancement. FAMM has some concerns that the definition proposed by the Commission will be overbroad and significantly increase the number of people with enhanced sentences.

The Commission's own data suggests that it should proceed with caution so as not to result in changes to the career offender guideline that would *increase* the number of eligible individuals. For example, in fiscal year 2022, 1,354 people received the career offender enhancement under §4B1.1. Only 94 people, or 6.9 percent of this total, were based on predicate COVs, compared to 40.5 percent for mixed predicates and 52.6 percent for drug predicates. But

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[25] *Compare United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018), *with United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021); *United States v. Henderson*, 11 F. 4th 713, 718-719 (CA8 2021); *United States v. Ward*, 972 F. 3d 364, 371-374 (CA4 2020); *United States v. Ruth*, 966 F. 3d 642, 651-654 (CA7 2020).
[26] *See Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., along with Barrett, J., respecting the denial of certiorari).
[27] *Id.*
[28] 28 U.S.C. §994(f).
[29] *Guerrant*, 142 S. Ct. 640.
[30] *See, e.g.,* FAMM Comments to USSC at 4-5 (October 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/famm2.pdf.

if the proposed amendment were implemented such that crime of violence is based on actual conduct, the overall number of people subject to the enhancement *goes up* when state drug priors are excluded and one-point events are excluded.[31] The number of people who would have predicate crimes of violence swells from 94 to 641.[32] And as the Defenders pointed out in their comment, the data used to yield these numbers significantly underrepresents the actual number of people who will be impacted by changes to the definition of COV.[33] Thus, we are greatly concerned about this particular proposal and urge the Commission to only adopt changes to the COV definition that would lessen the impact of the enhancement.

FAMM has reviewed the proposal submitted by the Federal Defenders. We believe that their proposal appropriately addresses the concerns we have with the proposed definition's overbreadth.

C. Both definitions should impose a meaningful sentence-based limitation

FAMM applauds the Commission's effort to further limit predicate crimes beyond the definitional changes. Doing so advances ease of administrability – regardless of the definitions used – and ensures that the career offender guideline enhancement excludes people with relatively minor underlying offenses. To this end, FAMM would advocate Option 3 – that the commission limit predicate offenses to only those for which the individual *served* a minimum of three years in prison for the underlying offense.

Introducing a "sentence served" limit ensures that only those people with prior convictions that actually warranted a lengthy term of imprisonment are captured by the career offender enhancement. This helps the Commission be faithful to the directive while also addressing some of the concerns about the potential breadth of the COV definition.

The Commission has made similar revisions before. In 2016, the Commission eliminated the categorical approach for illegal reentry cases and added a "sentence imposed" requirement for prior felonies. At the time, the Commission observed that doing so would streamline application of the guideline. But more to the point, the "Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court's assessment of the seriousness of the predicate offense . . . ."[34]

Although the Commission has proposed using a "sentence imposed" approach here, there are meaningful differences that counsel in favor of a "sentence served" limit. If the commission relies on "sentence imposed" they may unintentionally bake in significant jurisdictional disparity. For example, in a state with a Truth in Sentencing law, the judge likely contemplates

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[31] USSC *Individuals Sentenced Under §4B1.1 Proposed Amendment Data Background* (2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf.
[32] *Id.*
[33] See Fed. Defenders' Comment on USSG Proposed Amendment—Career Offender (Feb 3 2025).
[34] USSG App. C, Amend. 802, Reason for Amendment (Nov. 1, 2016).

the sentence imposed differently than a judge in a state where only a portion of the sentence imposed will actually be served.[35] Relying on sentence imposed versus sentence served may also exacerbate the already existing racial disparities in the career offender enhancement. FAMM believes that the "sentence served" time limit would ensure the fairest application of the guideline enhancement. If, however, the Commission chooses a "sentence imposed" limit, it should add time to account for the disparities raised above by increasing the time to five years.

II. *Proposed Amendment 4 – Simplification of the Three-Step Process*

It has been nearly two decades since the Supreme Court transformed the Guidelines from a mandatory to an advisory system.[36] The *Booker* three-step sentencing process has guided courts for quite some time. That the process has been used for a long time does not mean, however, that it should continue in its current form.

For more than 30 years, FAMM has advocated individualized sentencing the reflects the human being, their history and conduct, over a cookie-cutter formula for sentencing. Last year, when the Commission proposed a similar idea to simplify the Guidelines it also proposed a concept that we feared would convert 18 U.S.C. § 3553(a) into a guideline. FAMM, and others expressed concern that doing so would have the unintended consequence of constraining judicial discretion under § 3553(a). FAMM is grateful that the Commission listened to stakeholder input and changed its current proposal to exclude this portion that most concerned us.

FAMM supports the Commission in its innovative effort to simplify the Guidelines. We wholeheartedly agree with the comment submitted by the Federal Public Defenders to this end on both the changes to Chapter 1 and the changes to departures. FAMM is optimistic that the Commission can accomplish its commendable goal of simplifying the guidelines this amendment cycle.

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[35] *See, e.g.*, National Center for State Courts, *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*, at 9 ("In Minnesota, offenders generally serve two thirds of their imposed sentence; in Virginia they serve at least 85 percent. In Michigan, the Parole Board determines the sentence between the judicially imposed minimum, which is served in its entirety (100 percent) and the statutory maximum"), http://www.vcsc.virginia.gov/PEWExecutiveSummaryv10.pdf.

[36] *United States v. Booker*, 543 U.S. 220 (2005).

III. *Conclusion*

FAMM thanks the Commission for considering our input on issues critical to federal sentencing. We also appreciate the Commission's invitation to incarcerated individuals to testify and to write directly to the Commission. The Commission's commitment to hear from those whose lives your work touches is deeply appreciated. We look forward to the public hearings on these issues.

Sincerely,

Mary Price
General Counsel

Shanna Rifkin
Deputy General Counsel

fwd.us

February 3, 2025

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20008

Re: Proposed 2024-2025 Amendments to §4B1.1 of the Sentencing Guidelines and the Elimination of the "Categorical Approach"

Dear Judge Reeves:

FWD.us is a bipartisan organization that believes America's families, communities, and economy thrive when more individuals are able to achieve their full potential. To that end, FWD.us is committed to ending mass incarceration, eliminating racial disparities in the criminal justice system, expanding opportunities for the people and families impacted by the criminal justice system, and data-driven approaches to advancing public safety.

It is with this commitment in mind that we submit these comments on the Sentencing Commission's Proposed 2024-2025 Amendments to the Federal Sentencing Guidelines, as published in the Federal Register on December 19, 2024.[1] Our comments focus on the Commission's proposal to narrow the definition of a "controlled substance offense," set minimum sentence requirements for prior convictions to be considered, and eliminate the use of the "categorical approach" in determining whether specific prior offenses should be considered for purposes of §4B1.1 of the Guidelines.[2] Specifically, we write in support of (1) the proposed

[1] U.S. Sentencing Commission, "Proposed Amendments to the Sentencing Guidelines," Dec. 19, 2024, https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20241230_rf_proposed.pdf.

[2] Section 4B1.1 of the Sentencing Guidelines provides for an enhanced offense level and criminal history category where (1) the person being sentenced on an instant federal conviction was at least 18 years old at the time of the commission of the instant offense; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the person has at least two prior felony convictions for either crimes of violence or controlled substance offenses. Section 4B1.2 goes on to provide definitions for both "crime of violence" and "controlled substance offense." Section 4B1.1 is commonly referred to as the "career offender" enhancement. Formerly incarcerated people and advocates, however, have long called for replacing labels, such as "career offender," that stigmatize and pre-judge individuals. Our research found that such labels elicit biased reactions compared to more neutral terminology such as "individual with a criminal record." FWD.us, "People First: Drop the Harmful Labels From Criminal Justice Reporting," https://www.fwd.us/criminal-justice/people-first/.

amendment to exclude state drug convictions from the definition of a "controlled substance offense," as well as (2) the proposed amendment to set a minimum sentence length requirement (measured by time actually served) for qualifying prior convictions. We, however, urge the Commission to reject the proposed amendment replacing the categorical approach with an "actual conduct" approach for "crimes of violence."

In particular, we note:

- The exclusion of state-level drug convictions from §4B1.1 determinations will help prevent the replication and exacerbation of the arbitrariness and racial disparities that pervade state criminal justice systems and will shrink the number of people unnecessarily subjected to §4B1.1;

- Limiting consideration of prior convictions to only those convictions where a person actually served a sentence of five years or more will similarly guard against the uneven and arbitrary imposition of excessive sentences under §4B1.1 and ensure that such lengthy sentences are only imposed in a limited number of cases; and

- Conversely, the Commission's proposed adoption of an "actual conduct" approach to determining what constitutes a "crime of violence" will unnecessarily expand the number of people swept in by §4B1.1 while also exacerbating the administrative challenges and increasing the risk of uneven and arbitrary outcomes.

Our analysis of the proposed amendments is informed by the large and growing body of research showing that long sentences do not advance public safety.[3] As we have noted in previous comments, federal sentences are already too long and do not serve the underlying purposes of punishment. Section 4B1.1, in particular, is a significant driver of excessive federal prison sentences. For instance, in FY2023, the average sentence for people sentenced under §4B1.1 was 154 months.[4] In the plurality of cases (40.1%), the application of the §4B1.1 enhancement led to an increase in both the person's offense level and criminal history, meaning **an average increase in the recommended sentencing range from 84-105 months to 188-235 months**.[5] According to a 2016 report by the Commission, while people sentenced under §4B1.1 represented only 3.4% of the people sentenced in FY 2014, they represented 11.4% of the Bureau of Prisons population that year.[6] Moreover, as the Commission has noted,

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[3] *See* FWD.us, "Advancing Public Safety and Moving Justice Forward," Apr. 23, 2024, https://www.fwd.us/news/advancing-public-safety/#posts.
[4] U.S. Sentencing Commission, "Quick Facts: Career Offender," FY2023, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY23.pdf.
[5] *Id.*
[6] U.S. Sentencing Commission, "Report to the Congress: Career Offender Sentencing Enhancements," at 24, Aug. 2016, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

the current approach to §4B1.1 not only leads to lengthy sentences, but also "odd" and "arbitrary" outcomes.[7]

That §4B1.1 produces excessive and arbitrary sentence recommendations is reinforced by the behavior of federal judges. In its 2016 report, the Commission itself recognized that §4B1.1 creates troubling disparities in sentencing and "has resulted in overly severe penalties for some [people]"—particularly people convicted of drug-related offenses.[8] Federal judges have responded to the excessive guideline recommendations and disparate application of the enhancement by increasingly imposing below-guideline sentences. The Commission's own research shows that in FY2022, judges imposed sentences below the recommended guideline range in 62.1% of cases for individuals sentenced under §4B1.1.[9] And between FY2013 and FY2022, the gap between the recommended guideline minimum and the actual sentence imposed grew.[10]

Federal sentences should only be as long as required to achieve the goals of sentencing, and no more.[11] Any changes to the Guidelines, therefore, must (1) limit or narrow people's exposure to extreme, lengthy sentencing guideline ranges such as those under §4B1.1, and (2) reduce arbitrary and racially disparate sentencing outcomes.

1. **The Exclusion of State-Level Drug Convictions from §4B1.1 Determinations Will Help Prevent the Replication and Exacerbation of the Arbitrariness and Racial Disparities that Pervade State Criminal Justice Systems and Will Shrink the Number of People Unnecessarily Subjected to §4B1.1.**

    a. ***There is a striking lack of uniformity as well as pervasive racial disparities among state-level criminal justice systems.***

As the Commission's data makes clear, state convictions—and state drug convictions, in particular—are a principal driver of lengthy sentences under §4B1.1. State-level criminal convictions, however, vary too widely and are too inconsistent to convey useful information to federal courts considering the import of a person's prior convictions in sentencing. And not only is the information arbitrary, it is racially biased.

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[7] "Proposed Amendments to the Sentencing Guidelines," at 1.
[8] "Report to the Congress: Career Offender Sentencing Enhancements," at 2-3.
[9] U.S. Sentencing Commission, "Individuals Sentenced Under §4B1.1: Proposed Amendment Data Background," at 7, Jan. 2025, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Career-Offender.pdf.
[10] *Id* at 8.
[11] This is merely a restatement of the parsimony principle, which posits that "the state is entitled to deprive its citizens of liberty only when that deprivation is reasonably necessary to serve a legitimate social purpose. Any liberty deprivation beyond that minimum is gratuitous and constitutes state cruelty." Jeremy Travis and Bruce Western, ed., *Parsimony and Other Radical Ideas About Justice*, p. 3-4 (2023). The parsimony principle provides both a metric for evaluating the Commission's policy decisions and an important framework for organizing future efforts.

The concerns driving the Commission's proposed amendments—that §4B1.1 produces extreme, "odd," and "arbitrary" outomes—underscore a deeper issue with the Guidelines' heavy reliance on state convictions to determine criminal history scores and guideline ranges: namely, the disparate, inconsistent, and fragmented way in which state criminal justice systems are administered across the country. Conduct that may result in a non-criminal disposition and no incarceration in one state may lead to a felony conviction and prison time in another. For instance, a charge of simple possession of a controlled substance in Oklahoma is a misdemeanor, but constitutes a felony in Mississippi.

These discrepancies, in turn, are infected by the endemic racial disparities that exist at every stage of the justice system across local and state jurisdictions. Racial disparities in state convictions perpetuate inequality in the justice system and reinforce the disproportionate burden mass incarceration places on communities of color, and Black people in particular. Despite making up about 14% of the population, 32% of state prison populations and 27% of people in state prisons for drug offenses are Black, despite long-standing evidence that white people use drugs at the same rate as Black people.[12]

By relying so heavily on state drug convictions for the purposes of §4B1.1, the Guidelines reproduce these disparities and exacerbate them, leading to the racially disparate imposition of lengthy sentences at the federal level. Indeed, Commission data shows that the §4B1.1 enhancement disproportionately affects Black people: in FY2022, Black people made up 57.7% of people who received §4B1.1 enhancements, despite making up only 25.2% of all cases in the federal system.[13] More broadly, Black people make up just 14% of the U.S. population, but nearly 40% of the federal prison population.[14] Thirty-two percent of people in federal prison for drug offenses are Black, and 53% of men in federal prison serving drug sentences of 20 years or more are Black.[15]

Excluding state drug convictions from the definition of "controlled substance offense" for purposes of §4B1.1 will go a long way in mitigating the concerns about the uneven, arbitrary, and racially disparate way in which the enhancement has been imposed.

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[12] U.S. Census Bureau, "Quick Facts: United States," https://www.census.gov/quickfacts/fact/table/US/RHI225223#RHI225223; Bureau of Justice Statistics, "Prisoners in 2022," Nov. 2023, https://bjs.ojp.gov/library/publications/prisoners-2022-statistical-tables; Substance Abuse and Mental Health Services Administration, "Highlights by Race/Ethnicity for the 2022 National Survey on Drug Use and Health," https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-race-eth-highlights.pdf.
[13] "Individuals Sentenced Under §4B1.1: Proposed Amendment Data Background," at 5.
[14] FWD.us, "The Federal Prison Population Is at an Inflection Point," at 2, Oct. 2024, https://wp.fwd.us/wp-content/uploads/2024/09/FWD-NAACP-Federal-Prison-Fact-Sheet.pdf.
[15] *Id.*

b. ***The proposed amendment will safely shrink the number of people unnecessarily subject to lengthy sentences under §4B1.1.***

As noted above, §4B1.1 guideline ranges have increasingly been out of step with judges' assessments in individual cases, particularly drug cases. Put simply, §4B1.1 sweeps in too many people and recommends too many people for unnecessarily long federal sentences. The exclusion of state-level drug convictions from §4B1.1 determinations will dramatically reduce the number of people subjected to these excessive sentences without undermining public safety.

According to the Commission's data, there were 1,354 people sentenced under §4B1.1 in FY2022.[16] The majority of them (52.6%) qualified for §4B1.1 status solely on the basis of drug offenses (that is, the instant offense, as well as both qualifying prior offenses, were drug offenses). Another 40.5% had a "mixed" pathway (a combination of drug offenses and crimes of violence), while only 6.9% were impacted by §4B1.1 based on violent offenses alone.[17] The exclusion of state drug offenses under §4B1.1 will significantly narrow the universe of people exposed to extreme sentences under the guideline. Indeed, of the 1,354 people sentenced under the guideline in FY2022, only 392 people would qualify for the enhancement if prior state drug convictions were excluded from consideration (putting aside, for now, the Commission's other proposed amendments), a 71% decrease.

c. ***The exclusion of state-level drug convictions from §4B1.1 will not jeopardize public safety.***

Because research increasingly shows that lengthy sentences do not advance public safety or serve the underlying purposes of punishment, they should be reserved only for incredibly rare cases, if imposed at all.

A growing body of research shows that the marginal benefit of lengthier sentences is minimal at best—and counterproductive at worst. Traditionally, proponents of longer sentences have relied on three theoretical public safety justifications: general deterrence (preventing crime by instilling fear of punishment in the general population), specific deterrence (deterring an individual from committing further future crime through the imposition of punishment), and incapacitation (keeping people in custody to prevent them from committing offenses in the community).[18] Recent literature strongly calls into question the viability of incapacitation as a public safety strategy. Drug trafficking and sale offenses, for instance, are subject to the replacement

[16] "Individuals Sentenced Under §4B1.1: Proposed Amendment Data Background," at 4.
[17] *Id.* at 9.
[18] *See* Laura Bennett and Felicity Rose, Center for Just Journalism and FWD.us, "Deterrence and Incapacitation: A Quick Review of the Research," https://justjournalism.org/page/deterrence-and-incapacitation-a-quick-review-of-the-research.

effect—that is, while specific individuals may not commit a further crime while in prison, the volume of drug trafficking is unlikely to decline overall.[19]

Similarly, an extensive study of the age-crime curve suggests that individuals age out of criminal behavior over time, meaning the marginal value of incarceration also declines over time.[20] Indeed, a 2018 study using federal data estimated that an across the board reduction of 7.5 months would save over 33,000 federal prison beds without increasing recidivism by any demonstrable amount.[21] Research across the field shows that any contested and minimal benefits of increased sentence lengths, and incarceration generally, are far outweighed by the harms to individuals, communities, and public safety as a whole.

The Commission's recent experience with retroactive sentence reductions—namely, the FSA Guideline, Crack Minus Two, and Drugs Minus Two Amendments—reinforces these conclusions. Each retroactive application safely reduced sentences for thousands of people in federal prison, allowing them to reunite with their families and communities, sometimes years before their original release date. Critically, evaluations of these retroactive reductions have consistently found no decrease in specific deterrence, as recidivism rates for people released early were the same or lower than for those released after serving their full original sentences.[22]

2. **Limiting Consideration of Prior Convictions to Only Those Convictions Where a Person Actually Served a Sentence of Five Years or More Will Guard Against the Uneven and Arbitrary Imposition of Excessive Sentences under §4B1.1 and Ensure that Such Lengthy Sentences Are Only Imposed in a Limited Number of Cases.**

For the same reasons, the Commission should adopt the proposed amendment that would limit consideration of prior convictions to only those convictions for which a person ***actually served a prison term of five years or more for both controlled substance offenses and crimes of violence***.

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[19] Mark A.R. Kleiman, *Toward (More Nearly) Optimal Sentencing for Drug Offenders, 3* Crim & Public Policy 3 (2006).
[20] Michael Rocque, Chad Posick, and Justin Hoyle, *Age and Crime*, 2015, In The Encyclopedia of Crime and Punishment, W.G. Jennings (Ed.), https://doi.org/10.1002/9781118519639.wbecpx275
[21] William Rhodes, et al., "Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points," Criminology & Public Policy 17, Aug. 2018, https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12382
[22] *See* FWD.us, "The Case for Clemency: Reducing Lengthy Federal Prison Sentences and Advancing Public Safety," Sept. 2024, https://www.fwd.us/wp-content/uploads/2024/09/JustClemency-Recidivism-Brief.pdf. The Commission has also released studies on sentence length and recidivism that purport to show that longer sentences have a specific deterrent effect and are associated with lower recidivism. Those studies, however, were based on artificially constructed matched cohorts rather than the stronger quasi-experimental design of the retroactivity studies cited above.

The Commission's third proposed amendment would require certain minimum sentences for prior convictions to be counted for purposes of §4B1.1 (each option contains multiple suboptions):

- **Option 1** would limit qualifying prior convictions to only convictions that receive three (or two or three) criminal history points under §4A1.1.
- **Option 2** would limit qualifying prior convictions to only convictions that resulted in a sentence ***imposed*** of one, three, or five years.
- **Option 3** would limit qualifying prior convictions to only convictions that resulted in the person ***serving*** a sentence of one, three, or five years.

Because §4B1.1 guideline sentences should be reserved for only rare cases—to the extent they should be imposed at all—the Commission should adopt Option 3, limiting qualifying prior convictions to only those that resulted in a person actually serving five years or more in prison. Such a limitation will ensure that §4B1.1 guidelines are reserved for only a limited number of cases.

While the Commission has not provided impact estimates for each of the proposed options, the estimates for Option 1 (the least expansive) show that excluding one- and two-point offenses would restrict the universe of people subject to §4B1.1: if prior state drug convictions *and* one- and two-point prior convictions were excluded from consideration under §4B1.1, of the 1,354 people sentenced under the guideline in FY2022, only 305 people would qualify with the changes. Adopting the proposal that would limit consideration to those convictions for which the person actually served a sentence of five years or more would further shrink the universe of people to whom §4B1.1 would apply.

Moreover, states vary greatly in the amount of time a person's sentence may be reduced for earned time credits (e.g. good time and merit time), such that the baseline expectations for how much time a person will actually serve for a particular imposed sentence is not consistent across state-level convictions. Adopting minimum requirements for the amount of time served for a prior conviction to be considered under §4B1.1 will mitigate arbitrariness in the application of the enhancement and help ensure that like cases are treated consistently across the federal criminal justice system.

3. **The Commission's Proposed Adoption of an "Actual Conduct" Approach to Determining What Constitutes a "Crime of Violence" Will Unnecessarily Expand the Number of People Swept in by §4B1.1 while Also Exacerbating the Administrative Challenges and Increasing the Risk of Uneven and Arbitrary Outcomes**

Consistent with our analysis above and our prior comments submitted in March 2023, we urge the Commission to reject the proposed change to the definition of "crime of violence," replacing

the categorical approach with a fact-specific "actual conduct" approach.[23] We have previously argued that the categorical approach acts as an important limit on the reach of the already-embattled §4B1.1 enhancement by curbing the number of state convictions that may be considered under §4B1.2, and that any proposed change to the categorical approach that exposes more people to §4B1.1 enhancements must be rejected. The same reasoning applies here.

By instructing judges to look behind the statutory elements of a prior conviction, the adoption of an "actual conduct" approach proposed here would dramatically increase the number of people sentenced under §4B1.1, virtually erasing the reductions gained through the exclusion of state drug convictions and any minimum sentence requirements for prior convictions discussed above. For example, according to the Commission's estimates based on FY2022 numbers:

- Excluding state drug convictions and both one- and two-point prior convictions would reduce the number of people covered by §4B1.1 by 77%. Adopting the "actual conduct" approach for "crimes of violence," however, would sweep more people in and decrease the cumulative reduction to 29%.
- Excluding state drug convictions and only one-point prior convictions (the least expansive option) but adopting the "actual conduct" approach would actually *increase* the number of people subjected to §4B1.1 by 12%, erasing the gains of the Commission's other recommendations entirely.

The Commission should not adopt an amendment aimed at reducing inconsistencies in the imposition of lengthy sentences under §4B1.1 that simultaneously exposes significantly more people to those extreme sentences without advancing public safety. Moreover, the adoption of an "actual conduct" approach would lead to complicated and fact-intensive "mini-trials" in each §4B1.1 sentencing, creating a significant risk of inconsistent results across the federal system. Given the already-reduced influence of the §4B1.1 enhancement among judges and prosecutors, eliminating the categorical approach and bringing more people within its ambit would merely substitute one form of arbitrariness for another while simultaneously subjecting more people to it, without any evidence that the change would advance public safety.

[23] In determining whether a prior state conviction meets the definition of "crime of violence" in § 4B1.2, courts currently use the categorical approach, which requires judges to compare the statutory elements of the state crime of conviction with the elements of the relevant federal criminal statute rather than consider the facts and circumstances of the underlying conviction. In practice, this means that if the state statute of conviction is broader than the federal statute—that is, if it criminalizes conduct that would not be considered criminal under the relevant federal statute—the conviction does not satisfy the categorical approach and cannot be considered as a predicate for a § 4B1.1 enhancement. The result is a limitation on the number of convictions that can serve as predicate offenses for the career offender enhancement. This limitation, in turn, prevents people with certain prior state convictions from facing significantly longer sentences under § 4B1.1.

4. Conclusion

We appreciate the Commission's thoughtful consideration of these amendments and urge the Commission to adopt the proposed amendment to exclude state drug convictions from the definition of a "controlled substance offense," as well as the proposed amendment to requiring a minimum sentence of five years *served* in prison for a prior conviction to qualify for purposes of §4B1.1. We, however, urge the Commission to reject the proposed amendment replacing the categorical approach with an "actual conduct" approach for "crimes of violence."

Sincerely,

Scott D. Levy
Chief Policy Counsel
FWD.us

February 3, 2025

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Re: Proposed Amendments To The Sentencing Guidelines, Policy Statements, And Official Commentary

Dear Judge Reeves:

Thank you for the opportunity to present NACDL's comments on these important proposed amendments. This submission addresses the proposed amendments to the career offender guideline, firearms-related guidelines, and guideline simplification. On all other issues in the proposed amendment cycle not addressed in this letter, NACDL joins in the comments filed by the Federal Defenders.

I. Career Offender (Proposed Amendment 1)

NACDL appreciates that the Commission remains focused on improving the career offender guideline.[1] Unfortunately, NACDL's fear that moving away from the categorical and modified categorical approach for the "crime of violence" definition will increase the use of the career offender guideline remains.[2] While imperfect, the categorical and modified categorical approach is "under-inclusive by design," and helps prevent some of the worst excesses of the career offender guideline.[3] In addition, the proposed amendments would create significant administrative difficulties in implementation. Put simply, the current proposal does not solve the perceived problems with the current career offender guideline, and will likely multiply them.

The Commission's proposed revisions to the "controlled substance offense" definition would significantly restrain the career offender guideline's application, however, and would address the administrability concerns driving the Commission's desire to amend the guideline. This proposal is a positive development, and NACDL supports it.

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[1] U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 19, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/202412_fr-proposed-amdts.pdf ("Proposed Amendments").
[2] *See* NACDL et. al., Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 14, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.
[3] *Borden v. United States*, 593 U.S. 420, 442 (2021).

If the Commission does decide to implement the proposed amendments, it should use the most restrictive option, Option 3A, so that only convictions that resulted in a sentence for which the defendant served five years or more in prison and that are counted separately under §4A1.1(a) qualify.

A. The Current Career Offender Guideline Drives Overincarceration and Inequity in Federal Sentencing Without any Evidence That it Enhances Public Safety.

The Sentencing Commission's own data consistently shows that, although only one-fifth to one-quarter of federal defendants are Black, they constitute more than half of defendants designated as career offenders.[4] And defendants sentenced under the career offender guideline—again, the majority of whom are Black—also make up a disproportionate percentage of people incarcerated in federal prison.[5]

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequities that resulted in those prior convictions, particularly at the state level. Black communities and other communities of color face systematic and ongoing discrimination at every level. For example, Black people are more likely to have prior qualifying convictions in part because of overpolicing in their communities: "Police officers are more likely to stop [B]lack and Hispanic drivers for investigative reasons," and "[o]nce pulled over, people of color are more likely than whites to be searched, and blacks are more

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[4] *See, e.g.*, Paul J. Hofer et al., U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter, *Fifteen Years*] (showing that, in fiscal year 2000, Black people constituted 26% of defendants sentenced under the federal guidelines, but 58% of those subject to the career offender guideline); *compare* U.S. Sentencing Commission, *Quick Facts: Career Offenders* 1 (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2012] (showing that, in fiscal year 2012, Black people constituted 61.9% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Tbl. 4 (2013), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table04.pdf (showing that, in fiscal year 2013, only 20.6% of federal defendants were Black); *compare* U.S. Sentencing Commission, *Quick Facts: Career Offenders* 1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf [hereinafter, *Quick Facts* 2023] (showing that, in fiscal year 2023, Black people constituted 58.4% of those subject to the career offender guideline), *with* U.S. Sentencing Commission, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard (showing that in fiscal year 2023, only 24.5% of federal defendants were Black).

[5] U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* 2 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (noting that people sentenced under the career offender guideline were "sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months)"). "As a result of these lengthy sentences, career offenders [at the time of the report] account[ed] for more than 11 percent of the total BOP population," *id.*, even though people sentenced under the career offender guideline "have consistently accounted for about three percent of the total federal offender population sentenced each year," *id.* at 18 fig. 1; *see also id.* at 24. Due in part to these lengthy sentences, Black people constitute 38.9% of people incarcerated in federal prison right now. Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Jan. 18, 2025).

likely than whites to be arrested."[6] In some jurisdictions, like Ferguson, Missouri, "these patterns hold even though police have a higher 'contraband hit rate' when searching white versus black drivers."[7] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[8]

Moreover, Black and poor people are more likely to have pleaded guilty to a prior charge because of the coercive aspects of many state-level bail systems, and the difficulties in securing competent counsel in states with significantly overburdened public defender systems.[9] These two features of many state-court systems reinforce one another. As the United States Commission on Civil Rights reported, 96% of all felony defendants who are held pretrial would be released if they had the means to post monetary bail—but 90% were unable to post it.[10] The Commission further explained: "Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants."[11] One study has concluded that "pretrial detention resulted in a 40 percent difference in the Black-white sentencing gap and 28 percent in the Latinx-white sentencing gap,"[12] perhaps due in part to the fact that "similar felony pretrial detainees were more likely to plead guilty by 10 percentage points."[13]

During these long periods of pre-trial incarceration, defendants may face several collateral consequences, including the loss of a job, loss of housing, or loss of custody of their children.[14] In such circumstances, a defendant may plead guilty to an offense pursuant to a deal that would let them out with time served—not realizing that even though they did not

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[6] *See, e.g.* Nazgol Ghandnoosh, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 4 (2015), https://www.sentencingproject.org/app/uploads/2022/08/Black-Lives-Matter.pdf; *see also Fifteen Years*, *supra* n.3, at 134.

[7] *Black Lives Matter*, *supra* n.5, at 4.

[8] In 2005, Black people "represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense." Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, American Bar Ass'n (Oct. 1, 2010), https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/have-we-overcome-obstacles-to-racial-equality.pdf. This discrepancy is particularly salient to the career offender context, as the overwhelming majority—78.2% in fiscal year 2023—of defendants receiving the guideline enhancement are being sentenced for drug trafficking offenses. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Tbl. 26 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table26.pdf.

[9] *See, e.g.*, Radley Balko, *The states of indigent defense: part one*, THE WATCH (Oct. 30, 2023), https://radleybalko.substack.com/p/the-states-of-indigent-defense-part. Mr. Balko has released the first three parts of an intended report on the state of indigent defense in all 50 states.

[10] U.S. Commission on Civil Rights, *The Civil Rights Implications of Cash Bail* 3 (Jan. 2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf.

[11] *Id.* at 33-34.

[12] *Id.* at 52.

[13] *Id.* at 51.

[14] *See, e.g.*, Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html; Emily Yoffe, *Innocence is Irrelevant*, The Atlantic (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/; *see also* U.S. Commission on Civil Rights, *supra* n.9, at 53–54.

serve an additional sentence, the offense itself could have imposed a punishment of more than a year, and thus qualify as a predicate felony conviction later on.

Because these inequities become baked into the career offender guideline, the result is significant overincarceration that in turn falls most heavily on Black defendants. As of fiscal year 2012, nearly 63% of career offenders would have had a criminal history category below VI had the career offender provision not applied;[15] that is still true in fiscal year 2023.[16] Moreover, "[s]ome of the most significant sentencing impacts apply to those offenders who had the least extensive criminal history scores."[17] Among defendants who would have been placed in criminal history categories II or III absent their career offender designation, the average guideline minimum was increased by 84 months after the career offender provisions were applied.[18]

The long-standing pattern[19] of federal judges choosing to sentence defendants with career offender sentencing enhancements below the guidelines range demonstrates the wide-spread recognition that the augmented penalties are too severe. In its December 2020 report, the Commission noted a "steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases," which "demonstrates a continuing decline in the guideline's influence."[20] Section 4B1.1 therefore "has among the lowest within-guideline rates each year."[21]

The Sentencing Commission's data also confirms that there is no public safety reason to impose these career offender enhancements. One analysis, for instance, found that a model predicting days until recidivism showed a statistically significant difference between each criminal history category to which the defendants would have been assigned, absent the career offender enhancement.[22] The Commission therefore concluded that "assigning offenders to

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[15] *Quick Facts* 2012, *supra* n.3, at 1.
[16] *Quick Facts* 2023, *supra* n.3, at 1.
[17] *Report to the Congress*, *supra* n.4, at 21.
[18] *Id.* One study that worked to quantify the degree of overincarceration resulting from the career offender guideline analyzed cases in which defendants who had been sentenced under the residual clause of the career offender guideline were resentenced after the court of appeals governing their jurisdiction held (or assumed) that the guideline's residual clause was invalid. A review of eight defendants (across eight different circuits) showed their sentences were collectively reduced by 288 months (or more than twenty-four years)—an average of three fewer years imprisonment for each. *See* Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in* Beckles v. United States, 165 U. Pa. L. Rev. Online 33, 35, 38 (2016).
[19] *See, e.g.*, Quick Facts 2012, supra n.3, at 2 (chart); Quick Facts 2023, supra n.3, at 2 (chart); *see also Report to the Congress*, supra n.4, at 23 ("[T]he anchoring effect of the guidelines for career offenders appears to be diminishing.").
[20] U.S. Sentencing Commission, *The Influence of the Guidelines on Federal Sentencing: Federal Sentencing Outcomes, 2005-2017*, at 54 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf. For example, "the proportion of career offenders receiving a sentence within the applicable guideline range decreased from 43.3 percent in 2005 to 27.5 percent in 2014." *Id.* at 55.
[21] *Id.* at 55.
[22] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 9 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

criminal history category VI, under the career criminal or armed career criminal guidelines, is for reasons other than their recidivism risk."[23]

The disconnect between the career offender enhancement and recidivism risk is particularly pronounced for people whose prior qualifying convictions were for controlled substance offenses. In one Commission study, a "preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI": indeed, the Commission concluded, "[t]he recidivism rate for career offenders [based on prior drug offenses] more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[24]

The Commission has therefore previously recommended that Congress amend its directive to "no longer includ[e] those who currently qualify as career offenders based solely on drug trafficking offenses,"[25] recognizing that the "normal operation of Chapter Four's criminal history provisions adequately accounts for likelihood of recidivism and future criminal behavior of those [defendants] who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a 'crime of violence.'"[26]

NACDL is concerned that the proposed amendments that move away from the categorical and modified categorical approach for the "crime of violence" definition will expand, rather than narrow, the scope of the career offender guideline. The racial disparities detailed above, taken together with the lack of evidence that the imposition of the career offender enhancement reduces recidivism or improves public safety, strongly caution against any action that would expand its reach.

B. The Proposed Amendments Changing the Definition of "Controlled Substances Offense" are Encouraging, but the Proposed Changes to "Crime of Violence" Would Exacerbate, Rather than Reduce, the Significant Racial Inequities in Federal Sentencing, and Still Lead to Practical Difficulties.

The proposed amendments would drastically alter Section 4B1.2 by moving from the current, elements-based approach of determining whether a prior conviction qualifies as a "crime of violence" or a "controlled substance offense" to: (1) a new definition of "crime of violence" "based on the defendant's own conduct"; and (2) a revised definition of "controlled substance offense" based on a list of "specific federal statutes relating to drug offenses."[27] In addition, the proposed amendments set forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense," each with two Suboptions.[28]

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[23] *Id.*
[24] *Fifteen Years*, *supra* n.3, at 134 (emphasis in original).
[25] *Report to the Congress*, *supra* n.4, at 3.
[26] *Id.* at 44.
[27] Proposed Amendments, *supra* n.1, at 2-3.
[28] Proposed Amendments, *supra* n.1, at 3.

1. The New Proposed Definition of "Crime of Violence" Implicates the Same Concerns as Prior Proposals.

The proposed amendments provide a broad new definition for the term "crime of violence" based on the conduct the defendant "engaged in" during the prior conviction: "the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[29] The definition provides a list of types of qualifying conduct that includes a "force clause," certain specific offenses that currently qualify as a "crime of violence," and a provision that would allow certain inchoate offenses to still qualify as "crimes of violence."[30]

The Commission also proposes permitting the government to use documents from the prior convictions to make a prima facie case that the prior convictions qualify. These may include the charging document, the jury instructions and accompanying verdict form, a plea agreement or transcript of a plea colloquy, the judge's formal rulings of law or findings of fact, the judgment of conviction, any explicit factual finding by the trial judge to which the defendant had assented, and "[a]ny comparable judicial record of the sources described."[31] By contrast, under the current categorical approach, courts are permitted to look to these sorts of documents (known as *Shepard* documents) only when the statute of conviction is divisible, in order to prevent unfairness.[32]

In short, rather than looking to an objective test to determine whether the elements of the prior offense "necessarily" involved a crime of violence, courts will look to a subjective test to determine whether, based on a variety of documents from the prior offense, the defendant "engaged in" conduct that fits the new definition. Moving to such an approach will expand the number of defendants who are sentenced under the career offender guideline based on a prior "crime of violence," and introduce additional inequities by permitting courts to rely more frequently on documents from prior convictions that may not accurately convey what had occurred years prior.

a) The Proposed Changes to the "Crime of Violence" Definition do not Solve the Problems of Over-incarceration and Racial Inequity.

NACDL is concerned that a "conduct" approach to prior convictions does not always result in a finding of the facts that truly occurred. Rather, it reflects the outcome of a process already weighted down by systemic inequities. Black and poor people are disproportionately likely to be represented by overburdened public defenders in state court, where their counsel may not have the resources to fully advise their clients about the future consequences of pleading guilty or to carefully negotiate a plea agreement that accepts guilt under the statute

[29] Proposed Amendments, *supra* n.1, at 3.
[30] Proposed Amendments, *supra* n.1, at 3.
[31] Proposed Amendments, *supra* n.1, at 6-7.
[32] *See Descamps* v. *United States*, 570 U.S. 254, 258, 267 (2013).

that was charged but denies the factual allegations in the charging document (even where the defendant may dispute some of those factual allegations).

Under a conduct-based system—and where witnesses to the actual prior conduct are unavailable or unreliable due to the passage of time and geography—courts are likely to expand their reliance on charging documents when determining whether or not prior convictions qualify as a "crime of violence." Although such documents are likely to set forth the most detailed account of the supposed "facts" of the prior conviction, they are typically based on a one-sided narrative, often drawn from police reports (or the testimony of police officers before a grand jury). Such documents are therefore likely to bake in any bias or inaccuracies contained in those police reports. Indeed, one need only look at the most high-profile recent cases to see examples of inaccurate police reports and statements.[33] At a subsequent federal sentencing hearing years later, where the Federal Rules of Evidence do not apply,[34] a defendant would face meaningful difficulties in gainsaying such sources of evidence.

NACDL is in good company with its concerns that using a conduct-based approach to determine whether a prior conviction is a crime of violence will result in injustice. The Supreme Court, in *Taylor v. United States,* has already set forth the reasons that "the practical difficulties and potential unfairness of a factual approach are daunting."[35] In *Taylor*, a unanimous Supreme Court raised numerous questions about such a process:

> Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed [a qualifying predicate offense]? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed [a qualifying predicate offense], could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, [non-qualifying] offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [a qualifying offense].[36]

These questions and concerns have never been answered satisfactorily in the intervening three decades, nor are they addressed in the proposed amendments.

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[33] Jessica Jaglois et al., *Initial Police Report on Tyre Nichols Arrest Is Contradicted by Videos*, N.Y. Times (Feb. 1, 2023), https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html (detailing inaccuracies in the police report regarding the beating and killing of Tyre Nichols); Eric Levenson, *How Minneapolis Police first described the murder of George Floyd, and what we know now*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html (detailing the initial Minneapolis Police Department press release stating that George Floyd "Die[d] After Medical Incident During Police Interaction").

[34] Fed. R. Evid. 1101(d).

[35] *Taylor v. United States*, 495 U.S. 575, 601 (1990).

[36] *Id.* at 601–02.

The Supreme Court has also warned of the pitfalls of this approach, explaining that sentencing courts "would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense," even though "[t]he meaning of those documents will often be uncertain" and "the statements of fact in them may be downright wrong."[37] The "facts" contained "in the records of prior convictions are prone to error precisely because their proof is unnecessary."[38] After all, defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to," including fears of confusing the jury, or, in the plea context, "irk[ing] the prosecutor or court by squabbling about superfluous factual allegations."[39] As a result, "a prosecutor's or judge's mistake . . . reflected in the record, is likely to go uncorrected."[40] *Mathis*, 579 U.S. at 512. Those "inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence."[41]

b) The Proposed Amendments Would Exacerbate, Rather than Address, the Difficulties in Implementing the Current Career Offender Guideline.

The proposed career offender guideline would also exacerbate the very practical difficulties in administering the guideline that the Commission purports to address. In the prefatory material explaining its proposed amendments, the Commission does not address the justice and equity issues outlined above. Instead, it focuses primarily on criticism the current career offender guideline has received—primarily, that it is difficult to apply, as evidenced by the amount of litigation resulting from disputes about whether certain prior state court convictions count as qualifying predicate offenses or not.[42] Although NACDL appreciates the Commission's efforts to take that feedback seriously in developing its proposed amendments, the proposal before the Commission now would not redress any of the concerns about the current guideline. Instead, it is likely to exacerbate the practical difficulties of the current practice.

First, as already discussed, the proposal will spur mini trials at sentencing for each prior offense that will suffer from a number of practical difficulties. Records and court documents will not always be available or of high quality. Those records will not necessarily reflect the truth of the underlying conduct given that defendants and their attorneys were focused on fighting a crime's elements. And the ability to challenge or investigate key aspects of the prior offense such as witnesses will be severely limited. This will be the reality for most if not all career offender cases under the proposed amendments, compared to the current landscape where categorical issues are briefed less frequently.

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[37] *Descamps* v. *United States, supra* n.31, at 270.
[38] *Mathis* v. *United States*, 579 U.S. 500, 512 (2016).
[39] *Descamps* v. *United States, supra* n.31, at 270.
[40] *Mathis* v. *United States*, *supra* n.35, at 512.
[41] *Id.*
[42] Proposed Amendments, *supra* n.1, at 2.

Second, the current approach has some efficiencies insofar as courts routinely interpret cases involving the categorization of predicate offenses as "crimes of violence" and "controlled substance offenses" (or not) under Section 4B1.1 to be coextensive with the similar analysis of predicate convictions under the Armed Career Criminal Act.[43] As a result, one controlling case can often answer the question. But if the Commission creates a separate track for the career offender guideline, all of the settled law categorizing prior state convictions as qualifying predicates (or not) will fall by the wayside. Instead, parties will take part in this new pattern of mini trials in every case, and given that the proposed amendment will create a question heavily reliant on specific fact patterns, one case will not settle the issue for following cases. Put simply, rather than reducing litigation, the proposed approach would multiply it.

The proposed amendments also contradict feedback the Commission has previously received about the feasibility of implementing the career offender guideline. Indeed, the Commission itself has acknowledged that, in previous stakeholder meetings, "the primary theme that emerged from the roundtable discussion was the desire to have one definition of 'crime of violence' that would apply throughout criminal law."[44] Moving further away from the categorical approach—by diverting from the approach used for the ACCA—directly contradicts that feedback.

Third, the Commission has expressed concerns that the current categorical approach is a "'legal fiction,' in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to 'odd' and 'arbitrary' results."[45] Under the proposed amendments, defendants will still run the risk of being found to have previously committed a "crime of violence" based on documents often drafted by the government, such as the charging document and plea agreement, for which the defendant would not have had the need, time, ability, or resources to meaningfully investigate, consider, or challenge. Our constitutional system does not view these two possibilities as equivalent; indeed, our criminal system is predicated on the notion that it is better to underincarcerate the guilty than to overincarcerate the innocent. To the extent that there is a particular concern in a particular case, sentencing courts remain free to impose an upward variance.

The Commission is well aware that the current career offender guideline is broken, and it has previously urged Congress to enact changes to minimize its harm.[46] The amendments it now proposes for the "crime of violence" definition, however, would do the opposite. The Commission should decline to adopt its proposed amendments to this facet of the career offender guideline.[47]

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[43] *See, e.g.*, *United States* v. *Womack*, 610 F.3d 427, 433 (7th Cir. 2010); *see also James* v. *United States*, 550 U.S. 192, 206 (2007) (noting that "the Sentencing Guidelines' career offender enhancement['s] definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"), *overruled on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015).

[44] *Report to the Congress*, *supra* n.4, at 50.

[45] Proposed Amendments, supra n.1, at 2.

[46] *See generally Report to the Congress*, *supra* n.7.

[47] If the Commission remains interested in changing the career offender guideline and decides against implementing its simplification amendments discussed below, NACDL strongly recommend a revision to Section 4A1.3(b)(3)(A) as well. That provision currently limits the downward departure for defendants sentenced as career offenders under Section 4B1.1 to one criminal history category. If the Commission elects to expand the career offender guideline—

2. **The Proposed Changes to the "Controlled Substances Offense" Definition and the Types of Prior Convictions that Qualify are Encouraging.**

The proposed amendments also provide a new definition for "controlled substance offense" by "listing specific federal statutes relating to drug offenses," thereby excluding "state drug offenses from the scope of its application."[48] The proposed amendments would also move the provision currently located in the Commentary stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense" to the guideline.[49]

In addition, the proposed amendments set forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or "controlled substance offense," each with two Suboptions. Option 1 would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b). Option 2 would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of more than five years, three years, or one year that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b).[50] Option 3 would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served more than five years, three years, or one year in prison and that are counted separately under §4A1.1(a), or §4A1.1(a) and §4A1.1(b). All three options include two suboptions where Suboption A would set the minimum sentence length requirement for purposes of both "crime of violence" and "controlled substance offense" and Suboption B would set the minimum sentence length requirement for purposes of "crime of violence" only.[51]

NACDL is encouraged by the Commission's proposal to remove state drug offenses from the application of the career offender guideline. As explained above, there are serious concerns regarding whether defendants receive appropriate representation in state drug offenses, and the racial inequities baked into the enforcement and charging decisions upon which they rely. Indeed, the Commission itself has previously acknowledged issues with regards to prior controlled substance offenses.[52] Removing state drug offenses is a significant means to attack those problems. Moreover, the proposal provides the simplest solution to the workability problems the Commission has highlighted in the categorical and modified-categorical approach by removing state convictions from consideration.

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despite all of the reasons not to do so—then the Commission should permit, and indeed, encourage district court judges to exercise their discretion to downward depart as many criminal history categories as they deem necessary to correct course for defendants who have been unjustly swept up in this expansion of the career offender guideline.

[48] Proposed Amendments, *supra* n.1, at 2-3.

[49] Proposed Amendments, *supra* n.1, at 3.

[50] Option 2 includes the possibility that the defendant can show that a conviction does not qualify as a prior felony conviction if he can establish that the conviction resulted in a sentence for which the defendant served less than three years, two years, or six months in prison.

[51] Proposed Amendments, *supra* n.1, at 3.

[52] *Fifteen Years*, *supra* n.3, at 133-34 (noting that lengthy incapacitation of drug-traffickers "prevents little, if any, drug selling," that recidivism rates for these cases "are much lower than other offenders who are assigned to criminal history category VI," and that the career offender guideline adversely impacts Black individuals in drug cases).

NACDL is similarly encouraged by the Commission's multi-option proposal that would further limit which prior convictions can qualify. The career offender guideline has been overinclusive,[53] and can dramatically increase both the criminal history category and offense level.[54] These devastating consequences are felt especially by people of color.[55] Limiting the types of prior convictions for both "crime of violence" and "controlled substance offense" to those prior convictions where the defendant actually served five years in prison and that are counted separately under §4A1.1(a) will help ensure the guideline is only applied to those small handful of cases where "a term of imprisonment at or near the maximum term authorized" is "sufficient, but not greater than necessary." 28 U.S.C. § 994(h); 18 U.S.C. § 3553(a).[56] And any concerns regarding certain defendants no longer qualifying as a career offender due to these changes could be contained by judges' ability to vary upwards, a power they will continue to have, as they do now.[57]

II. Firearms Offenses (Proposed Amendment 2)

A. Machinegun Conversion Devices

The Commission proposes amending Guideline §2K2.1 to address a statutory difference in the definition of "machinegun conversion devices" (MCDs) between the Gun Control Act (GCA), 21 U.S.C. § 921(a)(3), and the National Firearms Act (NFA), 26 U.S.C. § 5845(a). The Commission notes that MCDs fall within the NFA's definition of firearm, but that the GCA definition of firearms does not include MCDs.

The Commission proposes two possible options. NACDL respectfully opposes both of these changes and supports maintaining the existing definition. NACDL believes that these statutory differences in definition are intended by Congress and, further, do not present a problem in firearms sentencing.

The amendment proposal also notes that some commenters believe that the existing language insufficiently addresses offenses involving MCDs, which are allegedly becoming more common. However, the Commission's own data show that the average sentence

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[53] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 2 (detailing that in FY23, 20.2% of sentences relative to the guideline range were within the range); USSC, *The Influence of the Guidelines on Federal Sentencing* 55-56 (2020), https://www.ussc.gov/research/research-reports/influence-guidelines-federal-sentencing ("The Commission's §4B1.1 analysis demonstrates a continuing decline in the guideline's influence, as reflected by the steady increase in the difference between the average guideline minimum and the average sentence imposed in career offender cases.").

[54] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 1 (detailing that in FY23, 40.1% of career offenders had an increase in both offense level and criminal history category).

[55] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 1 (detailing that in FY23, 58.4% of career offenders were Black).

[56] For instance, the Commission's Data Briefing accompanying the proposed amendment showed that the average time served in state custody for murder, rape, and other sexual assaults were all at five years or more, with robbery's average being very close at 4.8 years. U.S. Sentencing Commission, *Public Data Briefing: 2025 Proposed Amendment Relating to Individuals Sentenced Under §4B1.1* (Jan. 10, 2025), https://www.ussc.gov/education/videos/2025-career-offender-data-briefing.

[57] *See, e.g.*, *Quick Facts* 2023, *supra* n.3, at 2 (detailing that in FY23, 1.2% of career offenders received an upward variance).

imposed for individuals sentenced with MCDs is, in fact, below the guideline minimum.[58] This is strong evidence that an amendment is not warranted and that the existing guideline is sufficient for district judges to impose appropriate sentences.

B. Mens Rea

NACDL is pleased to see the Commission's proposal to strengthen the *mens rea* requirement for applying the enhancements for stolen firearms and modified serial numbers under Guideline section 2K2.1. As the Commission notes, these enhancements currently require no showing of the defendant's knowledge or mental state.

We are supportive of the Commission's goal to rectify this unfair situation. As the Commission is aware, the *mens rea*—or guilty mind—requirement is a fundamental element of criminal law. The requirement of a "guilty mind" protects a person from being convicted of a crime based on unintentional, accidental, and innocent conduct. The Supreme Court has repeatedly acknowledged the crucial protection the *mens rea* requirement provides in our legal system.[59]

The Commission's action on this issue is particularly important because a strong *mens rea* requirement is too often overlooked in criminal lawmaking. A recent study conducted jointly by NACDL and the Heritage Foundation found that over one-third of criminal bills introduced in Congress contained inadequate *mens rea* protections. [60] Strong intent standards are needed to ensure that unintentional conduct is not punished and to prevent overcriminalization.

Commission action here is warranted because there is currently no *mens rea* requirement for these enhancements. This is extremely harsh, punishing people for conduct they did not intend or, worse, had no knowledge of whatsoever. These enhancements are currently strict liability offenses. The Supreme Court has cautioned that a *mens rea* of strict liability is only appropriate for public welfare offenses, such as those relating to food or drug safety.[61]

The proposed amendment would apply the current *mens rea* requirement from Guideline §2K2.1(b)(4)(B)(ii) to all of subsection 2K2.1(b)(4). Under that proposed amendment, a defendant would be subject to a 2-level enhancement under §2K2.1(b)(4)(A) if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm was stolen." A defendant would be subject to a 4-level enhancement under §2K2.1(b)(4)(B)(i) if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is

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[58] U.S. Sentencing Comm'n, Public Data Briefing: Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices (Jan. 2025), at slide 8 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf (showing "average sentence and Guideline minimum for individuals sentenced with MCDs for fiscal year 2023).

[59] *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (noting that "the requirement of some *mens rea* for a crime is firmly embedded" in the common law).

[60] Heritage Foundation & NACDL, *Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later* (2021), https://www.heritage.org/without-intent-revisited.

[61] *See generally Morissette v. United States*, 342 U.S. 246 (1952).

rendered illegible or unrecognizable to the unaided eye."

NACDL also wishes to address the issue for comment the Commission noted for this amendment, which is whether there are particular evidentiary challenges to proving a defendant's mental state in firearms cases. We do not think that firearms offenses present evidentiary challenges to proving *mens rea* that are particularly difficult or insurmountable. Of course, it could be said that determining a defendant's mental state at the time of a crime's occurrence is always somewhat challenging. But even if firearms cases presented evidentiary challenges to proving *mens rea* that were particularly difficult—which we do not believe they do—district judges have significant experience in making such determinations and are certainly capable of doing so here.

As the Commission states in proposing this amendment, the intent standard proposed—"knew, was willfully blind to the fact, or consciously avoided" knowing—is in fact already used within this very guideline on sentencing firearms crimes. [62] This amendment would simply apply the exact *mens rea* standard already used in this subsection to a larger part of the subsection. There is no indication that district judges have particular difficulty in applying this *mens rea* standard in §2K2.1(b)(4)(B)(ii) such that they will not be able to do so for all of §2K2.1(b)(4). Finally, the fact that the Guidelines require a finding that meets a preponderance of evidence standard, rather than a more rigorous reasonable doubt standard for conviction at trial, also eases this determination.

III. Simplification of the Three-Step Process (Proposed Amendment 4)

NACDL supports the Commission's proposal to streamline and simplify the sentencing process. The Commission's proposal aligns the Guidelines manual with the Supreme Court's *Booker* jurisprudence, reflects predominant federal practice across the country, and would promote robust, client-centered sentencing advocacy. The new simplification proposal is a significant improvement on last year's proposal about which NACDL had expressed strong concerns.[63] While we had previously proposed implementing the simplification project in stages pending additional empirical research and the development of effective training programs, we join with the Federal Defenders in concluding that this new iteration of the simplification mission can be adopted in this amendment cycle. We include below some suggestions as to how the new schema can be rolled out and supported to ensure its effectiveness in realizing the vision of federal sentencing embodied in *United States v. Booker*, 543 U.S. 220 (2005).

As the Commission notes in explaining Proposed Amendment 4, the proposed rewrites are necessary to bring the manual in line with the revolutionary changes wrought by the Supreme Court in *Booker*, which rendered the Guidelines advisory and established it as the

[62] *See* U.S. Sent'g Guidelines Manual, § 2K2.1(b)(4). We also note that similar *mens rea* standards are used elsewhere within the Guidelines. *See id.* at 2B1.1(C)(iv) (knew or reasonably should have known); *id.* at 2K2.1(a)(4)(B); (a)(6)(C); (b)(5)(B); (b)(5)(C); (b)(6); 2K1.3(b)(3); 2M5.3(b)(1)(D) (knowledge, intent, or reason to believe).

[63] *See* NACDL Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (February 22, 2024), https://www.nacdl.org/getattachment/9d7cb66a-4466-4868-8c91-9e1eea2e5588/nacdl-comments-to-sentencing-commission-on-proposed-2024-amendments-02222024.pdf

first—albeit important—step in a larger analysis that requires the sentencing judge to consider the factors set forth in 18 U.S.C. § 3553. The change was so radical that time and again, the Court has admonished courts to recognize their broad power under *Booker* "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[64] Thus, the Commission's revisions to Chapter One reflect an accurate description of the post-*Booker* sentencing landscape that had replaced one where the Guidelines were not just the beginning point, but presumptively the end-point too. Post-*Booker*, sentencing courts may not presume that the applicable guideline range is reasonable; nor does it "fix the permissible range of sentences."[65] Rather, "the court must make an individualized assessment based on the facts presented and the other statutory factors."[66]

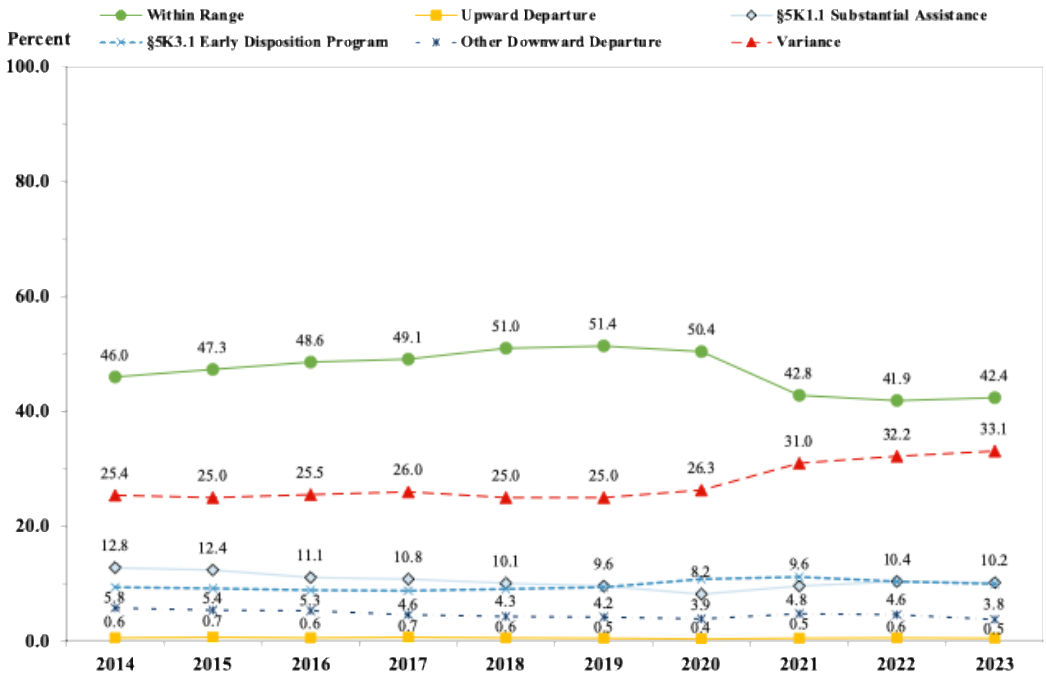
In this context, we welcome the elimination of both departures themselves and the concept of departures. The approved departures in the Guidelines have always been strictly rationed and narrowly crafted, sometimes requiring legal contortions to make them apply to a given case. The rhetorical gymnastics to apply the departure language become particularly absurd in the post-*Booker* world where a district court can simply side-step the restrictive departure ground and vary downwards for any reason. Moreover, the word "departure" frames the guideline range as the permissible endpoint, from which deviations are "departures" and, implicitly, something unusual or out of the ordinary. This is directly contrary to the *Booker* scheme outlined above. The deletion of departures and the departure language removes from the manual an anachronistic and improper privileging of the Guidelines in the manual.

Moreover, the Commission's simplification proposal is more consistent with *actual sentencing practices* in federal courts across the country. As the Commission notes, the trend across the country has been for judges to use their variance power more expansively and to use departures with less frequency. The table below, which shows sentencing trends over the past decade, reveals a steady increase in variances—now up to approximately one third of federal cases—while the use of the downward departure mechanism has remained consistently below 6% of cases, most recently dipping below 4% of cases.

[64] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (quotation omitted).
[65] *Beckles v. United States*, 580 U.S. 256, 263 (2017).
[66] *Id.* at 265 (*quoting Gall v. United States*, 552 U.S. 38, 49 (2007)) (quotation marks omitted).

Figure 9

SENTENCE IMPOSED RELATIVE TO THE GUIDELINE RANGE OVER TIME[1]
Fiscal Years 2014 - 2023



[1] Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2014 - 2023 Datafiles, USSCFY14 - USSCFY23.

See 2023 Annual report and Sourcebook of Federal Sentencing Statistics, Figure 9.[67]

The Commission's proposal, by dispensing with narrow departure grounds and the framing effect of the departure language, will also promote robust, client-centered sentencing advocacy. Once the guideline range is calculated, the focus of the sentencing court and the parties can immediately turn from the clinical mathematical calculations that characterize so many federal sentences to a more holistic and humane consideration of the unique circumstances of the individual being sentenced and their particular crime. Indeed, since 2005, NACDL and its partners, like the Federal Defenders, have devoted thousands of hours training its members on creative and client-centered plea bargaining and sentencing advocacy. As a result, the quality of sentencing advocacy across the country has improved considerably and the federal sentencing process has become closer to the ideal that the Supreme Court initiated with *Booker* and its progeny.

NACDL has the following suggestions for the implementation of this proposal:

First, we welcome the Commission's decision in this iteration of the simplification proposal to delete the departure provisions entirely and to dispense with a separate chapter listing and essentially codifying the 18 U.S.C. § 3553 factors. As we wrote last year, this

[67] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Figure09.pdf.

would be directly contrary to the congressional directive, oft repeated in the Supreme Court's *Booker* jurisprudence, that there is "*no limitation*" on "information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[68] Nonetheless, there are important and informative sections of the current manual that would be lost in this exercise – the research on the development of young brains, for example, currently contained in U.S.S.C. §5H1.1. (Age (Policy Statement)). This research does not need to disappear, however. It could be incorporated into a series of primers for judges that set forth the latest scientific research on potential mitigating and aggravating factors. Examples could include neuroscientific research on the impact of prolonged drug use on cognitive abilities,[69] the impact of post-traumatic stress disorder on criminal conduct,[70] the limited deterrent effect of long sentences,[71] or the collateral consequences of convictions,[72] to name just some. These primers, or whatever mechanism the Commission adopts to preserve and advance this and similar research, would further the Commission's purpose to "establish sentencing policies and practices for the Federal criminal justice system" that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A) & (C).

Second, NACDL repeats its concern expressed in our letter last year about the first simplification version that the Commission consider and address how this proposal will impact the sentencing practices of those judges who persistently decline to grant variances but remain comfortable with downward departures. The Commission's own data indicates that such judges exist. Its most recent graph demonstrating sentences imposed relative to the guideline range over a ten-year period (reproduced above) reveals that there is a small but persistent percentage of individuals receiving downward departures rather than pure variances (4 to 6%), a statistic that represents thousands of individuals every year. The apparent resilience of this departure rate, which judges could have folded into a variance decision, suggests that there is a group of judges deeply anchored in a guideline-centric sentencing methodology. Psychological literature on decision-making teaches us that such anchors can be difficult to displace, and the elimination of departures could well result in more within-guidelines sentences by judges who view variances as less legitimate.[73] Thus, to ensure against the potential that thousands of criminal defendants receive higher sentences from judges who will refuse to embrace their variance authority as a substitute for their departure authority, the Commission must engage in a thoughtful and unstinting education campaign so that this proposal meets its goal of securing the two-step, individualized sentencing process envisaged

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[68] 18 U.S.C. § 3661; *see also Concepcion v. United States*, 142 S. Ct. 2389, 2399 (2022) ("Accordingly, a federal judge in deciding to impose a sentence 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"), *quoting United States v. Tucker*, 404 U.S. 443, 446 (1972).

[69] *United States v. Hendrickson*, 25 F.Supp.3d 1166, 1172–73 (N.D. Iowa 2014) (Bennet, J.).

[70] *United States v. Polizzi*, 549 F. Supp. 2d 308, 411 (E.D.N.Y. 2008) (Weinstein, J.), *rev'd on other grounds, United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009)).

[71] *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006) (Rakoff, J.)

[72] *United States v. Nesbeth*, 188 F.Supp.3d 179 (E.D.N.Y. 2016) (Block J.),

[73] *See*, *e.g.*, *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J. concurring) (noting that the "so-called 'anchoring effects' long described by cognitive scientists and behavioral economists, show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point"), citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).

by *Booker*. For example, the Commission could conduct surveys, structured interviews and focus groups—perhaps engaging in particular with chief judges and former chief judges—to better determine how the elimination of the departure step in federal sentencing will be received and applied by judges across the country. Such research will inform a successful roll-out of the Commission's simplification proposal, and potentially identify alternative interventions – such as the use of respected judicial ambassadors – to ensure the proposal does not produce unintended consequences.

Finally, and related to the previous point, the Commission should ensure that its educational programs for judges include regular and forceful presentations on the judges' post-*Booker* duty to view each criminal defendant holistically as an individual, and the judges' power – and indeed duty in the appropriate case – to vary from the Guidelines. As the graph reproduced above illustrates, just as there is a persistent percentage of cases where departure rather than pure variance authority is used, there is a persistent and troublingly large percentage of cases (ranging from 42% to 51%) in which no departure or variance is granted at all. If judges were merely using the Guidelines as an initial benchmark, as the *Booker* jurisprudence requires, it is almost inconceivable that so many defendants would be sentenced each year *within* the applicable guideline range. If the Guidelines are only the starting point, after which the sentencing judge goes on to consider the wide range of mitigating and aggravating factors that make up an individual's life, conduct and future potential, common sense suggests that the mechanical guideline range will rarely represent the correct amount of time for a unique individual in their unique individual case. We submit that the persistence and prevalence of within-Guidelines sentences suggests the Commission's educational programs are deficient. Under *Booker*'s humane regime, the goal is individualized sentencing not national uniformity.

Conclusion

NACDL once again thanks the Commission for this opportunity to present our comments on the proposed amendments in this cycle. For any amendments not addressed in this letter, NACDL joins in the comments submitted by the Federal Defenders.

Respectfully Submitted,

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NEW YORK CITY BAR

COMMITTEE ON FEDERAL COURTS

RICHARD HONG
CHAIR
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February 3, 2025

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs – Proposed Amendments

RE: Comments on Proposed Amendment to the Guidelines Manual Regarding Simplification of the "Three-Step Process"

Dear Commissioners:

On behalf of the Federal Courts Committee of the New York City Bar Association[1] ("City Bar"), we respectfully submit the following comments on the United States Sentencing Commission's ("Commission") Proposed 2024 Amendments to the Federal Sentencing Guidelines Manual ("Guidelines" or "U.S.S.G."). Specifically, the City Bar submits its comments concerning Proposed Amendment 4 regarding the simplification of the three-step process set forth in Section 1B1.1 of the Guidelines. The City Bar appreciates this opportunity to comment on the Proposed Amendment.

I. PROPOSED AMENDMENT 8

On December 19, 2024, the Commission proposed an amendment requesting comment on, *inter alia*, whether any changes should be made to the three-step process set forth in Section 1B1.1 (Application Instructions) of the Guidelines and the use of departures and policy statements relating to specific personal characteristics. The proposed amendment would also restructure Section 1B1.1 and Chapter One of the Guidelines to simplify both the current three-step process

[1] The City Bar, founded in 1870, has approximately 23,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

for determining a sentence that is "sufficient, but not greater than necessary,"[2] and the guidance in the Guidelines regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

Specifically, the proposed amendment would remove the second step in the three-step process, set forth in Subsection 1B1.1(b), which currently requires a sentencing court to consider the departure provisions included throughout the Guidelines and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics. The proposed amendment would delete most "departures" currently provided throughout the Guidelines (except for those pertaining to substantial assistance to authorities and early disposition programs) and would account for these deleted "departures" through the court's consideration of the applicable sentencing factors identified in 18 U.S.C. § 3553(a). The Commission stated that this amendment would better align the Guidelines with the requirements placed on sentencing courts and reflect the growing shift away from the use of departures following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny.

The Commission has invited comments on several issues concerning the proposed amendment. The City Bar writes in response to the Commission's request for general comments on whether reconceptualizing the three-step process as proposed would streamline the application of the Guidelines and better reflect the interaction between 18 U.S.C. § 3553(a) and the Guidelines.

II. THE CITY BAR SUPPORTS THE PROPOSED AMENDMENT SIMPLIFYING THE PROCESS FOR DETERMINING THE SENTENCE TO BE IMPOSED

The City Bar supports the proposed amendment to the Guidelines to simplify the process for determining the sentence to be imposed and eliminate the second of the three steps currently reflected in Section 1B1.1 of the Guidelines. Specifically, the City Bar supports the Commission's proposal to remove the increasingly vestigial step of having courts analyze whether any departures are warranted before considering the Section 3553(a) factors and determining the sentence to be imposed. The proposed amendment would conform the Guidelines to prevailing practices, preserve for courts the ability to consider all relevant factors in determining a sentence, make the sentencing analysis more efficient, and clarify the process for defendants and non-practitioners.

A. The Commission's Authority to Enact the Proposed Amendment

We note at the outset that the Commission possesses statutory authority to promulgate and enact amendments to the Guidelines that simplify the process courts utilize to determine sentences that are "sufficient, but not greater than necessary." One of the Commission's statutory purposes is to "establish sentencing policies and practices for the Federal criminal justice system that" ensure punishments accord with the statutory goals of sentencing established by Congress, "provide certainty and fairness" while "avoiding unwarranted sentencing disparities" and "maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[3] Consistent with this purpose, the Commission is required to "promulgate and distribute

[2] 18 U.S.C. § 3553(a).

[3] 28 U.S.C. § 991(b)(1)(A)–(C).

to all courts of the United States and to the United States Probation System . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case,"[4] as well as "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further" the statutory purposes of sentencing.[5]

Congress has imposed limits on the Commission's authority to promulgate guidelines and policies,[6] but none preclude changes to the current three-step process for determining a federal sentence. Provided that any amendments simplifying that process continue to comply with the aforementioned requirements and further the statutory purposes of sentencing,[7] such amendments are within the Commission's authority. Nor would such amendments infringe on courts' overall sentencing discretion—including, among other things, the discretion to weigh factors beyond those identified in the Guidelines—because the range of sentences specified by the Guidelines is only "the starting point and the initial benchmark" in sentencing proceedings.[8]

B. General Comments on Reconceptualizing the Three-Step Process

The City Bar believes that the proposed amendment would helpfully streamline the application of the Guidelines and overall sentencing analysis and would better reflect the interaction between 18 U.S.C. § 3553(a) and the Guidelines, particularly given how courts apply these authorities in practice.

1. *Background on the Three-Step Process*

Section 1B1.1 of the Guidelines sets forth the instructions for determining the applicable Guidelines range and sentence to be imposed in each case. This process broadly involves three steps for a sentencing court: (1) calculating the applicable Guidelines range by determining the defendant's total offense level and criminal history category; (2) considering policy statements and Guidelines commentary relating to departures and specific personal characteristics; and (3) considering the factors identified in 18 U.S.C. § 3553(a) to reach a sentence that is sufficient, but not greater than necessary to comply with the statutory purposes of sentencing.[9]

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[4] *Id.* § 994(a)(1).

[5] *Id.* § 994(a)(2).

[6] *See, e.g.*, 28 U.S.C. §§ 994(b)(1) (requiring that the Commission's guidelines "for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code"); 994(c) (specifying that the Commission "shall consider" whether certain matters are relevant when "establishing categories of offenses for use in the guidelines and policy statements"); 994(d) (specifying that the Commission "shall consider" whether certain matters are relevant when "establishing categories of defendants for use in the guidelines and policy statements"); 994(h)–(i) (providing that the Commission "shall assure that the guidelines specify" certain sentences with respect to particular categories of defendants and offenses).

[7] *See id.* § 991(b)(1)(A); 18 U.S.C. § 3553(a)(2).

[8] *Gall v. United States*, 552 U.S. 38, 49 (2007); *accord Booker*, 543 U.S. at 259.

[9] *See* 18 U.S.C. § 3553(a)(2)(A)–(D) (identifying "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment"; "to afford adequate deterrence to

Departures are sentences outside of the Guidelines range authorized by specific provisions and policy statements in the Guidelines Manual.[10] Prior to the Supreme Court's decision in *Booker*, a sentence outside the Guidelines range could only be imposed if the court found "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."[11] The Guidelines eventually grew to contain more than two hundred provisions, as well as commentary and policy statements, to provide guidance to sentencing courts when determining whether to find that such aggravating or mitigating circumstances justified "departing" from the Guidelines range.

The Supreme Court's decision in *Booker*, which held that the Guidelines were merely "advisory," dramatically reduced the importance of this second step, by "sever[ing] and excis[ing] . . . the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)."[12] As the Court explained, the federal sentencing statutes require a sentencing court to consider the Guidelines range, but also to tailor each sentence in light of the factors identified in 18 U.S.C. § 3553(a), including, among others, "the nature and circumstances of the offense and the history and characteristics of the defendant."[13] A sentencing court thus is permitted to impose a sentence outside the Guidelines range even if the basis for that determination is not formally identified as a ground for departure or does not rise to the level of warranting a departure under the Guidelines framework. A sentence outside the Guidelines framework is called a "variance."[14]

2. *Simplifying the Three-Step Process to Eliminate Step Two Would Conform the Guidelines with Actual Practice*

Following *Booker* and its progeny, litigation and sentencing court determinations regarding formal departures from otherwise applicable Guidelines ranges have become much rarer. This is largely because the sentencing court's "[d]iscretion has replaced formal departure analysis" as the forum for resolving sentencing disputes.[15] Empowered to impose sentences unbound by the strictures of the Guidelines framework and the rubric of specifically identified departures, courts increasingly frame sentences imposed outside applicable Guidelines ranges as variances.[16] This is

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criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

[10] U.S.S.G. Ch. 1, Pt. A(1)(4)(b).

[11] 18 U.S.C. § 3553(b)(1).

[12] *Booker*, 543 U.S. at 245–46, 259.

[13] *Id.* at 259; *see Rita v. United States*, 551 U.S. 338, 347–48 (2007).

[14] U.S.S.G. § 1B1.1, cmt.

[15] *United States v. Gardner*, 939 F.3d 887, 892 (7th Cir. 2019).

[16] *Cf. United States v. Chase*, 560 F. 3d 828, 830–31 (8th Cir. 2009) ("Factors ordinarily considered irrelevant in calculating the advisory guideline range, or in determining whether a guideline departure is warranted, can be relevant in deciding whether to grant a variance. . . . [F]actors such as a defendant's age, medical condition, prior military service, family obligations, entrepreneurial spirit, etc., can form the bases for a variance even though they

so even when the bases for these variances are also identified as potential grounds for a departure.[17] As the First Circuit noted, "for practical purposes" there is no adjustment that "can be justified as a departure but not as a variance."[18] Courts also frequently rely on variances rather than departures because variances avoid the formalism and findings required for a departure.[19]

While the majority of courts still engage in the formal three-step process laid out in the Guidelines and determine whether any possible departures apply in a given case, at least two Courts of Appeal have abandoned this approach post-*Booker*. The Seventh Circuit has held that "departures" are "obsolete" post-*Booker* because district courts may account for the same considerations that underlie departures "by way of analogy in analyzing the section 3553(a) factors."[20] The Ninth Circuit has described how the process of considering potential departures at step two then considering many of the same considerations in the context of the Section 3553(a) factors to determine a reasonable sentence at step three is inefficient and "redundant."[21]

Whether sentencing courts are methodically considering the applicability of departures at the second step of the sentencing analysis or not, courts are finding formal departures with decreasing frequency. Commission data show that, in Fiscal Year 2023, departures (other than for substantial assistance or early disposition programs) were granted in only 4.3% of cases

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would not justify a departure. . . . In addition, factors that have already been taken into account in calculating the advisory guideline range, such as a defendant's lack of criminal history, can nevertheless form the basis of a variance.").

[17] *See, e.g.*, *United States v. Sealed Defendant One*, 49 F.4th 690, 697 (2d Cir. 2022) (explaining that the sentencing court used a variance, not a departure, in part because "that [was] how the district court characterized its own sentence, stating on the record at sentencing that it was 'going to *vary* upward'") (emphasis in original); *United States v. Anderson*, 547 F.3d 831, 833 (7th Cir. 2008) ("But now that the sentencing guidelines are merely advisory, a judge can give a sentencing discount to [a defendant] pursuant to 18 U.S.C. § 3553(a) on account of diminished capacity, without regard to the limitations in guideline section 5K2.13, because diminished capacity might affect 'the nature and circumstances of the offense and the history and characteristics of the defendant,' and those are among the statutory factors that guide sentencing.").

[18] *United States v. Santini-Santiago*, 846 F.3d 487, 490 (1st Cir. 2017).

[19] *See, e.g.*, *United States v. Montalvo*, No. 20-4176-CR, 2022 WL 4282145, at *2 (2d Cir. Sept. 16, 2022) ("Because it issued a variance, the district court was not required to find that Montalvo's discharged conduct was related to the offense of conviction before factoring that conduct into the sentence. . . . We therefore need not consider whether the conduct was sufficiently related to the offense of conviction to warrant a departure under U.S.S.G. § 5K2.21." (citing 18 U.S.C. § 3661)).

[20] *United States v. Miranda*, 505 F.3d 785, 792 (7th Cir. 2007); *see also United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

[21] *United States v. Mohamed*, 459 F.3d 979, 986–87 (9th Cir. 2006) ("We think the better view is to treat the scheme of downward and upward 'departures' as essentially replaced by the requirement that judges impose a 'reasonable' sentence.").

nationwide.[22] The data for Fiscal Year 2022 are in accord, with courts granting departures (other than for substantial assistance or early disposition programs) in only 7.4% of cases.[23]

The infrequency of departures is even more pronounced in those districts where waiver of the ability to request departures is a standard provision of plea agreements. For example, in Fiscal Year 2023 in the Southern District of New York—where such waivers are regularly included in plea agreements and 94.3% of cases resolved by way of a pretrial plea[24]—out of 1,142 sentenced cases, departures (other than for substantial assistance and early disposition programs) were applied in only 12—slightly more than 1% of cases.[25]

The City Bar believes that eliminating the second step in the three-step process would conform the Guidelines with how courts actually approach sentencing and would better reflect the interaction between 18 U.S.C. § 3553(a) and the Guidelines in practice. Moreover, because courts are already empowered to consider, within the broad sweep of the Section 3553(a) factors, all of the bases for potential departures, the proposed amendment if enacted would preserve for courts the ability to consider all relevant factors in determining a sentence.

3. *Simplifying the Three-Step Process Would Not Derogate Parties' Rights to Notice of Sentences Outside the Guidelines Range*

When the Commission solicited comments on simplifying the three-step process previously, some commenters raised concerns that the elimination of departures might lead to parties receiving less notice when courts are contemplating sentences outside applicable Guidelines ranges. Although a court is required to provide "reasonable notice" to the parties "specify[ing] any ground on which the court is contemplating a departure" before it "may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission,"[26] the same "reasonable notice" requirement does not apply when courts vary from the sentencing range recommended under the Guidelines.[27] While cognizant of the need to ensure parties have advance notice of potentially persuasive factors prior to sentencing and the prejudice that might result from insufficient notice, the City Bar does not believe that simplifying the three-step process would cause such harms.

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[22] U.S. Sentencing Comm'n, *2023 Sourcebook of Federal Sentencing Statistics* at 60, Tbl. 29, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf (All websites last accessed on Jan 31, 2025).

[23] U.S. Sentencing Comm'n, *2024 Simplification Data: Supplemental Data: 2024 Proposed Amendment Relating to Simplification*, available at https://www.ussc.gov/education/backgrounders/2024-simplification-data.

[24] U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2023, Southern District of New York*, at 4, Tbl. 2 "Guilty Pleas and Trials in Each Circuit and District," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/nys23.pdf.

[25] *Id.* at 12, Tbl. 8 "Sentence Imposed Relative to the Guideline Range."

[26] Fed. R. Crim. P. 32(h).

[27] *Irizarry v. United States*, 553 U.S. 708 (2008).

First, the notice requirement for departures embodied in Rule 32(h) was imposed when the Guidelines were still mandatory.[28] The ability of courts to vary from the sentencing range recommended from the Guidelines—even in the absence of a departure—lessens, though does not eliminate, the concerns that motivated the notice requirement.[29] Rule 32 also contains "other procedural protections," such as requiring advance disclosure of the presentence investigation report ("PSR"), the right to object to the PSR, and the right to comment on "matters relating to an appropriate sentence" and to present mitigation,[30] which are designed to "make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made."[31] To the extent these procedural protections do not ensure that the parties are provided sufficient notice of the bases for a court's potential sentence outside the Guidelines range, this concern can be addressed by the "district judge . . . granting a continuance when a party has a legitimate basis for claiming that [a] surprise was prejudicial."[32]

Second, after *Booker*, a departure or a variance produces the same result (i.e., a sentence either above or below the range recommended by the Guidelines). By requiring reasonable notice and specification of any contemplated departures in advance, however, Rule 32(h) places a procedural hurdle for courts on only one of those "two roads."[33] Conscientious judges seeking to consider and weigh all relevant circumstances but wary of procedural missteps may thus opt to frame sentences outside the Guidelines range as variances rather than departures. So long as an artificial distinction is maintained between departures and variances with respect to advance notice, prejudice may result if defendants or their counsel underestimate the potential significance of variances based on that distinction. This is particularly true because, as discussed, courts may and do base variances on grounds that may also support a departure.

Third, as the Commission has recognized, and as noted above, "[p]ost-*Booker*, courts have been using departures . . . with less frequency in favor of variances."[34] Thus, although Rule 32(h) requires notice in advance of some departures, the increased use of variances as compared to departures renders such notice increasingly anachronistic.

"Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an

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[28] *Id.* at 713–16.

[29] *See id.* at 713. It is worth noting that Rule 32(h) never prevented *all* surprise to the parties, as it required notice only when a court was considering a departure "on a ground not identified for departure either in the presentence report or in a party's prehearing submission," *id.*, which leaves ample room for uncertainty when multiple potential departures are identified prior to sentencing.

[30] Fed. R. Crim. P. 32(e)(2), 32(f), 32(i)(1)(C), 32(i)(4)(A)(ii).

[31] *Irizarry*, 553 U.S. at 716.

[32] *Id.* at 715–16; *accord United States v. Hatcher*, 947 F.3d 383, 391 (6th Cir. 2020) (reversing imposition of upward variance without notice where "the facts or issues on which the district court relied to impose a variance came as a surprise and the defendant's presentation to the court was prejudiced by the surprise" (cleaned up)).

[33] *United States v. Fletcher*, 56 F.4th 179, 187 (1st Cir. 2022).

[34] U.S. Sentencing Comm'n, "Proposed Amendments to the Sentencing Guidelines" at 123 (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

adequate opportunity to confront and debate the relevant issues."[35] We respectfully submit, however, that maintaining the current three-step process does not further that goal sufficiently to overcome the benefits of the proposed amendment simplifying that process.

4. *Simplifying the Three-Step Process Would Make the Sentencing Analysis More Efficient, Individualized, and Comprehensible to Non-Practitioners*

Simplifying the process by which federal sentences are imposed would have substantive benefits as well, including promoting judicial economy. For example, when a formal departure may be unjustified under the Guidelines but a variance warranted under the Section 3553(a) factors, skipping the intermediate analytical step and moving directly to the variance analysis would be more efficient for courts and litigants (as well as for Probation Officers drafting PSRs and recommending sentences).[36] This streamlined approach would eliminate the "redundancy and inefficiencies" of the three-step process for sentencing courts.[37] It would also make appellate review more efficient by obviating review of the appropriateness of departures and focusing on whether the imposed sentence—whether within the Guidelines range or not—is reasonable.[38]

Moving directly from the calculation of the applicable Guidelines range to the Section 3553(a) analysis would reflect the greater importance of the latter and properly focus the sentencing analysis on the statutory goals of sentencing.[39] The proposed amendment would simplify the analytical journey from the "initial benchmark" of the Guidelines to "consider[ation of] all of the § 3553(a) factors to determine whether they support the sentence requested by a party" and "an individualized assessment based on the facts presented." [40] Skipping the departure analysis would result in analytical clarity and a more transparent determination of an appropriate sentence.[41] This more direct approach may also further promote the imposition of "individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[42] The proposed amendment would restructure the inquiry from two technical, Guidelines-bound steps and one broad discretionary assessment to an analysis that is equal parts consideration of the Guidelines and the weighing of statutory sentencing

[35] *Irizarry*, 553 U.S. at 715.

[36] *See* Lee D. Heckman, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-*Booker *World*, 69 OHIO ST. L. J. 149, 178 (2008).

[37] *Id.* at 182–83 (citing *Mohamed*, 459 F. 3d at 986–87); *see also* Paul J. Hofer, *Beyond the "Heartland": Sentencing under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 699 (2011) ("It is hard to see the advantage of considering a circumstance within the unexplained strictures of the commentary and policy statements governing 'departures,' only to revisit the same factor at step three, under the rubric of 'variance,' free from those strictures.").

[38] Heckman, *supra* n.36 at 183; *see also United States v. Hawk Wing*, 433 F.3d 622, 633 (8th Cir. 2006) (Loken, J. concurring) (noting that review of departures "unduly complicates our appellate task and may compel a significant number of essentially meaningless remands" because the same sentence may be imposed as a variance).

[39] Heckman, *supra* n.36 at 180–81; *see* 18 U.S.C. § 3553(a)(2).

[40] *Gall*, 552 U.S. at 49–50.

[41] Heckman, *supra* n.36 at 183.

[42] 28 U.S.C. § 991(b)(1)(B).

factors specified in Section 3553(a).[43] As a matter of doctrine and practice, this shift in perspective would center sentencing determinations on the individualized evaluations that are both required under the law and essential to dispensing justice.

Finally, the proposed amendment and the clarity that would result if it were enacted would be beneficial for defendants and the public by demystifying the sentencing process. The terms "departure" and "variance," and their doctrinal overlap and distinctions, can be confusing not just for defendants and members of the public, but for practitioners and courts as well.[44] Lay defendants and observers of sentencing proceedings may be understandably confused by the analytical formalism and complications of evaluating and rejecting departures only for such considerations to then form the basis of a variance. Moreover, in those districts in which waiver of departures is a standard plea agreement provision, defendants may frequently misunderstand the plea offers they receive to require them to give up many sentencing arguments that remain available as the basis for a variance under the Section 3553(a) analysis. Making the sentencing process more comprehensible and accessible for defendants and members of the public is a valuable goal in its own right.

5. *The Content of the Deleted Departures and Background Commentary Should Be Preserved*

If the Commission adopts the proposed amendment to delete most "departures" currently provided throughout the Guidelines (except for those pertaining to substantial assistance to authorities and early disposition programs), it should consolidate and preserve the deleted provisions in some readily available format, such as an Appendix. The deleted departures were the result of considerable thought, debate, and years of experience by the Commission in the application of the guidelines. They may yet provide a valuable resource for defendants and prosecutors in fashioning arguments for or against a variance under the Section 3553(a) analysis, as well as for courts in exercising their discretion to impose sentences that are sufficient but not greater than necessary to comply with the purposes set forth in Section 3553(a).

For similar reasons, the Commission should retain background historical information contained in the Commentary to various guidelines, even if the departures provisions are deleted. Post-*Booker*, sentencing courts must still consider the advisory guidelines range. The historical background on the relevant guidelines, including the previous reasons for potential departures, will surely aid in that consideration and the court's determination as to whether the sentence should vary from that range.

[43] U.S.S.G. § 1B1.1(a)–(c).

[44] *See* Hofer, *supra* n.37 at 697–98 & n.91 (noting that in *Rita*, Justice Breyer wrote that a judge "may depart" either "pursuant to the Guidelines" or by imposing a "non-Guidelines sentence" pursuant to *Booker*, "while Justice Stevens' majority opinion in *Gall* used the terms interchangeably" (citing *Rita*, 551 U.S. at 350; *Gall*, 552 U.S. at 46, 51); *see, e.g.*, *Chase*, 560 F.3d at 831–32 (vacating and remanding when "the district court improperly equated a downward variance with a downward departure" and record was unclear whether district court properly considered factors it was required to consider when addressing a variance, if not a departure).

III. CONCLUSION

For the reasons set forth above, the City Bar supports the Commission's proposed amendment to the Guidelines to simplify the process for determining the sentence to be imposed in federal criminal cases. Specifically, the City Bar supports the proposed amendment to eliminate the second of the three steps currently reflected in Section 1B1.1 of the Guidelines. The proposed amendment would conform the Guidelines to prevailing practices, make the sentencing process more efficient and analytically coherent, preserve for courts the ability to consider all relevant factors in determining the sentence to be imposed, and clarify the process for courts, counsel, defendants, and the public.

Respectfully,

Richard Hong

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NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING 2025 PROPOSED AMENDMENT NO. 4 ("SIMPLIFICATION OF THREE-STEP PROCESS") TO THE SENTENCING GUIDELINES

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NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING 2025 PROPOSED AMENDMENT NO. 4 ("SIMPLIFICATION OF THREE-STEP PROCESS") TO THE SENTENCING GUIDELINES

This memorandum is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). The NYCDL is a not-for-profit professional association comprised of approximately 300 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court, primarily in the Southern and Eastern Districts of New York ("SDNY" and "EDNY"). Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the SDNY and EDNY. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the immediate past Executive Director and Attorney-in Chief of the Federal Defenders of New York, and a former Commissioner of the United States Sentencing Commission (the "Commission"). The NYCDL's members thus have intimate, practical working knowledge of the Federal Sentencing Guidelines (the "Guidelines") both as prosecutors and as defense lawyers.

The NYCDL offers the Commission the perspective of experienced practitioners who regularly handle sentencings in some of the most complex and significant criminal cases in the federal courts. Indeed, for the most recently reported fiscal year 2023, SDNY, where NYCDL members regularly practice, was among the busiest sentencing districts in the country. Only a handful of border-state districts and the Southern District of Florida handle more sentencings than SDNY. U.S. Sentencing Commission, *2023 Sourcebook of Federal Sentencing Statistics*, Table 1 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table01.pdf).

We appreciate this opportunity to submit comments to the Commission regarding the fourth of the proposed 2025 proposed amendments to the Guidelines, bearing the "Simplification of Three-Step Process" shorthand. The contributors to these comments include members of the NYCDL's Sentencing Guidelines Committee, Lisa A. Cahill (Co-Chair), Ilana Haramati (Co-Chair), Justine Harris, Sean Hecker, and Harry Sandick.

PROPOSED AMENDMENT: SIMPLIFICATION OF THREE-STEP PROCESS

A. The Request for Comment

In a nod to the reality of sentencing practice post-*United States v. Booker*, 543 U.S. 220 (2005), and the preeminence in many districts of 18 U.S.C. § 3553(a) factors, the Commission now proposes eliminating the second step of the Guidelines Manual's section 1B1.1 instructions, which currently calls for consideration of departures. With that step excised, judges would now follow a simplified two-step process: they would (1) calculate the Guidelines range; and then (2) consider the section 3553(a) factors to arrive at a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. *See* U.S. Sentencing Commission, *Proposed Amendments to the Sentencing* Guidelines, 59 (Dec. 19, 2024) ("Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. . . . Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines."); *id.*, 60 (noting "the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions.").

The more than 200 departure provisions in the Manual would be stricken, with two important exceptions. Section 5K1.1 departures for "substantial cooperation" would remain; so too departures where appropriate in districts with early disposition programs. Apart from these

exceptions, there would be no other departure grounds and so the distinction between "departures" and "variances" would be eliminated.

B. The NYCDL's Perspective

The NYCDL is perhaps uniquely equipped to speak to this particular proposed amendment. The Second Circuit Court of Appeals was first, among the nation's Circuit courts, to highlight that the U.S. Supreme Court's *Booker* decision revitalized section 3553(a) of the Sentencing Reform Act of 1984. *See* note 1, *infra.* Beginning with its penetrating decision in *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005), issued a mere three weeks after *Booker*, the Second Circuit has consistently acted as a thought leader on application of the individualized sentencing factors in 18 U.S.C. § 3553(a). The Circuit has also long led the nation in the percentage of defendants obtaining 18 U.S.C. § 3553(a) variances bringing their sentences beneath the Guidelines range.

SDNY and EDNY, where NYCDL members practice regularly, have routinely been among the most variance-friendly district courts in the country. Those years of experience have allowed NYCDL members to hone their sentencing advocacy skills to advocate for the individualized treatment mandated under section 3553(a), before a bench that understands the flexibility afforded judges under the statute.

Writing for a unanimous panel in *Crosby*, Judge Newman expressed the hope that, post-*Booker*, district judges in the Circuit would "now achiev[e] somewhat more individualized justice." 397 F.3d at 114. In large part because of the Second Circuit's leadership and guidance in *Crosby* and other cases, and the defense bar's concomitant 20 years' experience honing section 3553(a) variance arguments, the NYCDL respectfully submits that that *has* been the result of *Booker.* Such result is consistent with, and pays homage to, Congress's intent in passing the

Sentencing Reform Act of 1984 more than 40 years ago – to put each defendant's individual characteristics at the forefront of sentencing deliberation. *See infra* p. 8.

1. *Background*

Before the Supreme Court issued its decision in *Booker*, a defense lawyer in the Second Circuit fighting for beneath-the-Guidelines-range leniency for a non-cooperator had essentially two options: (1) argue for a specific downward departure found in the text of the Guidelines; or (2) argue pursuant to 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0 that a downward departure was warranted based on a mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . " (so-called "outside the heartland" departures (*Koon v. United States*, 518 U.S. 81, 93-96 (1996)). Even while the Commission suggested that the latter, "unguided," departures, would be "highly unusual" (U.S.S.G. § 1A1.1, Editorial Note (2004) (incorporating original Chapter One, Part A, § (4)(b) (1987)) (*available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2004/manual/CHAP1.pdf), the Second Circuit embraced their potentiality as essential:

> Although departure authority is not a device for subverting the Guidelines, its restrained use in limited circumstances can provide appropriate flexibility in an elaborate sentencing regime that, however thoughtfully constructed, could not possibly anticipate all of the circumstances that might arise in its application. That is why the governing statute [18 U.S.C. § 3553(b)] and the Guidelines [U.S.S.G. § 5K2.0] themselves permit departures, even when a circumstance has been considered by the Commission, as long as that circumstance is present "to a degree" not adequately considered by the Commission.

United States v. Lauersen, 362 F.3d 160, 168 (2d Cir. 2004); *see also United States v. Merritt*, 988 F.2d 1298, 1309 (2d Cir. 1993) ("the Commission expects the departure power to be sparingly used, and reserved for unusual cases. At the same time, however, the overall treatment makes clear that departure in the appropriate case is essential to the satisfactory functioning of the sentencing system.") (citation omitted).

Defense lawyers and judges in the Second Circuit in the pre-*Booker* era turned creative heartland arguments into an art form, presaging the kind of individualized sentencing advocacy that would later take root in the post-*Booker* era. *See, e.g.*, *Lauersen*, 362 F.3d at 164 ("What is present to a degree not adequately considered by the Commission is the *combined effect* of the aggregation of substantially overlapping enhancements and the large increase in the sentencing range minimum at the higher end of the sentencing table.") (emphasis in original); *United States v. Lara*, 47 F.3d 60, 63, 65-67 (2d Cir. 1995) (affirming downward departures for two defendants where the district court identified the "quantity-time factor," i.e., "'the relationship between the amount of narcotics distributed by a defendant and the length of time it took the defendant to accomplish the distribution,'" as a circumstance not adequately considered by the Commission; undue emphasis on quantities of drugs sold over a lengthy time period could, if applied at the high end of the drug-quantity table, overrepresent the defendant's real culpability); *United States v. Concepcion*, 983 F.2d 369, 389 (2d Cir. 1992) (remanding so the district court could consider a downward departure where considered conduct on which the defendant was acquitted "could lead to a sentence of nearly 22 years instead of one-to-three years"; "we doubt that, with respect to conduct of which the defendant was acquitted, the Commission intended so extreme an increase."); *Merritt*, 988 F.2d at 1309-10 (collecting cases).

With *Booker*, the Guidelines became advisory. In what was the first meaningful appellate decision in the country after *Booker*,[1] the Second Circuit was quick to observe that the Supreme Court's decision gave the Sentencing Reform Act of 1984's section 3553(a) factors "renewed significance." *Crosby*, 397 F.3d at 111 ("Prior to *Booker/Fanfan*, the section 3553(a)

[1] Kevin J. Doyle, *Criminal Sentencing in the Second Circuit After Booker: Theoretical and Practical Considerations*, 21 St. John's J.L. Comm. 653, 662 (2007) (noting that the Second Circuit with *Crosby* was "the first federal appeals court to delineate the effect of *Booker* on federal sentencing procedure.").

requirement that the sentencing judge 'consider' all of the factors enumerated in that section had uncertain import because subsection 3553(b)(1) required judges to select a sentence within the applicable Guidelines range unless the statutory standard for a departure was met. Now, with the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance."); *id.*, 110 ("Although the most significant aspect of the [*Booker*] Remedy Opinion is the excision of 18 U.S.C. § 3553(b)(1), with the result that the use of the Guidelines to select a sentence is no longer mandatory, a critically important aspect of *Booker/Fanfan* is the preservation of the entirety of the SRA [Sentencing Reform Act] with the exception of only the two severed provisions. . . . Notably, the [*Booker*] Court explained, 'Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing.'"); *see also United States v. Williams*, 475 F.3d 468, 472 (2d Cir. 2007) (observing that the section 3553(a) factors were "given renewed vitality by *Booker/Fanfan*").

A new word entered the sentencing lexicon post-*Booker* – "variance." A downward departure was a non-Guidelines sentence "imposed *under* the framework set out in the Guidelines." *Irizarry v. United States*, 553 U.S. 708, 714 (2008) (emphasis added); *see also Crosby*, 397 F.3d at 108; *United States v. Cosimi*, 368 F. Supp. 2d 345, 356 (S.D.N.Y. 2005). A variance in reliance on one or more section 3553(a) factor was a non-Guidelines sentence imposed "*outside* the Guidelines framework." *Pepper v. United States*, 562 U.S. 476, 498 n.12 (2011) (emphasis added; citation omitted); U.S.S.G. § 1B1.1 cmt. background (2024).

It is not hyperbole to say that section 3553(a)(1) in particular – the "history and characteristics of the defendant" – allows defense counsel and judges to account for a world of individualized leniency and mitigation that was functionally precluded pre-*Booker*, even utilizing the "outside the heartland" threshold under section 5K2.0. *See Crosby*, 397 F.3d at 108 (*Booker*

"significantly altered the sentencing regime that has existed since the Guidelines became effective on November 1, 1987."). Indeed, the Second Circuit had appreciated section 3553(a)(1)'s significance even years before *Booker*. *See Merritt*, 988 F.2d at 1306-07 ("The keystone section in the creation of the new sentencing system is 18 U.S.C. § 3553. . . . Most prominently listed in clause (1) are 'the nature and circumstances of the offense *and the history and characteristics of the defendant*.'") (emphasis in original); *id.*, 1307 ("the [Sentencing Reform] Act [of 1984, of which section 3553 is a part] clearly ordered that the characteristics of the defendant were to be a central consideration in the fashioning of a just sentence."); *see also United States v. Rodriguez*, 724 F. Supp. 1118, 1119 (S.D.N.Y. 1989) ("the importance of the individual characteristics of the defendant is stressed in the new legislation.").

After a period of obviously close study and consideration, in November 2010 the Commission instituted an amendment to the instruction section of the Guidelines Manual, U.S.S.G. § 1B1.1, formally incorporating *Booker*. Going forward, sentencing would be a three-step process: (1) determination of the Guidelines range; (2) determination whether a departure was warranted; and (3) consideration of the section 3553(a) factors. U.S. Sentencing Commission, Amendment 741 (*available at* https://www.ussc.gov/guidelines/amendment/741). For the first time, the Manual referenced "variances." *Id.*

2. *Departure/Variance Trend in the Second Circuit*

In an era when trials are regrettably few and far between, sentencing advocacy has become arguably *the* critical playing field for Second Circuit criminal defense lawyers. The bar has thus appropriately embraced the breadth of section 3553(a) in the nearly two decades since *Booker*. That practice of requesting individualized variances has rendered downward departure arguments essentially obsolete. Of the numerous downward departure grounds in the current

Manual, we are hard pressed to think of a single one that does not fit neatly within a section 3553(a) factor.[2]

The Sentencing Commission's data bears out the speed, extent and enthusiasm of the Second Circuit's embrace (especially in SDNY) of section 3553(a) variances—unique among the Circuits. Fiscal year 2006 (October 1, 2005 – September 30, 2006) was the first full statistical reporting year post-*Booker*. Perhaps because of the force and clarity of the Second Circuit's leadership in *Crosby*, the Circuit stood out early on. The national average of "within Guideline range" sentences that fiscal year was 61.7%. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2006, Second Circuit*, Table 9 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2006/2c06.pdf). The Second Circuit average was significantly lower, at 51.2% (with only a very modest percentage – less than one percentage point – explained by *upward* moves). *Id.* That year the Second Circuit had a higher percentage of non-departure, below Guidelines sentences (10.9%) than any other Circuit; the Second Circuit's was substantially higher than the 6% national average. *Id.* SDNY was similarly a leader in non-departure, below Guidelines range sentences (15%), with a greater percentage of non-Guidelines sentences than all but four districts in the country. *Id.*

A sampling of the Commission's data for fiscal years 2010, 2015 and 2020, and the last fiscal year available, 2023, indicates that this early trend continued and, if anything, has accelerated:

- For fiscal year 2010, only 39.8% of Second Circuit sentences were within the Guidelines range, compared to 55% nationally; only the D.C. Circuit had a lower percentage. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2010, Second Circuit*, Tables 8 & 9 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-

[2] Not all variances are downward, of course. Commission reporting in the last four fiscal years reflects Second Circuit sentences based on upward variances of between 1.2% and 1.9% annually.

and-publications/federal-sentencing-statistics/state-district-circuit/2010/2c10.pdf). In 30% of Second Circuit sentencings, the defendant received a below Guidelines range sentence based on a *Booker*/§ 3553 variance (overwhelmingly the most popular vehicle for leniency as compared to, for example, a section 5K1.1 motion). *Id.*, Table 9. That was the highest such percentage among all Circuits. The average was just 13.6% nationally. *Id.* In SDNY, 41.9% of sentencings included a *Booker*/§ 3553 variance, which represented the highest percentage among all districts in the country. *Id.*[3]

- For fiscal year 2015, only 28.8% of Second Circuit sentences were within the Guidelines range, compared to 47.3% nationally; only the Ninth Circuit had a lower percentage. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2015, Second Circuit*, Tables 8 & 9 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/2c15.pdf). In 37.7% of Second Circuit sentencings, the highest such percentage among all Circuits, the defendant received a below-Guidelines sentence based on a *Booker*/§ 3553 variance. *Id.*, Table 9. That compared to 17.6% nationally. *Id.* And no district came close to SDNY's 49.1% of sentencings with a *Booker*/§ 3553 variance. *Id.*

- For fiscal year 2020, only 29.8% of Second Circuit sentences were within the Guidelines range, compared to 50.4% nationally; again only the Ninth Circuit had a lower percentage. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2020, Second Circuit*, Tables 8 & 9 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/2c20.pdf).
  In 38.9% of Second Circuit sentencings, the defendant received a non-government variance bringing him/her beneath the Guidelines range, compared to 18.6% nationwide. *Id.*, Table 9. The overall 48% variance percentage in the Second Circuit (also including far fewer upward variances and government-sponsored variances) was the highest among all Circuits. *Id.* The SDNY's 61.3% variance rate was exceeded by just four other districts in the country.

- For fiscal year 2023, only 27.5% of Second Circuit sentences were within the Guidelines range, the lowest among all Circuits save the Ninth, compared to 42.4% nationally. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2023, Second Circuit*, Tables 8 & 9 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/2c23.pdf), Tables 8 & 9, 2020 Federal Sentencing Statistics. In 52.6% of Second Circuit sentencings, the defendant received a variance (1.9% upward + 10% downward, government initiated + 40.7% downward, non-government initiated), the highest percentage among all Circuits. This compared to a 33.1% variance percentage nationwide. *Id.* Only two districts in the country had higher than the 68.4% variance rate in SDNY.

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[3] Commission data indicates that variances are likewise the substantially preferred vehicle for leniency for non-cooperators in EDNY also, but not to the overwhelming extent they are in SDNY. One explanation for the discrepancy is that, according to the data, EDNY routinely leads the Circuit in downward departures other than for substantial cooperation and early disposition program participation.

The variance statistics bear out what NYCDL members see on a daily basis – it is section 3553(a), which gives rise to variances, that typically carries the day in SDNY and EDNY courtrooms post-*Booker*. The statute invites an individualized advocacy that NYCDL members have been experienced in since the *Koon* heartland days, and which they endeavor to excel at.

C. The NYCDL's Position

1. *Proposed Amendment 4 is Consistent With Nearly Two Decades of Supreme Court Federal Sentencing Precedent*

The Commission's simplification proposal in Proposed Amendment 4 is consistent with the Supreme Court's instructions in *Booker* and its progeny, as well as with the federal sentencing statutes. As the Commission noted, post-*Booker*, the sentencing process is properly as follows:

> After determining the kinds of sentence and guideline range, the court ***must*** also ***fully consider*** the factors in 18 U.S.C. § 3553(a), including, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," to determine a sentence that is sufficient but not greater than necessary.

U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines*, 57 (Dec. 19, 2024) (citing *Rita v. United States*, 551 U.S. 338, 347–48 (2007)) (emphasis added).

2. *The Proposed Two-Step Process Should Tend to Elevate the Individualized Considerations Codified in 18 U.S.C. § 3553(a), the Hallmark of Federal Sentencing*

By eliminating most departures, and streamlining sentencing considerations into a two-step approach, the Proposed Amendments should tend to increase the salience of the section 3553(a) factors—as is warranted under the federal sentencing statutes and Supreme Court precedent. Following computation of the applicable Guidelines in step one, the second step's focus on individualized sentencing, centered on the section 3553(a) factors, permits counsel to elevate and the sentencing court to consider a defendant's human characteristics and experiences at sentences. That is precisely what the Supreme Court instructed district courts to do at

sentencing: ensure that "the punishment should fit the offender and not merely the crime." *Pepper v. United States*, 562 U.S. 476, 487-88 (2011) (quotation marks and citation omitted). Including considerations under section 3553(a) as one of only two steps should promote the Supreme Court's mandate that district courts "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.*, 487 (quotation marks and citation omitted).

Indeed, because departures are used sparingly in the Second Circuit, the two-step approach in Proposed Amendment 4 is effectively the practice for most of NYCDL's membership. Based on NYCDL members' collective experience, the two-step approach is not merely workable, it is positive. The Second Circuit's high variance rate demonstrates that the two-step approach provides judges and practitioners with the flexibility to fully consider defendants' individual characteristics and histories in crafting a sentence that is "sufficient, but not greater than necessary" in any particular case. *See* 18 U.S.C. § 3553(a); *accord Pepper*, 562 U.S. at 488 ("[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. Permitting sentencing courts to consider the widest possible breadth of information about a defendant 'ensures that the punishment will suit not merely the offense but the individual defendant.'") (quotation marks, citations, and modifications omitted); *see also United States v. Smith*, 697 F. App'x 31, 33 (2d Cir. 2017) ("sentencing is a holistic analysis, and here, there can be no doubt that the district court considered all of the § 3553(a) factors, including the nature of the offense, the need for treatment, and the characteristics of the defendant"); *United States v. Corsey*, 723 F.3d 366, 380 (2d Cir. 2013) (describing circumstances

when "'a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences.'") (Underhill, J., concurring) (quoting *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), aff'd mem., 301 F. App'x 93 (2d Cir. 2008)); *United States v. Cooper*, 408 F. App'x 483, 485 (2d Cir. 2011) ("In determining a sentence, the district court must consider the factors laid out in 18 U.S.C. § 3553(a) in order to reach 'an informed and individualized judgment . . . as to what is 'sufficient, but not greater than necessary to fulfill the purposes of sentencing.'") (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir.2008) (*en banc*)).

While departures may technically be permitted under the present process, as a practical matter, they are unnecessary under current sentencing law. Virtually anything that attorneys seek to argue, or judges may consider in crafting an individualized sentence, is properly encompassed within section 3553(a). If perfectly implemented by practitioners and the judiciary, departure considerations could be seamlessly folded into the second step contemplated in Proposed Amendment 4. *See* U.S. Sentencing Commission, *Proposed Amendments to the Sentencing* Guidelines, 59 (Dec. 19, 2024) ("Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances.").

3. *The NYCDL Remains Concerned That Elimination of Departures May Harm Defendants Sentenced By Judges Who Have Historically Focused on the Guidelines, Even Post-Booker*

The NYCDL, however, remains mindful that, while section 3553(a) variances are the norm within the Second Circuit, they are less common elsewhere in the country. *See supra* pp. 9-10. In 2023, the national average for within-Guidelines sentences was 42.4%. U.S. Sentencing Commission, *Statistical Information Packet*, *Fiscal Year 2023, Second Circuit*, Table 8 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-

sentencing-statistics/state-district-circuit/2023/2c23.pdf). District courts within the Fifth Circuit imposed within-Guidelines range sentences on more than 63% of defendants, while the courts within the Eleventh and D.C. Circuits approached 50% within-Guidelines range sentences. *See id.*, Table 9. Variances are hardly as pervasive throughout the country as they are in the Second Circuit where the NYCDL's membership practices most often.

Similarly, departures, used sparingly in the Second Circuit, are still implemented in thousands of cases each year in district courts throughout the country. In fiscal year 2023 alone, downward departures were obtained by defendants in 2,421 sentencings nationwide. *Id.* That may represent just a small percentage of cases, but the federal sentencing statutes' focus on individualized sentencing renders the results for individual defendants an important consideration in crafting the Guidelines.

Accordingly, there is a real risk that eliminating most downward departures may harm many criminal defendants sentenced before judges who are habituated to the longstanding three-step process, and who routinely incorporate departures. Some judges and practitioners who are less comfortable with section 3553(a) variances may abandon the individualized second step altogether, in the absence of departures.

The NYCDL thus respectfully recommends adding additional guidance in Chapter One clarifying that elimination of most departures does not render obsolete ***the considerations*** behind historically-implemented downward departures. Specifically, the NYCDL proposes the following language for inclusion:

> Consistent with 18 U.S.C. § 3553(a), the two-step approach permits judges to consider any fact, information, evidence, or aspect of a defendant's life in crafting an appropriate sentence. Any element that courts may have considered in applying a departure under the Guidelines' previous three-step approach is properly considered as a basis for a variance under section 3553(a) in the second step.

The unequivocal statement that prior bases for departures are now bases for variances under the two-step approach may assist judges and practitioners in properly implementing the simplified process in Proposed Amendment 4 without adversely impacting criminal defendants at sentencing.[4]

Finally, the NYCDL adopts the National Association of Criminal Defense Lawyers' 2024 comment on the 2024 Proposed Amendment 7 encouraging the Commission to "ensure (if it does not already do so) that its educational programs for judges include a robust presentation on the judges' post-*Booker* duty to view each criminal defendant holistically as an individual, and their power to vary from the Guidelines." *See* National Association of Criminal Defense Lawyers, 2024 Comments at 14 (*available at* https://www.nacdl.org/getattachment/9d7cb66a-4466-4868-8c91-9e1eea2e5588/nacdl-comments-to-sentencing-commission-on-proposed-2024-amendments-02222024.pdf).

[4] We understand that both the NYCDL's general support for the Proposed Amendment, and our concerns that it should not lead to some defendants receiving higher sentences, mirrors the Federal Public Defender's position on the Proposed Amendment.

CONCLUSION

The NYCDL once again wants to thank the Commission for offering us the opportunity to comment on the proposed fourth amendment. We look forward to continuing dialogue with the Commission as it continues in its efforts to modify the Guidelines as more experience dictates change.

New York, New York
February 3, 2025

Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

By: 

Dani R. James, Esq.
Gibson Dunn
[redacted]

Dani R. James, President
Lisa A. Cahill, Co-Chair, Sentencing Guidelines Committee
Ilana Haramati, Co-Chair, Sentencing Guidelines Committee

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

[redacted]

Topics:

Career Offender

Comments:

Racial Justice Reform Corp is a non-profit that has very simple goals which are to focus on removing the laws that create excessive sentences for non-violent urban minorities, which is the true definition of "systemic racism," The fight to remove state drug charges from 4b1.1/2k2.1 has been one we have battled to accomplish for at least half a decade.

While this rule change can create more incarceration on the side of the analysis of "crime of violence", we still fully support it because it takes the excess punishment away from the non-violent minority and disenfranchised poor.

This change is essential to begin to give the black and brown American who got caught in the desperate search for survival a chance to rehabilitate and not pass on more poverty to the next generation by creating more fatherless children.

We have extensive positive written responses from the range of Joe Biden, countless US Congressmen, and other Civil Rights leaders and the general public.

I congratulate the USSC for this rule change. It is essential to start to equalize "justice" for the black and brown minorities. Thank you.

Creaghan A. Harry
Director
RacialJusticeReform.com
[redacted]

Submitted on: January 15, 2025

THE SENTENCING PROJECT

Submitted Electronically

February 3, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: The Sentencing Project Comment on "Career Offender" Guideline

Dear Judge Reeves:

The Sentencing Project appreciates the opportunity to comment on the Commission's proposed amendments relating to §4B1.2, the "career offender" guideline, for the amendment cycle ending May 1, 2025. The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice. We are eager to be a resource as you work to create just and equitable sentencing policies.

An individual is classified as a career offender under the Sentencing Guidelines if they commit a crime of violence or a controlled substance offense after two prior felony convictions for those crimes. The guidelines assign all individuals classified as career offenders to Criminal History Category VI and to offense levels at or near the statutory maximum for their offense, often resulting in lengthy sentence recommendations.[1] The career offender guideline has been widely criticized by practitioners, judges, and by those who must serve the long sentences that it can yield.[2] The long-standing pattern of federal judges choosing to sentence individuals with career offender sentencing enhancements below the guidelines range demonstrates the consensus that the guideline is often too severe.[3] And its burden falls disproportionately on Black individuals. Roughly one quarter of all federally sentenced individuals in FY23 were Black,[4] but over half of those subject to the career offender guideline were Black.[5]

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[1] U.S. Sentencing Commission (2024). U.S. Sentencing Guidelines. §4B1.2.
[2] *See* U.S. Sentencing Commission (2016). Report to Congress: Career Offender Sentencing Enhancements; Sample of Public Comment on Proposed Amendments (2023).
[3] *See, e.g.* U.S. Sentencing Commission (2012). Quick Facts: Career Offenders; U.S. Sentencing Commission (2021). Quick Facts: Career Offenders; U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.
[4] U.S. Sentencing Commission (2023). Annual Report 2023.
[5] U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.

These disparities are unsurprising, given that the career offender guideline effectively bakes in systemic inequalities that resulted in prior relevant convictions, particularly at the state level. "Police officers are more likely to stop Black and Hispanic drivers for investigative reasons," and "[o]nce pulled over, people of color are more likely than whites to be searched, and Blacks are more likely than whites to be arrested."[6] As a result of consistent overpolicing, Black people are disproportionately likely to have drug convictions, despite using drugs at similar rates to other people.[7] Moreover, Black and poor people are more likely to have pled guilty to a prior charge because of the coercive aspects of many state bail systems, and inadequate counsel in states with overburdened public defender systems.[8] Those pleas, often to drug charges, then form the predicate felonies for sentencing under the federal career offender guideline.

Stakeholders, including The Sentencing Project, have offered extensive feedback on potential changes to the career offender guideline over the past decade. For example, in our March 14, 2023 letter on prior proposed amendments to the career offender guideline, we expressed strong concerns regarding the potential elimination of the categorical approach[9] to defining crimes of violence, which, without other significant changes to the career offender guideline, would have expanded the reach of the career offender guideline and likely deepened racial disparities.[10] We applaud the Commission for the robust revision of the career offender guideline that it now proposes as it again considers the elimination of the categorical approach – particularly the potential exclusion of state drug offenses.

If the Commission now chooses to eliminate the categorical approach we urge you to prioritize two principles. First, at minimum, the career offender guideline should not apply to more individuals. Ideally, it should apply to fewer. Given that the guideline makes already significant federal penalties even more punitive, its application should be restricted to those with the most substantial criminal records. Lengthening already long sentences typically does not reduce recidivism.[11] Individuals also naturally desist from crime as they age – lengthy sentences are rarely necessary for public safety.[12] Faced with a worsening staffing and infrastructure crisis,

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[6] *See, e.g.* Ghandnoosh, N. (2015). The Sentencing Project. Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System.

[7] In 2005, Black people "represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense." Marc Maurer (2010). Justice for All? Challenging Racial Disparities in the Criminal Justice System. American Bar Ass'n.

[8] U.S. Commission on Civil Rights (2022). The Civil Rights Implications of Cash Bail.

[9] The categorical approach is a form of legal analysis focused on the elements of the statute of conviction, not the individual's actual conduct.

[10] Comment from FAMM, the American Civil Liberties Union, Bend the Arc: Jewish Action, Equal Justice USA, the Japanese American Citizens League, Juvenile Law Center, The Leadership Conference on Civil and Human Rights, NAACP Legal Defense and Educational Fund, Inc., the National Association of Criminal Defense Lawyers, the National Center for Transgender Equality, the National Council of Churches, and The Sentencing Project (2023). Proposed Amendments to the Career Offender and Criminal History Guidelines.

[11] Mauer, Marc (2018). The Sentencing Project. Long-Term Sentences: Time to Reconsider the Scale of Punishment. 87 UMKC Law Review 1.

[12] Ghandnoosh, N. (2021). The Sentencing Project. A Second Look at Injustice; Loeber, R., & Farrington, D. (2014). Age-crime curve. In G. Bruinsma & D. Weisburd (Eds.), Encyclopedia of criminology and criminal justice (pp. 12–18). Springer; Piquero, A., Hawkins, J., & Kazemian, L. (2012). Criminal career patterns. In R. Loeber & D. P.

federal prisons are also struggling to safely accommodate the existing prison population.[13] We urge the Commission to work to ensure that the population does not further increase.

Second, the guideline should be revised in a manner to reduce racial disparities as much as possible, to address the longstanding inequities in career offender sentencing, which we discuss below.

As such, The Sentencing Project recommends that the definition of "controlled substance offense" in the federal career offender guideline be revised to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. Additionally, we recommend that for both drug offenses and crimes of violence, that predicate offenses triggering the career offender guideline be limited to those for which the individual served at least five years in prison.[14]

I. The career offender guideline should exclude state drug offenses to improve consistency in sentencing and to reduce the number of individuals given lengthier sentences solely based on prior drug offenses.

The plain language of 28 U.S.C. § 994(h)(2)(B) does not require the definition of "controlled substance offense" to include *state* drug offenses. As the Federal Public and Community Defenders articulated at length in their March 14, 2023 comment, read within the broader context of the Comprehensive Crime Control Act of 1984, it is clear that when Congress intended a provision to include non-federal convictions, it said so expressly.[15] The Commission is well within its power to exclude state drug offenses from the career offender guideline.

Doing so would fulfill the purpose of the guidelines: bringing greater predictability and fairness to federal sentencing. The inclusion of state drug offenses injects substantial arbitrariness into career offender guidelines. State controlled substance laws may criminalize substances beyond those criminalized in federal law, or, in the case of marijuana, may decline to criminalize the same substances as other states.[16] Statutory felony quantity thresholds differ.[17] And charging and plea bargaining practices vary wildly even within state lines. Eliminating state drug offenses would increase the overall uniformity in the career offender guideline's application.

Eliminating state drug offenses would also reduce the overall number of individuals who are subject to the career offender guideline solely based on drug trafficking offenses, which would be consistent with their considerably lower recidivism risk. As such, the Commission has previously recommended that Congress amend its directive to "no longer includ[e] those who

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Farrington (Eds.), From juvenile delinquency to adult crime: Criminal careers, justice policy, and prevention (pp. 14–46). New York, NY: Oxford University Press, p. 40.

[13] *See* Office of the Inspector General (2023). Audit of the Federal Bureau of Prisons' Efforts to Maintain and Construct Institutions.

[14] Specifically, we recommend that the Commission adopt option 3, suboption A.

[15] Federal Public and Community Defenders (2023). Comment on Circuit Conflict re: Controlled Substance Offense (Proposal 4B) and Proposals to Amend Career Offender Guideline (Proposal 6).

[16] Knight, Carly (2023). High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements. 39 Georgia St. Univ. L. Rev. 895.

[17] *See* Ohio Criminal Sentencing Commission (2018). 50 State Low-level Drug Possession Review.

currently qualify as career offenders based solely on drug trafficking offenses,"[18] recognizing that the guidelines existing criminal history rules adequately address their recidivism risk.[19]

Reducing the number of individuals given lengthier sentences based on prior drug convictions is vital if the Commission chooses to eliminate the categorical approach to defining crimes of violence. The categorical approach has played a significant role in limiting the application of the career offender guideline. The categorical approach is an analysis that looks to the statutory elements of an offense, rather than the potentially challenging-to-accurately-discern underlying facts of a prior conviction, when determining whether a conviction qualifies as a crime of violence.[20] In practice, the categorical approach excludes a significant proportion of convictions for violent crimes under state laws from being classified as crimes of violence for the purposes of guidelines. As we addressed in our March 2023 comment, were the Commission to eliminate the categorical approach and move to a conduct-based definition of crimes of violence without other significant amendments that limit the guideline's applicability, the guideline's reach would be harmfully overbroad. The Commission's statistical analysis indicates that moving to an actual conduct approach to defining crimes of violence would potentially quadruple the number of individuals subject to the guideline based on such crimes of violence alone.[21] In FY23, the Commission found that over 90% of individuals who were subject to the guideline received a longer sentence than they would have otherwise because they were classified as a career offender.[22] Therefore broadening the application of the guideline would likely increase sentences for a significant portion of the federal docket, with limited (if any) public safety benefits and an added burden on the Bureau of Prisons and the loved ones of those serving the additional time. Excluding state drug offenses is one of two key ways the Commission can offset that increase.

II. The career offender guideline should exclude convictions which resulted in less than five years of imprisonment to ensure that they are of sufficient seriousness, to avoid a dramatic increase in the application of the guideline, and to reduce racial disparities.

We urge the Commission to ensure that this highly punitive sentence enhancement is limited to those who have caused the most harm by instituting a five year time served[23] requirement for predicate felonies. Not all felony crimes of violence are inherently serious offenses. A robbery, for example, can consist of shoving someone and running away with their purse. A five year time served requirement is not a perfect means of ensuring that only the most serious conduct is subject to the career offender guideline, but it will exclude a substantial portion of lower-level felony conduct. Likewise a five year time served requirement will ensure that the lowest federal drug offenses, which disproportionately arise out of Tribal communities where all drug offenses are prosecuted federally, do not qualify as predicate offenses.

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[18] U.S. Sentencing Commission (2016). Report to Congress: Career Offender Sentencing Enhancements.
[19] *Id.* at 44.
[20] *Id.* at 50.
[21] U.S. Sentencing Commission (2024). Data Briefing: Individuals Sentenced Under §4B1.2.
[22] U.S. Sentencing Commission (2024). Quick Facts: Career Offenders.
[23] We recommend a five year time served, rather than five year sentence imposed, requirement given the significant disparity in proportion of sentence served across jurisdictions.

Given that the weight of the career offender enhancement, even after these recommended changes, will overwhelmingly fall on Black and Latino Americans, the Commission should follow the principle of parsimony in determining how many people will be exposed to even lengthier federal prison sentences. The Commission's statistical analysis based on FY22 data indicates that a proposed amendment excluding state drug charges, using actual conduct to define crime of violence, and excluding one and two criminal history point offenses would result in Black Americans comprising 50% of those subject to the career offender guideline, and Latinos making up another 21%.[24] Given these disparities, the Commission should ensure that it is wielding the career offender enhancement for a narrow set of cases.

We appreciate the Commission's openness to meaningful and significant reforms. As the Commission contemplates eliminating the categorical approach, we encourage you to learn from the career offender guideline's past failures and ensure that it is neither overbroad nor a driver of further racial disparities.

Thank you for this opportunity to provide feedback and please reach out to Liz Komar, Sentencing Reform Counsel, at [redacted] with any questions.

Sincerely,

Kara Gotsch
Executive Director
The Sentencing Project

[24] U.S. Sentencing Commission (2024). Data Briefing: Individuals Sentenced Under §4B1.2.

I am very encouraged with several of the proposed amendments. I especially would want to comment on the Career Offender proposal relating to §4B1.2 . And the elimination of the Categorical and Modified Categorical Approach, and the definitions of Serious Drug Offense and Violent Felony.

I have attached PDF with an example from the First Circuit, which shows the disastrous effects that the Categorical Approach renders. This real life example is also meaningful for your fourth proposed amendment, which would give the Judge an opportunity to look at the individual circumstances. As it should be. I highly support the adoption of both of those.

As the Definitions would be effective to correct prior cases I enthusiastically endorse having both the First and Fourth proposed amendments be effective retroactively.

Rachel Barkow, NYU Law Professor, and former staff at U.S.S.C. wrote in the Harvard Law Review, Nov. 2019: "Further, as with other laws imposing harsh mandatory punishments, the ACCA has been erratically and discriminatorily applied. Because Congress wanted to include a range of prior offenses as eligible for triggering the ACCA's mandatory minimum, it used sweeping and imprecise language."

In the Second proposed amendment, regarding Firearms; there are a substantial number of prisoners, my own son included, who have the word felon after their names from poor decisions as young men. Then like in my son's case, his father died. He did what he could to NOT possess, and was not in violation of State Law, but the Federal government charged him with constructive possession, 922(g)(1) and enhanced with ACCA via Categorical Approach, and he like many others is a taxpayer burden of 15 years, because his dad died. There should be an exception for "Felon in Possession" when there is no criminal intent.

RE: 18 USC §924(e)(2)(A)

When Congress wrote the most current amendment to 924e, AKA the Armed Career Criminal Act, they defined a predicate conviction as "{ii} an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), **for which a maximum term of imprisonment of Ten years or More is prescribed by law".**

The Burning Question is…

Was it the intention of Congress, that a state conviction; for example, MA Gen. Law Chapter 94c Section 32Aa, {drug possession with intent}, a statute with a punishment of, Zero to **"Not More than Ten years"**, be considered a lawful predicate for the Armed Career Criminal Act? **Can the Federal Floor meet the State Ceiling**?

The United States District Court for the District of Massachusetts, the 1st Circuit, has said "Yes they can". Although the 4th and other Circuits says "no they can not".

For the past 30 years, the 1st Circuit prosecutors have allowed a conviction of Chap.94c Sec.32(A)(a), to be used as an ACCA predicate offense when a person violates 18 USC §922(g)(1), "Felon in Possession of a Firearm". This means a 922g1 conviction, that could be non-violent, often victimless and sometimes unintentional, can have its penalty increased to ACCA's mandated minimum of 15 years all the way to life without parole. The result is that thousands of low-level offenders are swept up in the bulldozer of Mass Incarceration and sentenced to overlong punishments. Billions of wasted taxpayer dollars.

Why would the Federal Court say that Sec.32Aa with a punishment of NO MORE THAN TEN YEARS, fits the definition of Serious Drug Offense? Especially when the actual Serious Drug Offenses are in Chap. 94c Sec. 32(E)(a)(b) etc. with punishments of 2 to 15 years and 6 to 20 years, etc. Punishments that do have a probability of TEN OR MORE.

In the September 2021 D.O.J. Journal of Federal Law & Practice, AUSA Robert A. Zauzmer wrote: 'Fixing the Categorical Approach Mess'. He said: "each circuit contributes to a list of strange anomalies, where the definitions of [serious drug offense or] violent felony vary state to state".

We are looking for collaboration to amend 18 USC § 924(e)(2)(A)(i) & (ii). Just one simple change to read **"a punishment of More than TEN years"** instead of the current phrase, **"a punishment of TEN years or more",** to stop the 1st and other circuits from saying that the Federal floor and the State ceiling "Meet at Ten".

Shyer Maguire,
CEO TowersForChange.org
Working to break the School to Prison pipeline.
[redacted]

January 30, 2025

Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle, N.E. Suite 2-500 South Lobby
Washington, D.C. 20002-8002

RE: Tzedek Association Comment on the Commission's Proposed Amendments for the 2025 Amendment Cycle

Dear Judge Reeves and Members of the Commission,

Tzedek Association appreciates the opportunity to comment on two of the proposed amendments promulgated in December 2024 for the cycle ending May 1, 2025. Tzedek is a non-profit humanitarian organization that focuses on criminal justice reform, religious liberty, and humanitarian causes around the globe. Tzedek is committed to championing the civil rights of those mistreated by the criminal justice system, empowering individuals to be productive members of the community and aiding the less fortunate. Tzedek seeks a society that values and embraces compassion and fairness.

In recent years, Tzedek has championed ground-breaking reforms such as the First Step Act and the provisions in the CARES Act that allowed for home-confinement for incarcerated individuals vulnerable to COVID-19 based on CDC criteria. Tzedek always advocates for reform measures seeking to ensure that the criminal justice system embraces fundamental core values that reflect a belief in the unbounded human capacity for atonement, redemption and rehabilitation.

Last July, in response to the Commission's call for comments on Proposed 2024-25 Policy Priorities, Tzedek submitted a comprehensive memorandum, urging the Commission to embrace bold reforms to combat excessive harshness and unwarranted disparity in federal sentencing.[1] As explained below, Tzedek believes that, in modest ways, the Commission's proposed amendments begin to address Tzedek's key concerns with the lack of adequate *mens rea* in federal criminal law

[1] See Tzedek Association Comment on the Commission's Proposed 2024-25 Policy Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=761.

and sentencing provisions. To the extent that the proposed amendments address this deficiency and begins to redress the problem of undue punishment imposed on those lacking in proven culpability, Tzedek endorses these proposals and offers concrete suggestions to ensure that they have the intended impact.

Introductory Context

Mens Rea – a "guilty mind," or otherwise simply known as *criminal intent*, is foundational to our notions of criminal justice. It is the moral anchor of a criminal code. Individuals should not be subjected to criminal prosecution or conviction unless the underlying conduct evinces a guilty mental state. Similarly, the severity of the punishment imposed should be tethered to the extent of the individual's criminal intent. An unintended consequence of the Sentencing Reform Act, which gave rise to the guideline approach to sentencing, is a sentencing structure that operates to eviscerate traditional notions of *mens rea* in the imposition of punishment.

The late Honorable Jack Weinstein and Fred Bernstein wrote about this problem, with a particular emphasis on drug cases:[2]

> "In the guidelines era, *mens rea* has been all but eliminated from the sentencing of drug offenders. This development is a disastrous departure from the great traditions of Anglo-American law . . . It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial. . . Punishing a defendant for facts she 'reasonably should have foreseen' is tantamount to punishing negligent conduct. This is a substantial departure from . . . traditional principles of *mens rea*. The Model Penal Code, for example, permits criminal liability only in cases of extreme negligence, and then only rarely. Moreover, punishments are 'proportional' to mental states."

The Honorable Judge Gerald E. Lynch similarly wrote:[3]

> The guidelines significantly muddle questions of *mens rea* as applied to factors that can have a dramatic effect on culpability . . . The lack of

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[2] Judge Jack Weinstein & Fred Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Federal Sentencing Reporter 121 (1994).

[3] Judge Gerald E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code,* 7 Federal Sentencing Reporter 112 (1994).

> attention to *mens rea* issues [means] the guidelines totally ignore the question of the level of culpability required with respect to the quantities of narcotics that determine the severity of sentencing in drug cases."

Tzedek believes that the need for *mens rea* reform in the operation of our federal sentencing system for all manner of crime is long overdue. Guideline reliance upon arithmetic formulations whether in the context of drug quantities or monetary loss amount, along with other numerous other mechanistic, enhancing calculations without proof of a defendant's knowledge and intent, are inadequate and inappropriate substitutes for an assessment of individual culpability and tend to result in overly harsh sentences.

To further underscore Tzedek's strong recommendation that the Commission address the need to tether sentencing severity to an individualized assessment of culpability, we respectfully offer two observations:

First, it is significant that for crimes involving organizational entities, Chapter Eight sets forth a mechanism that specifically and rigorously correlates the punishment to a case specific assessment of culpability. This approach should be uniform throughout the guidelines, whether dealing with the relative culpability of co-defendants in a multi-defendant case, or in all drug and economic crimes where reliance upon drug quantities and loss amounts tend to inadequately assess individual culpability.

Second, Tzedek is heartened to note that the Commission appears to demonstrate an increasing sensitivity to *mens rea* consideration. The Proposed Amendments to the Sentencing Guidelines (Preliminary) posted for public comment on January 24, 2025 include a request for comment on an amendment that could provide avenues to ameliorate the sentencing severity pursuant to potential revisions of §2D1.1(17) to provide significant reductions for various categories of low level drug trafficking offenses.[4]

Tzedek Endorses the Proposed Firearms Offenses Amendment Part B

With the foregoing as context, Tzedek strongly supports the amendment establishing a *mens re*a requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers.

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[4] Tzedek may submit specific comments on the January 24 proposed amendments in accordance with the schedule set by the Commission.

First, the proposed amendment is entirely consistent with Tzedek's strong preference for explicit *mens rea* requirements to ensure that the moral anchor of knowledge is established to justify an increased sentence. Second, there is no rational basis to impose a mental state requirement when the enhancement applies to firearms not marked with a serial number but omits a similar requirement for a stolen firearm or a firearm with a modified serial number. Thus, the proposed amendment is both sensible and essential in terms of fairness and justice, and it addresses an apparently irrational inconsistency in a morally sound way.

The Commission specifically seeks comment on the evidentiary challenges that may arise from the amendments and asks if there are amendments to address potential evidentiary issues.

To the extent that the "evidentiary challenges" to which the Commission refers reflects a concern that limited evidence of a culpable mental state may make it less likely that the enhancements will be applied, Tzedek believes this is exactly the outcome that should flow from a requirement that an individual manifest a provable guilty mental state – in this case knowledge, willful blindness, or conscious avoidance – to face an increased sentencing range. If none of those mental states can be inferred from the evidence by the standard of proof that applies to the enhancements, then the sentencing enhancement should not be applied.

Does that mean that fewer individuals will likely receive the enhancement? It does, if mental culpability cannot be proven by the government. But that is not a justification to withhold the amendment, nor does it suggest that there should be any ameliorating language designed to make it easier to circumvent the *mens rea* requirement. The whole point of the *mens rea* doctrine is to ensure that those who lack the requisite guilty state of mind should not be subject to a sentencing guideline range as severe as those who are shown to have it.

Tzedek Supports Revision of the Three-Step Process in the Guidelines Manual While Urging Measures to Ensure that Judges Recognize the Duty to Consider Those Matters that were Historically Grounds for Departure are to be Considered as Grounds for Variance in Conjunction with 18 U.S.C. § 3553(a) Factors and that *Mens Rea* Considerations Must Also be Considered

The Commission's proposed amendment reflects a renewed effort to eliminate the largely antiquated three-step process set forth in §1B1.1 and the use of departures

and policy statements related to specific personal characteristics. Presumably, the current proposal embodies refinements adopted in response to comments received in response to an earlier (December 2023) proposal to provide a two-step process. As part of the new proposal, which includes Parts A and B, the Commission specifically identifies four issues for comment under Part A.

Although Tzedek will not comment on each of the specific issues, Tzedek does support the effort to simplify the Guideline process and commends the Commission for specifically recommending changes that will define a two-step process that gives primacy to the factors articulated in 18 U.S.C. §3553 (a) and recognizes a sentencing court's duty to impose a sentence that is "sufficient but not greater than necessary" to comply with the purposes of sentencing set forth in the statute.

Specifically, Tzedek strongly supports the inclusion of new background commentary that makes clear that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994 do not apply to sentencing courts. The litany of circumstances that were foreclosed from departure considerations have always been antithetical to a court's inherent authority and obligation to consider – in the form of "variance" - the unique nature and circumstances of the offense and the history and characteristics of the defendant.

The elimination of the departure process is seemingly consistent with post-*Booker* jurisprudence that reflects and emphasizes the advisory nature of the Guidelines. That said, Tzedek shares concerns admirably articulated by the National Association of Criminal Defense Lawyers (NACDL) in its comments responding to the December 2023 simplification proposal[5]. NACDL noted that at least as of the publication of the 2022 Sourcebook there is a well-established post-*Booker* trend of continued reliance upon departures by a group of judges who apparently remain tethered to the guideline structure, with judges in 4.6 percent of all cases granting downward departures. The 2023 Sourcebook indicates that the number of non-cooperation downward departures declined to 3.8 percent of all cases,[6] but that

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[5] NACDL, Comments to the US Sentencing Commission on Proposed 2024-2025 Priorities (July 15, 2024), *at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=477

[6] U.S. Sentencing Commission, 2023 Sourcebook of Federal Sentencing Statistics, Figure 9 (Sentence Imposed Relative To The Guideline Range Over Time Fiscal Years 2014 -2023) *at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf

percentage still represents thousands of sentenced individuals benefiting from those departures.

Accordingly, to move forward with the proposed simplification reform without risking the deprivation of significant numbers of individuals of a sentence reduction, Tzedek strongly urges the Commission to include commentary making clear that the reason for the simplification is not to deprive otherwise deserving individuals of the benefit of a downward departure, but rather to strongly encourage all judges to give weight to those ameliorating factors as a guideline "variance" when fashioning the sentence pursuant to 18 U.S.C. § 3553(a). In this regard, the Commission should not only make clear that the prior restrictions on Commission promulgated departure grounds do not apply to the sentencing court, but also make clear that the previously articulated grounds for departure still must be considered when determining a sentence that is sufficient but not greater than necessary. Tzedek's endorsement of the simplification of the sentencing process is premised upon the assumption that judges will feel at least as authorized – if not compelled – to vary on a sentence based on departure factors, as they did under the antiquated three-step process.

In this regard, for the sake of efficiency and clarity for all stakeholders, Tzedek supports the concept that the Commission should consolidate and preserve for historical purposes the deleted departure provisions as an additional Appendix to the *Guidelines Manual*, and perhaps emphasize that all of these tools remain readily available to the sentencing Judge in the form of variance.

Additionally, as noted above in discussing the firearms reform, Tzedek remains concerned that the Guidelines do not adequately and appropriately ensure that an individual's *mens rea* is considered in, and plays a central role in calibrating, the imposition of the sentence. While Tzedek stands by its earlier comment supporting broad *mens rea* reform of the Guidelines,[7] the current proposed amendment provides a unique and appropriate opportunity to take a step in this direction. Indeed, as the Commission moves toward a two-step process that presumes that former grounds for departure all can and will be considered in formulating the appropriate sentence, irrespective of the formulaic guideline calculation, it is important to note that many potential departure grounds, such as substance abuse, mental health issues, aberrant behavior, and many more already implicate *mens rea* considerations (albeit indirectly).

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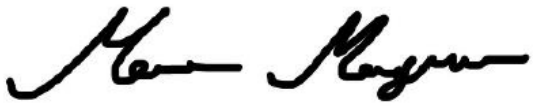
[7] See note 1, *supra* at 778

Accordingly, Tzedek proposes that the Commission make clear, through specific language in the Guidelines, that an individual's *mens rea* or mental state, including motive, purpose, knowledge and personal culpability should be considered by a court with respect the imposition of sentence. Specifically, as part of the revision to §1B1.4 "Information to be Used in Imposing Sentence," Tzedek proposes that a sentence be added after the currently proposed final sentence (which provide an example for sentencing at the top or above the guideline range for someone who pled guilty to one of two robberies) as follows:

> "Similarly a court may consider the individual's culpability as reflected in *mens rea* in connection with the conviction, including any and all aspects of the defendant's mental state, including motive, purpose, knowledge and personal culpability."

Tzedek appreciates the opportunity to provide input on the proposed amendments in the current amendment cycle and looks forward to continuing to work with the Commission in pursuit of a fairer and more humane approach to sentencing.

Sincerely,



Rabbi Moshe Margaretten
President

Proposed Amendments to the Sentencing Guidelines (December 19, 2024)

Topic Number 1: Career Offender

- Vote for sub option 1A
    - To provide consistency, sub option 1A (Limitation applicable to both "crime of violence" and "controlled substance offenses") appears the most viable solution. Providing identical parameters for both types of offenses will help probation officers, attorneys, and Judges ensure guideline provisions are applied correctly. This appears to be the cleanest way to address qualifying offenses for Career Offender applicability. Furthermore, taking this approach will hopefully reduce disparity across the districts. No matter the sentence imposed, if the prior conviction receives criminal history points and meets the definition of either a controlled substance offense or crime of violence, the conviction will count toward the Career Offender provision. Disparity in sentencing could directly impact who qualifies as a Career Offender and who does not. If two people sustained the same conviction in two different states but received different lengths of sentences, this will directly impact the Federal Sentencing Guidelines. Eliminating that aspect of this amendment will attempt to reduce disparity. Finally, treating controlled substance and crime of violence offenses the same appears appropriate. If both trigger the potential applicability of Career Offender, why are we treating them differently as it pertains to criminal history scoring? Doing so could create the impression that controlled substance offenses are not as serious as crimes of violence. If controlled substance offenses are serious enough to be a predicate for Career Offender, then make the definition reflect just that. Again, creating different criminal history point provisions for crimes of violence could, in turn, create disparities.
    - This option also avoids the messiness that comes with determining how much of a sentence a person served. Obtaining custody records can be hard. Therefore, following the application notes under USSG §4A1.2, in that it is the sentence pronounced, will be the easiest and cleanest approach.

Topic Number 2: Firearm Offenses

- Part A: Machinegun Conversion Devices (MCDs)
- Vote for Option 1
    - Including the definition for a firearm throughout USSG §2K2.1 appears to be the best option. Doing so would provide consistency and clarity. A uniform definition across the board would streamline this guideline provision. If the definition of a firearm is serious enough to increase the base offense level, it should be serious enough to apply to the specific offense characteristics. MCDs should not be treated differently. The statute provision, 26 U.S.C. § 5845(a), defines these types of devices as firearms. Not counting MCDs as firearms could potentially underrepresent the seriousness of the offense. If someone is prohibited from possessing firearms and/or ammunition, should they be possessing MCDs? Treating these types of devices as firearms will represent the seriousness of such conduct.
    - Under this option, there appears to be a need to move the definition to the guidelines in all areas (base offense level, specific offense characteristics, and cross references). Leaving the definition in the commentary or application notes could potentially cause similar outcomes as the *US v. Havis* case in the Sixth Circuit. If the Commission moves the definition to the guidelines, it should be done throughout the manual. This will ensure consistency, clarity, and avoid disparities from other areas of the book.
- Issue for Comment Under Part B
    - A question to consider: if a person purchases/obtains a firearm illegally, is there a high probability that the defendant knows or has reason to know the firearm is stolen?
    - Adding in the requirement for intent/knowledge can make things difficult. If police reports indicate a firearm is stolen but there is nothing in the plea agreement or discovery indicating the defendant knew such, we wouldn't be able to apply the enhancement under this proposed amendment. Alternatively, if the plea agreement does not contain a stipulation or admission that a firearm was stolen, can this provision apply? Plea negotiations or tactics could reduce the appearance of the seriousness of the offense and ultimately, the computation of the total offense level.
    - Adding in the requirement for intent/knowledge could create more work for the probation department. This could also create objections that might not be warranted. The proposed amendment appears to muddy the waters versus simplifying the guidelines or providing a clear approach.

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Federal Criminal Justice Clinic

Judith P. Miller
Clinical Professor of Law
Federal Criminal Justice Clinic
[redacted]

February 3, 2025

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
Via Public Submission Portal

Re: Proposed 2024-2025 Amendment on Simplification

Dear Judge Chair Reeves, Vice Chairs, and Commissioners:

We write in response to Issues 1, 3, and 4 of the Commission's request for comment on its proposed amendment, "Simplification of Three-Step Process" (Simplification Amendment).[1] We are a Clinical Professor of Law and three law students in the University of Chicago Law School's Federal Criminal Justice Clinic. We submit this letter in our individual, not institutional, capacities.

I. Summary of Comment.

Our Comment proposes two changes to the Simplification Amendment. First, we urge the Commission to revise departure-related language to resolve rather than inadvertently entrench a circuit split under § 1B1.10 (Reduction in a Term of an Imprisonment as a Result of an Amended Guideline Range). Second, we advocate for the Commission to retain the substance of two departures in order to avoid creating confusion and risking improperly punitive sentences under § 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment).

The Simplification Amendment eliminates step two of the Sentencing Guidelines by deleting all departures and departure-related language from the *Guidelines Manual*. By and large, those deletions are relatively straightforward and unobjectionable. In some situations, however, the departures and related language play a special and distinct role in the operation of the applicable guideline or policy statement. For those provisions, eliminating departures and departure-related language creates significant and unintended consequences that do not further the purpose of the Simplification Amendment. The better course is to revise the underlying guideline or policy statement to incorporate the role of the previous departures or departure-related language.

[1] U.S. SENT'G COMM'N, Proposed Amendment: Simplification of Three-Step Process in *Proposed Amendments to the Sentencing Guidelines* 57, 61–63 (Dec. 19, 2024), https://perma.cc/E97Z-GN88.

Sections 1B1.10 and 5G1.3 are such a policy statement and guideline, respectively, although no doubt there are a handful of others. For § 1B1.10, the Simplification Amendment inadvertently adds fuel to an existing circuit split over how to perform a guidelines calculation in sentence reduction proceedings under 18 U.S.C. § 3582(c)(2). For § 5G1.3, the Simplification Amendment removes critical guidance on which courts rely to steer them through the distinct legal questions unique to concurrent and consecutive sentencing. Parts II and III of this Comment explain these issues in detail, and offer responsive proposals that further the Simplification Amendment's goals while avoiding the problems created by its changes. We urge the Commission to adopt a similar approach where other departures or departure-related language play a special and distinct role in the operation of the guideline.

First and foremost, this Comment suggests revisions to the Simplification Amendment's changes to Application Note 1(A) to § 1B1.10, to properly resolve the circuit split it implicates and avoid adding uncertainty and absurdity. Title 18 of the U.S. Code, § 3582(c)(2) authorizes courts to reduce sentences when the Commission retroactively amends a guideline. Section 1B1.10 governs those sentence reductions, and limits the extent of any such reduction to the low-end of an amended applicable guideline range.[2] Individuals whose original sentence lies below the low-end of that range cannot receive a sentence reduction. There is a circuit split, however, on whether to include § 1B1.1(a)(8) (Step 8) in calculating § 1B1.10's "applicable guideline range." The Eleventh Circuit holds that Step 8 is part of § 1B1.10's applicable guideline range calculation. The Second and Eighth Circuits hold that it is not.[3]

The Simplification Amendment's changes to § 1B1.10's definition of "applicable guideline range" directly implicate this circuit split. The amendment revises the definition of "applicable guideline range" in Application Note 1(A) to § 1B1.10 to be: "the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a)(1)–(7), which is determined before consideration of ~~any departure provision in the Guidelines Manual or any variance~~ Part K of Chapter Five and §1B1.1(b)."[4] Far from clarifying the circuit split, these changes inadvertently exacerbate it.

The problem is that the changes can be read to redefine § 1B1.10's "applicable guideline range" in two separate and opposing ways—both to include and to exclude Step 8. That is precisely the issue over which the circuits have split. On the one hand, the proposed amendment narrows the cross-reference from § 1B1.1(a) as a whole to only Steps 1 through 7 of § 1B1.1(a) ("§ 1B1.1(a)(1)–(7)"). That narrowing implicitly excludes Step 8. On the other hand, the proposed amendment adds language that equates § 1B1.10's guideline range with everything "which is determined before consideration of Part K of Chapter Five"—i.e., with everything before the new Step 9.[5] That addition implicitly includes Step 8 in § 1B1.10. Step 8 is also

[2] U.S.S.G. § 1B1.10(b)(2)(A); *id.* § 1B1.10, comment. (n.3).
[3] *Compare United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1337–39 (11th Cir. 2017), *with United States v. Zapatero*, 961 F.3d 123, 128–31 (2d Cir. 2020), *and United States v. Helm*, 891 F.3d 740, 742–44 (8th Cir. 2018).
[4] Simplification Amendment at *Amended* U.S.S.G § 1B1.10, comment. (n.1(A)). For the sake of clarity, citations to provisions contained only in Part B of the Simplification Amendment will be cited as "*Amended* U.S.S.G. [guideline]."
[5] *See id.* at § 1B1.1(a)(9).

implicitly included through the Simplification Amendment's retention of § 1B1.10(c), which directs courts to calculate certain cases' "amended guideline range . . . without regard to" two provisions applied under Step 8 (§§ 5G1.1 and 5G1.2).[6] If the Simplification Amendment suddenly intended to exclude Step 8, then § 1B1.10(c) would be superfluous.

The Simplification Amendment thus begs the question of what to do about Step 8. Is it excluded from § 1B1.10 (as the first part of the redefinition implies)? Or is it included (as the second part of the redefinition and the decision to retain § 1B1.10(c) imply)? Putting the two parts together, the Simplification Amendment's redefinition as written creates confusion about whether Step 8 applies and fails to "streamline[] the application of the *Guidelines Manual*."[7]

The Simplification Amendment should not create questions about Step 8's inclusion. Excluding Step 8 from sentence reduction proceedings would be a disaster. Step 8 directs courts to determine the "sentencing requirements and options" for "the particular guideline range" "from Parts B through G of Chapter Five."[8] These requirements and options include, among other things, statutory mandatory minimums and consecutive and concurrent sentencing (Chapter 5, Part G, including § 5G1.3(b) adjustments). Excluding Step 8 would prohibit courts from including these sentencing requirements and options in sentence reduction proceedings.[9] As the introduction to Chapter 5 acknowledges, a sentence that does not comply with these sentencing requirements and options is not within the guidelines.[10]

To avoid the twin horns of uncertainty and exclusion, we propose narrowly modifying the Simplification Amendment to confirm that Step 8 is part of § 1B1.10's guideline calculation.[11] Doing so maintains the elimination of § 1B1.10's departure-related language without inadvertently sowing unrelated chaos in sentence reduction proceedings. It also resolves the related circuit split, simplifies the operation of § 1B1.10, and reduces the costs of

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[6] U.S.S.G. at § 1B1.10(c).
[7] Simplification Amendment at 61.
[8] U.S.S.G. § 1B1.1(a)(8).
[9] The Guidelines are mandatory in § 3582(c)(2) sentence reduction proceedings. *See Dillon v. United States*, 560 U.S. 817, 829–30 (2010).
[10] Both the current and amended Introductory Commentary to chapter 5 recognize that a "sentence is within the guidelines if it complies with each applicable section of this chapter." U.S.S.G. Ch.5, intro. comment.; *Amended* Ch.5, intro. comment. The Simplification Amendment likewise retitles Chapter Five "to reflect its focus on the rules pertaining to the calculation of the guideline range." Simplification Amendment at 61. Omitting Step 8 (which incorporates Chapter Five) would leave those rules out of the § 1B1.10 guideline calculation.
[11] We also believe our proposed revision to § 1B1.10 is superior to the changes in the Commission's 2024 simplification amendment. *See* U.S. SENT'G COMM'N, Proposed Amendment: Simplification of Three-Step Process in *Proposed Amendments to the Sentencing Guidelines* 41 (Dec. 26, 2023), https://perma.cc/8AEF-93MQ. The 2024 proposed amendment may at first appear to solve the problem discussed in the text above because it does not expressly cross-reference § 1B1.1(a)(1)–(7). *Id.* However, it creates uncertainty because its new language, "the remaining provisions in §1B1.1," is unclear. *Id*. Ultimately, eliminating the departures-language from § 1B1.10 n.1(A) unsettles the current guideline. In that context, the best course is to end the uncertainty and adopt the better interpretation § 1B1.10. *See Gonzalez-Murillo*, 852 F.3d at 1339.

unnecessary incarceration.[12] For these reasons, we urge the Commission to adopt our revisions to § 1B1.10 ***regardless*** of whether or how it adopts the Simplification Amendment.

Secondarily, this Comment urges the Commission to make tailored changes to § 5G1.3 rather than adopt the Simplification Amendment's deletion of two related departures, Application Note 4(E) to § 5G1.3 and §§ 5K2.23/Application Note 5 to 5G1.3. (Note 5 to § 5G1.3 repeats and cross-references the § 5K2.23 departure.) Section 5G1.3 covers an especially complex area of law: how to structure a federal sentence for individuals who are also subject to another sentence. Its animating concerns are not only the § 3553(a) factors at which the Simplification Amendment is addressed but also statutory and constitutional questions about federal sentencing courts' relationship to other sentencing courts (sometimes a separate sovereign), state and federal prison systems, and double jeopardy/fairness.[13] Faced with that morass, § 5G1.3 provides meaningful guidance on nearly all questions about concurrent and consecutive sentences. Time spent trying to understand the provision is well-rewarded, if challenging.[14] (Undersigned regularly fields questions about its terms.)

The Simplification Amendment undermines § 5G1.3's great strength by creating a confusing new gap in § 5G1.3's essential guidance. Specifically, it eliminates two departures that offer advice for when and how to reduce a sentence to account for time served on certain other terms of imprisonment, § 5K2.23/Application Note 5 to § 5G1.3 and Application Note 4(E) to § 5G1.3. Eliminating these departures makes an already-confusing guideline worse by robbing courts and practitioners of critical guidance. The Simplification Amendment's overarching focus on the relationship between the Guidelines and § 3553(a) does not justify these changes to a guideline that addresses other concerns in addition to § 3553(a).

The fix is not to re-insert the deleted departures as-is. Instead, below we propose tailored revisions to § 5G1.3 that restore all relevant guidance about concurrent and consecutive sentencing to that guideline, without the use of departures. Our suggested changes help streamline and clarify § 5G1.3 and its related departures.[15] For these reasons, we urge the Commission to adopt our revision ***regardless*** of whether or how it adopts the Simplification Amendment.

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[12] *See* Final Priorities for Amendment Cycle, 89 FED. REG. 66176 (Aug. 14, 2024).

[13] *See, e.g.*, *Setser v. United States*, 566 U.S. 231, 239–41 & n.4 (2012) (discussing the interplay between federal courts, state courts, and the BOP in making "concurrent-vs.-consecutive [sentencing] decisions"); *Witte v. United States*, 515 U.S. 389, 404 (1995) (noting that "the Guidelines take into account the potential unfairness" incident to multiple prosecutions).

[14] Even by comparison to other guidelines, § 5G1.3 is unusually complex. Applying it requires grappling with unusual technical terms (e.g., discharged vs. undischarged sentences), using Guidelines terminology outside of its typical context (e.g., relevant conduct, adjustments), understanding how to resolve separate and complex legal questions (e.g., when the Bureau of Prisons credits prior custody), and properly parsing lengthy and multiple conditions precedent.

[15] In our view, § 5G1.3 is sufficiently difficulty to apply that a full-scale reconsideration and revision are in order. Our proposal helps correct some of § 5G1.3's problems, but its ambit is necessarily limited as a response to the Simplification Amendment. We suggest that the Commission consider more significant, simplifying changes in the next round of revisions to the Guidelines, and would be happy to submit such a proposal.

II. Any Simplification Should Confirm That Step 8 Is Part of Sentence Reduction Proceedings Under § 1B1.10.

This Comment opposes the Simplification Amendment's changes to § 1B1.10 as written. Instead, we propose alternative language which confirms that Step 8 is part of § 1B1.10 sentence reduction proceedings.

Step 8 must be part of § 1B1.10 to avoid disastrous consequences for sentence reduction proceedings. Step 8 includes essential components of a Guidelines calculation—statutory mandatory minimums, consecutive/concurrent sentencing, and the like. As the Simplification Amendment acknowledges, Chapter Five "focus[es] on the rules pertaining to the calculation of the guideline range."[16] Omitting Step 8 (which incorporates the bulk of Chapter Five) would omit those rules from the § 1B1.10 guideline range calculation. Unsurprisingly, the current Guidelines do include Step 8, circuit split notwithstanding.

The Simplification Amendment's deletion of departure-related language from Application Note 1(A) to § 1B1.10 inadvertently aggravates that circuit split, the wrong side of which would exclude Step 8 from sentence reduction proceedings. Instead, Note 1(A) should be revised to expressly include Step 8 while still eliminating the Note's current reference to departures.

A. Step 8 Must Be Part of § 1B1.10 Sentence Reduction Proceedings.

Section 1B1.10 governs reductions in sentences that were based on a guideline that has since been amended. To impose a reduced sentence, the court calculates the amended guideline range "that would have been applicable" using the amended guideline(s).[17] The court substitutes only the changed amendments in the calculation and "leave[s] all other guideline application decisions unaffected."[18] Excluding Step 8 from this calculation would lead to absurd results for at least three reasons.

First, excluding Step 8 would be inconsistent with § 1B1.10's command to change the amended guideline and "leave all other guideline application decisions unaffected."[19] Instead, it would require one group of guideline application decisions at the original sentencing (§ 1B1.1(a)(1)–(8)) and another group of guideline application decisions at a sentence reduction proceeding (§ 1B1.1(a)(1)–(7)). That does not make sense: "Under the [current three-step] Guidelines, a defendant has only one applicable guideline range," which precedes "any departures under Chapter 5 of the Guidelines."[20] As a practical matter, creating two different guideline calculations for the simplified Guidelines would only confuse proceedings, in addition to creating an internal contradiction in § 1B1.10.

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[16] Simplification Amendment at 61.
[17] U.S.S.G. § 1B1.10(b)(1).
[18] *Id.*
[19] *Id*.
[20] *United States v. Guyton*, 636 F.3d 316, 319–20 (7th Cir. 2011) (quotation marks omitted), *cited favorably in* U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011) (redefining § 1B1.10's "applicable guideline range" in *Guyton's* terms).

Second, excluding Step 8 would mean excluding statutory mandatory minimums from the Guidelines calculation in a sentence reduction proceeding. Federal law forbids imposing a sentence below a mandatory minimum, and the Guidelines implement that statutory requirement at Step 8.[21] Without Step 8, the *Guidelines Manual* in reduction proceedings would authorize judges to impose illegal sentences below a congressionally mandated statutory minimum.[22] This result is absurd, illegal, and inconsistent with the rest of the Guidelines. Revising the Guidelines to potentially require this nonsensical result would wreak havoc on sentence reduction proceedings and certainly not streamline them.

Finally, excluding Step 8 from sentence reduction proceedings would also leave courts bereft of § 5G1.3's rules for handling concurrent and consecutive sentences, and excludes the downward adjustment in § 5G1.3(b) from sentence reduction proceedings. As to the former, this area of law is already rife with error and confusion; leaving retroactive sentence proceedings without even § 5G1.3's guidance would surely create even greater problems.[23]

As to the latter, § 5G1.3(b) adjustments (which apply via Step 8) are an essential part of structuring a just term of imprisonment. They require courts to adjust a sentence downward in certain circumstances to prevent unfair double-punishment for the same offense conduct—"to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence."[24] Excluding § 5G1.3(b) from sentence reduction proceedings would contravene this purpose—and, in fact, serve no purpose—by effectively requiring double-counting in sentence reduction proceedings.[25]

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[21] *See* U.S.S.G. § 1B1.1(a)(8) (directing courts: "For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements[.]"); *id.* § 5G1.1(a), (b) (directing courts to apply statutory maxima and minima when calculating the Guidelines); *see also, e.g.*, *United States v. Hippolyte*, 712 F.3d 535, 541 (11th Cir. 2013) ("[W]hen one uses § 1B1.1(a) to determine the applicable guideline range, one necessarily is required to take into account the mandatory minimum sentences that may be statutorily required.").

[22] The Guidelines are mandatory in § 3582(c)(2) sentence reduction proceedings. *See Dillon*, 560 U.S. at 829–30. Omitting Step 8 and its mandatory statutory mandatory minimums from the applicable Guidelines calculation would therefore carry force of law. *See United States v. Barfield*, No. 08-CR-172, 2012 WL 73192, at *3 (E.D. Wis. Jan. 6, 2012) ("[D]espite conceding that he remains subject to a 10 year mandatory minimum, defendant cannot explain how—if § 5G1.1(b) no longer applies—a statutory minimum can be enforced in a § 3582(c)(2) proceeding."); *see also Hippolyte*, 712 F.3d at 540–41.

[23] Part III discusses § 5G1.3's complexity, distinctiveness, and importance at great length. There, we emphasize the confusion that the Simplification Amendment risks by dropping just two departures from § 5G1.3. Excluding Step 8 from sentence reduction proceedings would mean leaving the *entirety* of § 5G1.3—creating potentially enormous problems. *Cf.* FED. PUB. & CMTY. DEFS., *Comment on Simplification of Three-Step Process (Proposal 7)* at 42 (Feb. 22, 2024), https://perma.cc/H38Q-JF5A (Section 5G1.3 "provide[s] guidance that is very much needed.").

[24] *Witte*, 515 U.S. at 405; *see also United States v. Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (Section 5G1.3(b)'s "purpose . . . is to prevent [] double-counting").

[25] This situation is no mere hypothetical. Circuit split aside, courts regularly apply 5G1.3(b) adjustments in sentence reduction proceedings governed by § 1B1.10. *See, e.g.*, *United States v. Farias*, No. 1:08-cr-274-21, 2017 WL 3187518, at *1–2 & n.1 (W.D. Mich. July 27, 2017); *United States v. Dean*, No. 3:95-cr-31-MOC, 2015 WL 5457847, at *4–5 (W.D.N.C. Sep. 16, 2015); *United States v. Verner*, No. 06-CR-44-1-TCK, 2009 WL 2044705, at *1–2 & n.1 (N.D. Okla. July 9, 2009). Professor Miller likewise

Ultimately, Step 8 (and especially chapter 5, Part G) must unquestionably be a part of the § 1B1.10 guidelines calculation. Excluding it would make § 1B1.10 more complex and more punitive, and lead to absurd results that courts would either struggle to enact or be forced to ignore.

B. The Current Guidelines Include Step 8 in § 1B1.10.

Despite the circuit split, the current Application Note 1(A) to § 1B1.10 contains no ambiguity: § 1B1.10 includes Step 8. But given the split, the Simplification Amendment should make Step 8's applicability even clearer. The Note currently defines the applicable guideline range as the "guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the *Guidelines Manual* or any variance."[26] By cross referencing the entirety of § 1B1.1(a), the definition includes all eight steps of § 1B1.1(a), and not just some of the steps.[27] The second half of the definition makes the same point: § 1B1.10's applicable guideline range consists of § 1B1.1(a) exclusive of any departures (§ 1B1.1(b)) or variances (§ 1B1.1(c)).[28] Together, the two halves of the definition properly include all components of 1B1.1(a) that are used to calculate the Guidelines, including Step 8.

The Second and Eighth Circuits' contrary view relies on an overly formalist reading of the Guidelines that ignores their structure. Focusing on § 1B1.1(a), the Second Circuit emphasizes the difference between Step 7's requirement that courts "'[d]etermine the guideline range'" and Step 8's determination of the sentencing requirements and options "'[f]or the particular guideline range.'"[29] From this fine-grained distinction, the Second and Eighth Circuits conclude that § 1B1.10 applicable guideline range includes only § 1B1.1(a)(1)–(7) and excludes the sentencing requirements and options that apply by way of § 1B1.1(a)(8).

This hyper-formalist distinction ignores the elephant in the room. "[W]hen one uses § 1B1.1(a) to determine the applicable guideline range, one necessarily is required to take into account [Step 8 considerations like] the mandatory minimum sentences that may be statutorily required."[30] Mandatory minimums are just one example of numerous consequential

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currently represents an individual who received an § 5G1.3(b) adjustment at his original sentencing and is now requesting such a sentence reduction.

[26] U.S.S.G. § 1B1.10, comment. (n.1(A)).

[27] Cross references for offense guidelines "refer[] to the entire offense guideline" unless otherwise specified. *See* U.S.S.G. § 1B1.5(a), (b)(2).

[28] The second half of the definition was adopted to clarify that certain departures, such as overrepresentation of criminal history, U.S.S.G. § 4A1.3, were not part of the applicable guideline range for § 1B1.10 purposes. *See* U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011) (resolving circuit split).

[29] *Zapatero*, 961 F.3d at 128 (emphasis omitted) (quoting U.S.S.G. § 1B1.1(a)(7)–(8)). The Eighth Circuit relies on essentially the same reasoning. *See Helm*, 891 F.3d at 742–743 ("Step seven is where the court determines 'the guideline range' . . . . Step eight . . . instructs the court to determine the 'sentencing requirements and options' that apply '[f]or the particular guideline range.'" (emphasis omitted) (quoting U.S.S.G. § 1B1.1(a)(7)–(8))).

[30] *Hippolyte*, 712 F.3d at 541.

considerations that simply cannot be ignored in a sentence reduction proceeding.[31] It is difficult to overstate this point. As the Eleventh Circuit puts it, "§ 1B1.1(a)(8) [must be applied] before [a court] can arrive at the amended guideline range for purposes of § 1B1.10(a)(1)."[32]

C. The Simplification Amendment Does Not Resolve the Circuit Split.

To be clear, the Simplification Amendment's changes to § 1B1.10 would not resolve the circuit split. They do not unambiguously exclude Step 8 from § 1B1.10 (the Second and Eighth Circuits' positions) nor do they unambiguously include it (the Eleventh Circuit's position). Instead, the Amendment splits the definition in two. One half includes Steps 1 through 7 and the other begins with the newly added Step 9. The fate of Step 8 is left unclear. Regardless, the Simplification Amendment should not exacerbate or ignore the circuit split it necessarily implicates. Doing so would certainly fail to "streamline[] the application of the *Guidelines Manual*."[33] For all the reasons stated above, the Commission should expressly adopt the better interpretation of § 1B1.10 by including Step 8 in § 1B1.10 and adopting the Eleventh Circuit's position.

D. The Simplification Amendment's Changes to § 1B1.10 Should Confirm that Step 8 is Included in Sentence Reduction Proceedings.

We offer two options for confirming Step 8's inclusion in § 1B1.10 calculations and streamlining the application of the Guidelines, consistent with overarching goals of the Simplification Amendment. We favor our first proposal because it simplifies the language of § 1B1.10 and avoids a separate looming problem under *Kisor v. Wilkie*.[34] Our secondary proposal offers a narrower change that confirms Step 8's inclusion but does not otherwise simplify § 1B1.10 or resolve the *Kisor* problem. For the sake of clarity, our revisions in the text work off the proposed amendment, and we include parallel revisions in the footnotes that we suggest if the Simplification Amendment is not adopted.

1. Proposal #1: Revise § 1B1.10(a)(1) and Note 1(A).

We suggest moving the definition of applicable guideline range to the text of § 1B1.10 and revising the text of the Application Note 1(A) application note accordingly. We favor this approach for its simplicity and resolution of a potential problem under *Kisor*. The revised text and accompanying Application Note would read (revisions bold, underlined, and in red; deletions in strike through):

> **1B1.10(a)(1)**: "In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been

[31] Certain Step 8 considerations may be statutorily inapplicable at the § 3582(c)(2) sentence reduction stage. *See United States v. Island*, 336 F. App'x 759, 760–61 (9th Cir. 2009) (unpublished) (supervised release). But the existence of possible statutory exceptions does not change the structural necessity for Step 8 to be part of § 1B1.10's guideline calculation.
[32] *Gonzalez-Murillo*, 852 F.3d at 1337.
[33] Simplification Amendment at 61.
[34] 588 U.S. 558 (2019).

lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). **The guideline range applicable to the defendant is determined by § 1B1.1(a), which includes both the calculation performed in § 1B1.1(a)(1)–(7) and the sentencing requirements and options in § 1B1.1(a)(8).**

Note 1(A): Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range**.** ~~(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a)(1)–(7), which~~ **The applicable guideline range** is determined before Part K of Chapter Five and §1B1.1(b)~~)~~. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).[35]

First and foremost, this revision confirms that Step 8 applies by expressly cross-referencing Step 8 and using Step 8's "sentencing requirements and options" language.[36] With this revision, there can be no question that § 1B1.10 includes Step 8, as it must. The revised language in the text of § 1B1.10(a)(1) echoes the current language from the application note. In doing so, it further confirms that no substantive change is intended, only a clarification.

Second, moving the definition of applicable guideline range to the text of the Guideline resolves the potential *Kisor* concern. Under *Kisor*, courts defer to reasonable interpretations of agency regulations only if the regulation is "genuinely ambiguous."[37] Since *Kisor*, some circuits have concluded that Guidelines commentary should be given deference only when the Guidelines text is "'genuinely ambiguous.'"[38] The Commission has resolved prior *Kisor*

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[35] If the Commission chooses not to adopt the Simplification Amendment, our Proposal #1 remains nearly identical:

- § 1B1.10: Same as text above.
- **Note 1(A):** Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range**.** ~~(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which~~ **The applicable guideline range** is determined before consideration of any departure provision in the Guidelines Manual or any variance~~)~~.

[36] U.S.S.G. § 1B1.1(a)(8) ("For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.").

[37] *Kisor*, 588 U.S. at 574.

[38] *See, e.g.*, *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023) (quoting *Kisor*, 588 U.S. at 574); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc); *United States v. Campbell*, 22

problems in the same way Proposal #1 suggests (by moving contested language from the application notes to the text of the guideline itself).[39]

Making the same change here will head off any potential *Kisor* problems before they arise. The Second and Eighth Circuits' decisions in *Zapatero* and *Helm* suggest a potential *Kisor* problem with § 1B1.10. Both cases focus in part on the language of § 1B1.1(a) itself to conclude that Step 8 is not part of § 1B1.10's "applicable guideline range."[40] If the definition remains in the commentary, some courts may maintain that the phrase "applicable guideline range" unambiguously refers to § 1B1.1(a)(1)–(7) only and, therefore, that the definition in the commentary should be ignored. Moving the definition to the text of § 1B1.10 avoids this foreseeable problem without unnecessary litigation or incarceration in the meantime.

2. Proposal #2: Revise Note 1(A) Only.

Alternatively, the Commission could revise only the Application Note to expressly include the cross-reference to Step 8 and its sentencing requirements and options. Making just this change is a narrower revision than Proposal #1. However, it leaves in place the potential *Kisor* issue. Application Note 1(A) to § 1B1.10 would then read as follows:

> **§ 1B1.10, Note 1(A):** Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range**, including any applicable sentencing requirements and options** (i.e., the guideline range **and sentencing requirements and options** ~~that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a)(1)–(7),~~ **determined pursuant to §1B1.1(a)(1)–(8)**, which is determined before consideration of Part K of Chapter Five and §1B1.1(b)). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).[41]

F.4th 438, 445 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021).

[39] *See* U.S.S.G. App. C, Amend. 822 (Nov 1, 2023); *id.* Amend 827 (Nov, 1, 2024).

[40] *See Zapatero*, 961 F.3d at 128–29; *Helm*, 891 F.3d at 743.

[41] If the Commission does not adopt the Simplification Amendment, then our Proposal #2 remains very similar to the text above:

> **Application Note 1(A):** Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range**.** ~~(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which~~ **The applicable guideline range** is determined before consideration of any departure provision in the Guidelines Manual or any variance~~)~~.

The benefit of this proposal is its simplicity. It modifies only Note 1(A) and makes no other changes to § 1B1.10. However, we believe this proposal is ultimately inferior to Proposal #1, for two reasons. First, it defers the potential *Kisor* problem with the definition of "applicable guideline range." The Commission has already revised § 1B1.10 at least twice to clarify the definition of applicable guideline range in light of prior circuit splits.[42] The best course is to avoid a foreseeable circuit split and yet another round of amendment(s) by fixing the problem now, as in Proposal #1. Second, the definition of "applicable guideline range" in Note 1(A) is long and confusing, involving multiple sub-clauses, both inside and outside the parenthetical. Proposal #2 retains that confusing structure—to the detriment of § 1B1.10, in our opinion. Nonetheless, Proposal #2 does correct the central problem with the Simplification Amendment's changes to Note 1(A), namely, it clarifies that Step 8 applies in § 1B1.10 proceedings.

III. All Guidance About Concurrent and Consecutive Sentencing Should Be Retained in § 5G1.3.

The Simplification Amendment eliminates two departures connected to § 5G1.3: Application Note 4(E) to § 5G1.3 (Note 4(E)) and § 5K2.23/Application Note 5 to § 5G1.3 (Note 5).[43] We urge the Commission to retain the substance of those departures, as revised below. Along with the rest of § 5G1.3, they are critical to providing guidance on courts' options for imposing concurrent or consecutive sentences. Eliminating them will deepen confusion over an already-complex Guideline, without serving the purposes of the Simplification Amendment.

Section 5G1.3 governs consecutive and concurrent sentencing, including sentence reductions to account for time served on other terms of imprisonment. It tells courts when to impose a consecutive sentence (§ 5G1.3(a)), when to impose a concurrent sentence and accompanying adjustment (§ 5G1.3(b)), how to handle an anticipated future sentence (§ 5G1.3(c)), and offers a policy statement for the remaining cases (§ 5G1.3(d)). In turn, § 5K2.23/Note 5 offers a departure that parallels the adjustment in § 5G1.3(b), and Note 4(E) details a possible departure under § 5G1.3(d).

This Comment proposes revisions to the text of § 5G1.3 that retain the substance and equitable purpose of § 5K2.23/Note 5 and Note 4(E) in revised form, and knock-on changes throughout the rest of § 5G1.3 and its notes. Though currently denominated as departures, both § 5K2.23/Note 5 and Note 4(E) actually provide important guidance for how courts can or should structure a term of imprisonment. Section 5G1.3(b) is the starting point. It helps courts avoid arbitrary double-punishments for the same underlying conduct by adjusting a sentence downward to account for time served on a related and undischarged term of imprisonment.[44] The § 5K2.23/Note 5 departure does the same thing for individuals whose related term of imprisonment was fully discharged. Finally, the Note 4(E) departure authorizes a reduced sentence for time served on a partially related sentence, among other things. Again, the

[42] *See* U.S.S.G. App. C, Amend. 759 (Nov. 1, 2011); *id.* Amend. 780 (Nov. 1, 2014).
[43] *Amended* U.S.S.G. § 5G1.3, comment. (n.4(E)); *id.* § 5K2.23; *id.* § 5G1.3, comment. (n.5) (cross-referencing § 5K2.23).
[44] *See Witte*, 515 U.S. at 405.

touchstone is ensuring that the total term of imprisonment "is not increased unduly by the fortuity and timing of separate prosecutions and sentencings."[45]

This structural and equitable role distinguishes § 5G1.3 and its related departures from the run of other departures that the Simplification Amendment deletes. The Simplification Amendment envisions courts accounting for the deleted departures "through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a)."[46] That inference does not hold for § 5G1.3's departures. Section 5G1.3 helps implement 18 U.S.C. § 3584 (Multiple sentences of imprisonment) and § 3585 (Calculation of a term of imprisonment).[47] It likewise operates against a backdrop of complex legal issues that the rest of federal sentencing does not typically invoke—comity concerns for state and other federal courts' sentences, separation of powers concerns about the actions of a coordinate branch (the Executive Branch's Bureau of Prisons), and double jeopardy/fairness concerns about multiple punishments for the same conduct.[48] The deleted departures help guide courts through this complex and rich area of law; eliminating them poses a unique risk of confusion or omission altogether.[49] We urge the Commission not to sweep § 5K2.23/Note 5 and Note 4(E) aside as part of the Simplification Amendment's changes to the relationship between the Guidelines and § 3553(a).

Retaining the substance of the departures in § 5G1.3 avoids creating additional and new questions about the parameters of concurrent or consecutive sentencing. Determining whether and how to impose a consecutive or concurrent sentence is already complex and error-prone.[50]

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[45] U.S.S.G. § 5G1.3, comment. (n.4(E)).

[46] Simplification Amendment at 62.

[47] *See, e.g.*, *United States v. Dorsey*, 166 F.3d 558, 563 (3d Cir. 1999) (Section 5G1.3(b) "harmonize[s] the court's discretion under section 3584 to make a federal sentence concurrent with other terms of imprisonment and the BOP's authority under section 3585(b) to award credit for presentence custody.").

[48] Courts regularly highlight these concerns in federal sentencings that implicate consecutive and concurrent sentencing. *See, e.g.*, *Setser*, 566 U.S. at 241; *United States v. Henson*, 500 Fed. App's 211, 214 (4th Cir. 2012); *United States v. Hankton*, 875 F.3d 786, 793 (5th Cir. 2017); *Witte*, 515 U.S. at 404.

[49] This concern is not an abstract one. Section 5G1.3 continues to provide important guidance on the scope of courts' authority on this topic. *See, e.g.*, *Hankton*, 875 F.3d at 793 (vacating sentence because, "contrary to the government's argument, the district court had authority to reduce Derrick's sentence based on previous time served . . . . [B]etween §§ 5G1.3 and 5K2.23, courts have the authority to reduce a defendant's sentence for *any* previous time served on related charges whenever the BOP will not grant that credit"). Robbing courts of § 5G1.3's helpful guidance through this distinct area of law would create less clarity, not more.

[50] We agree with the 2024 Defenders report that this topic creates significant confusion. *See* FED. PUB. & CMTY DEFS., *supra* note 23 at 42 n.93 (citing *United States v. Comer*, No. 5:12-cr-043, 2022 WL 1719404, at *5 (W.D. Va. May 27, 2022); *United States v. Castillo*, No. 3:18-cr-00112, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021))); *see also, e.g.*, *United States v. Meeks*, No. 6:17-CR-70-CHB-6, 2023 WL 5111950, at *5 (E.D. Ky. Aug. 9, 2023); *Jones v. United States*, No. 2:19-cv-291-FtM-29NPM, 2019 WL 4060390, at *3 (M.D. Fla. Aug. 28, 2019); U.S. SENT'G COMM'N, *Undischarged Terms of Imprisonment* at 1 (May 2020), https://perma.cc/3R5M-V3RQ (flow chart for "how to determine when the court should impose a consecutive or concurrent sentence" under § 5G1.3 that includes five decision points); *Federal Sentence Computation & Interaction of Federal and Non-Federal Sentences* at 1 (hosted on Sentencing Commission website without author or date), https://perma.cc/A2UZ-S9YJ (characterizing federal sentence computation in presence of state sentence as "the single most confusing and least understood federal sentencing issue.").

At a very practical level, simply deleting § 5K2.23/Note 5 and Note 4(E) will further confuse this difficult area of sentencing.

This Part begins with a draft revision to the text of § 5G1.3 that incorporates Note 4(E) and § 5K2.23/Note 5 without the use of departures. It then explains each component of the draft, change by change. If the Commission does not adopt the Simplification Amendment, we nonetheless urge it to adopt these changes as they streamline the Guidelines and mitigate the risk of unfair double counting.

A. Proposed Revision to § 5G1.3.

We propose revising § 5G1.3 to read as follows (revisions bold, underlined, and in red; deletions in strike through):

Imposition of a Sentence on a Defendant Subject to Another ~~an Undischarged~~ Term of Imprisonment ~~or Anticipated State Term of Imprisonment~~

(a) **CONSECUTIVE SENTENCE.—**If the instant offense was committed while the defendant was serving a term of imprisonment ~~(including work release, furlough, or escape status)~~ or after sentencing for, but before commencing service of, such term of imprisonment, **then** the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. **For the purpose of §5G1.3, a term of imprisonment includes work release, furlough, or escape status. Subsections (b) and (c) do not apply where this subsection applies.**

(b) **CONCURRENT SENTENCE.— When a defendant has received** ~~If subsection (a) does not apply, and~~ a term of imprisonment **that** resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) **UNDISCHARGED OTHER TERM OF IMPRISONMENT.—For any such term of imprisonment that is undischarged,** the court shall **impose the instant sentence to run concurrently to the remainder of that term of imprisonment and shall** adjust the **instant** sentence for any period of imprisonment already served on the undischarged term of imprisonment**.** ~~if the court determines that~~ **Provided, this adjustment applies only when** such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons**.**~~; and the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.~~

(2) **DISCHARGED OTHER TERM OF IMPRISONMENT.—For any such term of imprisonment that is discharged, the court may adjust the instant sentence to account for the discharged term of imprisonment.**

(c) **ANTICIPATED TERM OF IMPRISONMENT.—**If ~~subsection (a) does not apply, and~~ a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), **then** the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (POLICY STATEMENT) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense. **In an extraordinary case, it may be appropriate for the court to adjust the sentence for a period of imprisonment already served.**

Commentary

Application Notes:

~~1. **Consecutive Sentence—Subsection (a) Cases.** Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.~~

~~2~~**1. Application of Subsection (b).—**

(A) **In General**.—Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which **none or** only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

~~(B) **Inapplicability of Subsection (b).**—Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is a prior conviction for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).~~

(B) Relevance of Bureau of Prisons.—The Bureau of Prisons alone determines when to credit a prior term of imprisonment against a federal sentence. *See United States v. Wilson*, 503 U.S. 329, 335 (1992). A statutory and regulatory framework has developed to answer the question of whether the Bureau of Prisons grant that credit. *See* 18 U.S.C. § 3585.

Subsection (b)(1)'s adjustment applies for undischarged, related terms of imprisonment, where the Bureau of Prisons will not credit a defendant's time served on the other term of imprisonment. To determine whether Subsection (b)(1)'s adjustment applies, the court must determine whether the Bureau of Prisons will credit time served on the other term of imprisonment. The extent of the reduction is governed by Subsection (b)(1).

Subsection (b)(2) applies to discharged, related terms of imprisonment. Federal law offers no avenue for the Bureau of Prisons to credit such prior terms of imprisonment. *See generally* 18 U.S.C. §§ 3584, 3585. Accordingly, unlike in subsection (b)(1), a court may apply the Subsection (b)(2) adjustment without first determining whether the Bureau of Prisons will credit the discharged term of imprisonment.

(C) **Imposition of Adjustment ~~Sentence~~.—**If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (*e.g.*, §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) **Example.—**The following is an example in which subsection (b)**(1)** applies and an adjustment to the sentence is appropriate: The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

~~3~~**2**. **Application of Subsection (c).—**Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

~~4~~**3**. **Application of Subsection (d).—**

(A) **In General.—**Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
(ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
(iii) the time served on the undischarged sentence and the time likely to be served before release;
(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) **Partially Concurrent Sentence.—**In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) **Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—**Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) **Complex Situations.—**Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) ~~**Downward Departure**~~**Adjustment**~~.— Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, i~~**I**n an extraordinary case involving an undischarged term of imprisonment under subsection

(d), it may be appropriate for the court to **adjust the sentence downward.** ~~downwardly depart.~~ This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, ~~a downward departure~~ **an adjustment** may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that ~~a departure~~ **an adjustment** pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any ~~downward departure~~ **adjustment** under this application note be clearly stated on the Judgment in a Criminal Case Order as ~~a downward departure~~ **an adjustment** pursuant to §5G1.3(d), rather than as a credit for time served.

~~5. Downward Departure Provision. In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).~~

Background: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." *See Setser v. United States*, 566 U.S. 231, 236 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See *Setser*, 566 U.S. at 236. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

B. Explanation of Each Proposed Revision to § 5G1.3.

In response to the Commission's requests for comment, this Comment argues that the departures in Application Note 4(E) to § 5G1.3, § 5K2.23/Note 5 should be retained by incorporating them into the text of § 5G1.3, in revised form. To implement this change, this Comment simplifies those provisions and suggests conforming changes to the rest of § 5G1.3. In sum, these changes put all of the guidance on consecutive and concurrent sentences in one place while also making the provision easier to understand for courts and practitioners. This subsection explains each change in the order in which it appears in our proposed revision to § 5G1.3. However, the underlying motivation for all of the changes is to retain the substance of the two departures.

Title. Section 5G1.3's current title is twenty words long and contains multiple technical terms and sub-clauses. Its complexity creates a barrier for the less-experienced practitioner or judge to determine whether or when the section applies at all. We propose simplifying the title as proposed by the Practitioners Advisory Group over a decade ago.[51] Replacing "an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment" with "Another Term of Imprisonment" retains the same meaning while making § 5G1.3 easier to identify for courts and practitioners.

5G1.3(a). Our three changes to § 5G1.3(a) each make § 5G1.3 more digestible, which allows us to simplify § 5G1.3(b)'s complex terms. First, we add a sentence to § 5G1.3(a) explaining that, where it applies, it always trumps § 5G1.3(b) and § 5G1.3(c). Currently, that trumping mechanism is contained in the latter two subsections. ("If subsection (a) does not apply,"). Moving the trumping mechanism into § 5G1.3(a) itself and revising accordingly leaves its meaning the same. ("Subsections (b) and (c) do not apply where this subsection applies.") But consolidating all of § 5G1.3(a) in one subsection streamlines the operation of § 5G1.3(a), (b), and (c). That streamlining facilitates the addition of the § 5K2.23/Note 5 departure into § 5G1.3(b) without adding undue complexity.

The remaining two changes are minor. We add headings throughout § 5G1.3 (here, "Consecutive Sentence") to tell the reader what the subsection is about and to highlight the internal structure of § 5G1.3. This change was especially important for § 5G1.3(b) and § 5G1.3(d) in light of their newly added sentence reductions. We then insert similar headings across the rest of § 5G1.3 for internal consistency. Finally, we move § 5G1.3(a)'s key examples of a term of imprisonment to their own sentence. Doing so improves readability by reducing the sentence length and eliminating a parenthetical.

5G1.3(b). We propose incorporating what is now § 5K2.23/Note 5 into § 5G1.3(b)(2). The provisions serve the same purpose: avoiding unfair double-counting. In many ways, § 5K2.23/Note 5 is a quasi-adjustment already—it mimics § 5G1.3(b)'s adjustment in order to avoid arbitrary disparities between individuals who fully served their related state sentence by the time of their federal sentencing (§ 5K2.23/Note 5) and individuals did not (§ 5G1.3(b)).

Placing § 5K2.23/Note 5 into § 5G1.3(b) is a natural structural fit. Section 5K2.23/Note 5's discharged sentence provision is already intricately bound up with § 5G1.3's undischarged sentence provision, § 5G1.3(b). Currently, § 5K2.23 states that a "downward departure may be appropriate" for a discharged sentence if *§ 5G1.3(b)* "would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense."[52] Note 5 authorizes the same departure, cross-referencing § 5K2.23. Section 5K2.23's

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[51] PRACS. ADVISORY GRP, *Response to Request for Comment on Proposed 2013 Amendments and Related Issues* at 17 (Mar. 19, 2013), https://perma.cc/RER6-HZLD.

[52] U.S.S.G. § 5K2.23. The interwoven relationship between what is now the § 5K2.23/Note 5 departure and the § 5G1.3(b) adjustment appears to be long-standing and undisputed. *See, e.g.*, *United States v. Blackwell*, 49 F.3d 1232, 1241 (7th Cir. 1995) (recognizing parties, Probation, and Sentencing Commission's position that "the rationale underlying § 5G1.3—to avoid double punishment" supported departure).

historical placement as an application note to § 5G1.3 further confirms the interwovenness of the two provisions.[53]

The rest of our proposed revisions to § 5G1.3(b) streamline the provision in light of the addition of what is currently § 5K2.23/Note 5. We split § 5G1.3(b) into two parts: § 5G1.3(b)(1) for the current § 5G1.3(b) and § 5G1.3(b)(2) for the current § 5K2.23. Both provisions continue to require that the other term of imprisonment is related to the conduct underlying the instant sentencing. To streamline the application of the new § 5G1.3(b), we retained that shared requirement at the beginning of the subsection. The distinctive parts of (b)(1) and (b)(2) follow, using language that clarifies their relationship. In light of the new structure, we also simplified the conditions precedent for applying new § 5G1.3(b)(1).[54] For the same reason, we added headings to each part of § 5G1.3(b) so that a reader skimming § 5G1.3 can quickly identify the provision for which they are looking. Finally, we eliminated the qualification that § 5G1.3(b) only applies if § 5G1.3(a) as unnecessary given our revisions to § 5G1.3(a).

5G1.3(c). We propose adding a heading for clarity and consistency, cutting the qualification about § 5G1.3(a) as unnecessary given our revisions to § 5G1.3(a), and adding "then" to draw the reader's attention to the 'if-then' structure of § 5G1.3(c).

5G1.3(d). We propose revising § 5G1.3(d) to incorporate the departure currently contained Note 4(E) as an adjustment. The Commission should make this change to ensure that § 5G1.3 continues to offer guidance in the broad range of situations courts face when sentencing an individual with another term of imprisonment. Eliminating that guidance risks further confusing an already-complex area of the Guidelines.

Section 5G1.3(d) is a catchall policy statement offering guidance about imposing concurrent, partially concurrent, or consecutive sentences in the broad range of cases that share similarities with the prior three subsections of § 5G1.3, but do not fall within their specific narrow terms. In turn, Note 4(E) in turn acknowledges the propriety of reducing a sentence for time-served in circumstances similar but not identical to the § 5G1.3(b) adjustment and the § 5K2.23/Note 5 departure. Eliminating the Note 4(E) departure from § 5G1.3's carefully structured guidance creates a confusing gap: how do the Guidelines advise a court handle such circumstances? And more fundamentally, what do courts have the power to do in such circumstances? Where it applies, the departure is central to structuring an individual's sentence vis-à-vis time served on another sentence. As the Guidelines explain, Note 4(E) "ensure[s] that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings."[55] As a practical matter, its guidance also helps delimit the scope of § 5G1.3's other provisions without adding additional complexity to their definitions. The

[53] *See* U.S.S.G. App. C, Amend. 645 (Nov. 1, 2002); *id*. Amend. 660 (Nov. 1, 2003). Notably, the current § 5K2.23 was removed from § 5G1.3 only for the purpose of clarity. *Id*. With the elimination of departures, re-inserting into § 5G1.3 now serves the purpose of clarity.
[54] When the undersigned advises people about this guideline, they constantly confuse this issue.
[55] U.S.S.G. § 5G1.3, comment. (n.4(E)).

special role Note 4(E) plays strongly supports retaining it, albeit in revised form. The revisions in the text do so.[56]

Application Note 1. We suggest deleting what is currently Note 1 to § 5G1.3 because it is unnecessary and confusing. The application of § 5G1.3(a) is fully defined in the text. Note 1's addition of "undischarged" to the terms of § 5G1.3(a) risks unnecessary confusion with § 5G1.3(b), which now turns on whether a prior sentence is "discharged" or "undischarged."

Application Note 2(B). Our proposed revision eliminates the current version of Note 2(B) and substitutes in a new Note 2(B). The new Note 2(B) clarifies one of the most confusing parts of § 5G1.3(b), namely, its reference to Bureau of Prisons (BOP) calculations, and explains how they apply differently to subsections (b)(1) and (b)(2).[57] The current § 5G1.3(b) and accompanying application note do not explain why the BOP calculations matter nor the legal provision(s) that governs the BOP's calculations. The proposed new Note corrects those omissions in the context of the revised guideline, cites the relevant statute, and directs the reader to pertinent Supreme Court case law.[58]

At the same time, eliminating the existing Note 2(B) streamlines and clarifies the operation of § 5G1.3(b). As currently structured, Note 2(A) tells readers where § 5G1.3(b) applies. Then, the current version of Note 2(B) repeats similar information in the negative—telling readers where § 5G1.3(b) does *not* apply. The redundancy is confusing, and cutting it offers little meaningful loss of guidance.

Application Notes 2(C), 2(D). The reasons for the remaining miscellaneous changes to Note 2 are straightforward. The current version of Note 2(C) is titled "Imposition of Sentence." However, the Note implements only the adjustment component of § 5G1.3(b) rather all sentencing components. We propose narrowing Note 2(C)'s title to more accurately reflect its specific focus on implementing the adjustment. Given the expanded ambit for § 5G1.3(b) that we propose, narrowing this part of the accompanying note should clarify and streamline 5G1.3's application. In addition, our revision to the text of § 5G1.3(b) required updating Note 2(D)'s cross reference to § 5G1.3(b) and adding "none or" to current Note 2(A), for the purpose of accuracy.

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[56] Our proposed revision is very similar to last year's Defenders Comment. *See* FED. PUB. & CMTY. DEFS., *supra* note 23 at 43–44. We make minor changes in implementing the change but agree with their position.

[57] *See e.g.*, *United States v. Kieffer*, 596 F. App'x 653, 655–59 (10th Cir. 2014) (unpublished) (describing district court's multiple attempts to effectuate judgment vis-à-vis state sentence, in light of BOP sentence calculation); *United States v. Wilder*, 125 F. App'x 740, 742–43 (7th Cir. 2005) (remanding for resentencing after district court and parties miscalculated time credited for state sentence under § 5G1.3(b)).

[58] The first paragraph of our proposed new Note 2(B) may be best described as "background information." Simplification Amendment at 63 (Issue for Comment 4). We think this background information should be added in an attempt to limit confusion about BOP credit for time served under the existing § 5G1.3(b), and even more so under our revised version of § 5G1.3(b).

Application Note 4. Our proposed revision refashions the departure in what is currently Note 4(E) to § 5G1.3 as an adjustment in the text of § 5G1.3(d). Accordingly, we deleted the first sentence of current Note 4(E), which states that it is not an adjustment. We also changed each reference to a departure to an adjustment. The reasons for these changes are set out in our notes to § 5G1.3(d).

Application Note 5. The Commission's Simplification Amendment eliminates Note 5 to § 5G1.3. We agree with this change provided that the guidance is retained, as it is in our proposed addition of § 5G1.3(b)(2).

IV. Conclusion

The Commission is considering a transformative project. Eliminating departures from the whole of the *Guidelines Manual* is a tremendous undertaking that requires a 596-page amendment.[59] This comment's two proposed implementation changes may seem small in the big picture, but they matter immensely to the individuals whose prison sentence may be arbitrarily extended by the unintended consequences of the Simplification Amendment. The increased complexity of these unintended consequences also risks unnecessarily burdening an already-busy judicial system. For these reasons, and the reasons set out above, we respectfully urge the Commission to make these technical revisions, and to do so **regardless** of whether or how the Simplification Amendment is adopted.

Thank you for considering our views on the Commission's proposed amendment. Please do not hesitate to contact Professor Miller with any questions or concerns.

Sincerely,

Judith P. Miller, Clinical Professor of Law
Federal Criminal Justice Clinic
University of Chicago Law School

Written with:
Ben Chanenson, University of Chicago Law School, Class of 2025
Ryan Liu, University of Chicago Law School, Class of 2026
Varun Vijay, University of Chicago Law School, Class of 2026

[59] *See* Simplification Amendment at 66–661.

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Pike Maria, Christian Church of Beaumont

Topics:

Career Offender

Firearms Offenses

Circuit Conflicts

Simplification

Comments:

Hi, I'm Maria Pike, at this time I'm giving my support for the proposed amendments of the guidelines that the commission plan to do. As well we know, and as we, people of church, read the proposed amendments, we really appreciate the commission who comes up with brilliant changes in our law to give people's of second chance in life. Some of our friends provided us with some example of federal cases where the defendants were sentenced to a much higher sentence when a judge use the three steps sentencing process with some provisions of upward departure. We, people of church, respectfully support the simplification of the sentencing process which to delete the third steps and all the upward departure provisions in chapter five of the sentencing guidelines to provide a more secure sentencing system and fair knowledge of sentence a defendant facing with his/her cases. Hopefully the amendments will pass through the house, Senate, and Mr. President Trump and to be apply retroactively for everybody to provide equal chance to each individual/inmate (so far, most of the time,.when a new law was passed it will apply to some certain group of people only and prohibit some other group to get benefit of it:i.e. the First Step Act, people such who got gun, violence, and sex offender were prohibited from the benefit of a time off of it which means the law itself was made to discriminate some group of inmates. Meanwhile, our Constitution provide a certainty and secure equality to everyone). With word of "Amen", we,. people of church, pray that the amendments (especially the simplification part) to be passed and apply for everybody ASAP. Amen

Submitted on: January 21, 2025

UNITED STATES PROBATION OFFICE
NORTHERN DISTRICT OF OKLAHOMA

ASHLEY SCHNEEBERG
CHIEF UNITED STATES PROBATION OFFICER

UNITED STATES COURTHOUSE
333 WEST 4TH, SUITE 3820
TULSA, OKLAHOMA 74103
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RE: Proposed changes to Career Offender/4B1.2

To whom it may concern:

While I appreciate the Commission's efforts to simplify the process of applying the United States Sentencing Guidelines, the proposed methodology for removing the Categorical Approach is likely to create as much or more difficulty for practitioners as applying the Categorical Approach. In theory, removing the need to conduct exhaustive legal research to determine whether a state law categorically matches the crime of violence definitions seems ideal. However, replacing that task with a factual investigation would cause just as much work, if not more.

At first blush, it may seem simple to determine the underlying facts of a criminal conviction, and in some cases, it is. However, each jurisdiction, from local municipalities to counties and states, has its own unique and drastically different processes and practices for maintaining records in a criminal proceeding. Additionally, these processes and practices vary wildly in quality and detail. The variation in the quality, contents, and availability of the Shepard style documents suggested to be used for making these determinations will make conducting this analysis even more time consuming than applying the Categorical Approach. Though the Categorical Approach is time consuming and often results in unexpected and seemingly illogical outcomes, we as a system have become accustomed to operating within its parameters. Additionally, especially in recent years, the courts have developed a litany of case law to aid in its application. Simply put, while the Categorical Approach is a broken tool, it is a broken tool we are well trained to use, and we are able to use it consistently and efficiently.

The new proposed approach would undoubtedly result in fewer illogical outcomes; however, we would almost certainly see an even greater disparity among defendants with criminal history from different jurisdictions based solely on those jurisdictions record keeping practices, procedures, and quality. We would also see an increase in disputes related to the nature of the supporting documentation and underlying facts of the prior convictions in question. An objection over whether a crime meets a categorical definition is simple to tackle in that it is a legal objection that can often be handled without a protracted hearing. An objection to the underlying facts of prior criminal convictions, however, is likely to result in lengthy evidentiary hearings relating to the facts of the case and reliability of the supporting documentation. Because of the lack of standardization among the various jurisdictions and variation in quality of supporting documentation, replacing the Categorical Approach with the proposed fact-based inquiry would simply replace one broken and difficult to apply methodology with one that is perhaps less broken but far more difficult to apply.

Clearly the idiom, "If it ain't broke don't fix it" does not apply here. The Categorical Approach has been broken since its inception, and a way to move beyond it is sorely needed. However, the proposed amendment would fail to simplify the application of the guidelines as they relate to crimes of violence and would likely result in increased disparity and increased litigation.

Signed,

1/27/25
Sean M. Dooley, Date
Supervisory United States Probation Officer

01/27/2025
Ashley Schneeberg, Date
Chief United States Probation Officer

1/27/25
Anthony Marsh, Date
Deputy Chief United States Probation Officer

1/27/25
Benjamin Ciranowicz, Date
Supervisory United States Probation Officer

VILLANOVA UNIVERSITY

CHARLES WIDGER SCHOOL of LAW

January 29, 2025

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

We hope this finds you and all at the Commission well.

This is in response to the Commission's Proposed Amendment to the Sentencing Guidelines, *Simplification of the Three-Step Process*, published in the Federal Register on January 2, 2025.[1] We appreciate the opportunity to share a few thoughts with you on this significant proposal.

We were gratified to read last summer that in this 40th anniversary year of the Sentencing Reform Act (SRA), and now the 20th anniversary year of the Supreme Court's decision in *Booker v. United States*,[2] the Commission would be reflecting on the core goals of the Sentencing Reform Act, the progress that has been made towards meeting them, and what actions might be taken now, and in the future, to further them. We were also pleased to see the Commission unanimously publish the *Simplification of the Three-Step Process* proposed amendment and issues for comment to further those core goals and better reflect the *Booker* jurisprudence in the Sentencing Guidelines.

Better reflecting *Booker* in the Guidelines is well past due. So is simplification of the Guidelines. Before *Booker*, the federal sentencing Guidelines were criticized for being overly complex, overly harsh, overly reliant on such quantifiable offense factors as drug quantity and loss, and contributing to a system of ever-growing plea bargaining and the "vanishing" jury trial.[3] Twenty years after *Booker*, the system is even more complex. It is still overly reliant on quantifiable factors. There are fewer jury trials today, not more, even though the *Booker* merits majority opinion was expressly predicated on vindicating the Sixth Amendment jury trial right. The average federal sentence has increased since *Booker*. There is more unwarranted disparity in sentencing between and within the circuits and districts, with some courts still sentencing within the Guidelines regularly and others doing so rarely.

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[1] U.S. SENT'G COMM'N, Sentencing Guidelines for the United States, 90 Fed. Reg. 128 (January 2, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-02/pdf/2024-31279.pdf.
[2] 543 U.S. 220 (2005).
[3] *See*, *e.g.*, Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315 (2005); National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (July 2018).

Not all these problems, of course, can be laid solely on the doorstep of the Guidelines and the Sentencing Commission. But we strongly believe that the Commission is well situated to reform federal sentencing policy and advance solutions to these problems. As we've stated before in prior comments to this Commission, we think changes to the Guidelines' fundamental architecture are essential for reforms to be effective. And we think the Commission is the best-positioned institution to help structurally reshape federal criminal and sentencing law and practice for the better.

We applaud the Commission for the issues for comment and an ambitious proposed amendment, which we see as an important opening step in a multi-year process to adjust, at long last, the Guidelines to both recognize the landmark changes brought by *Booker* to federal sentencing and incorporate in the Guidelines the legal mandates and realities of the post-*Booker* advisory guideline system. If the Commission makes the needed structural changes, it will necessarily address some of the longstanding systemic problems with the Guidelines.

Our views on the proposed amendment and issue for comment are simple: the current three-step process unnecessarily complicates the federal sentencing process, causes much confusion for practitioners and defendants alike, and likely leads to greater unwarranted disparities in sentencing outcomes. At the same time, we do not think simply eliminating departure guidance from the Guidelines Manual is the right approach to better achieving the Sentencing Reform Act's goals, which we believe are still very important and worth pursuing. Nor do we think eliminating departure guidance is entirely consistent with the SRA and other enactments by Congress.

There are deep flaws in how all three steps of the process currently operate, some of which are the result of Commission decisions, and others are the product of longstanding flaws in the federal criminal code. Together, they undermine effective sentencing policy and important constitutional values. *Booker* has a long lineage and incorporating it into the Guidelines credibly means grappling with that lineage and laying out a vision for a better criminal law and sentencing system.

We think the Commission should address all these challenging and critical structural issues by developing a path to a federal criminal law and sentencing architecture consistent with best practice and constitutional values. The Commission has the capacity to develop this better architecture, and we offer some ideas for that here. Our suggestions are derived mostly from best practices from the states and foreign countries that have adopted sentencing guidelines and from the foundational Supreme Court criminal law decisions that animated much of *Booker*.

We hope the Commission will continue this collaborative policy development process to craft a revised proposal. We think great work on sentencing requires the broader perspective we suggest here, and the Commission is uniquely positioned to accomplish it in a bipartisan and legislatively realistic way.

Each Step of the Sentencing Process Is in Need of Reform

The Sentencing Guidelines issued by the 1987 Commission – and sentencing guidelines issued by many states and nations that have adopted them – are based on a two-step architecture. That architecture requires users to first – in Step One – determine a recommended sentencing range based on a formula developed by the sentencing commission, and second – in Step Two – determine whether to sentence the individual defendant outside that recommended range or at a particular point within the range.

This is the process Congress had in mind when it enacted the Sentencing Reform Act in 1984. It is the process the Commission had in mind when it promulgated the Guidelines in 1987. It is the process Congress had in mind when it promulgated the PROTECT Act in 2003. And it is the process that is used by many states and nations that have adopted sentencing guidelines.

The current three-step process was not designed by anyone. It is not part of any cohesive strategy. It is an accidental artifact of a sharply divided Supreme Court in 2005 that expected Congress to quickly reconsider the design of federal sentencing policy after *Booker* and adjust it. Justice Stephen Breyer famously said in the *Booker* remedial majority opinion, "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[4] Congress never picked up that ball – and neither has the Commission, until now – and we've lived with an unnecessarily complex and confusing three-step guideline system for over 20 years.

We applaud the Commission for picking up the ball today. But calling the right play is essential now that you have the ball in your hands. Simply eliminating departure guidance isn't a sound strategy. We think all three steps of the current process are flawed. Fixing them will require a multi-year plan at the Commission as well as congressional action. We think the Commission's first task is to devise that plan, which will include refinements to the Guidelines – and eventually the federal criminal code, too – to more fully embrace the constitutional values underlying *Booker*, *Blakely*, and foundational criminal law decisions that are *Booker*'s pedigree.

We start, below, with thoughts on Steps Two and Three, as this is the focus of the Commission's proposed amendment. Ultimately, though, changing Steps Two and Three will be insufficient without also addressing Step One. The Guidelines' architecture must fit together with the architecture of federal criminal law to create a system that meets the goals of sentencing reform and the constitutional values at the heart of *Booker*.

The Complexity and Confusion Inherent in the Current Steps Two and Three

The complexity and confusion around Steps Two and Three of the sentencing process and arising from *Booker* stem in significant part from what the Commission itself long ago recognized as the "tension" between the requirements of 18 U.S.C. § 3553(a) and those in 28 U.S.C. §§ 991 *et seq*. As then-Commission Chair Patti Saris testified before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security in 2011, 28 U.S.C. § 994(e) directs the Commission to "assure" that the guidelines *and policy statements* reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in determining the length of imprisonment.[5] And the Commission, on its own, adopted policy statements to limit the use of other offender factors. All this while § 3553(a) and post-*Booker* jurisprudence puts no limits on the consideration of offender factors but instead mandates that sentencing judges consider "the history and characteristics of the defendant" in all cases.[6]

Judge Saris told the Subcommittee that "[o]ver the course of its history, the Commission has ensured that the departure provisions set forth in the Guidelines Manual are consistent with this directive. Yet under the current advisory regime, judges consider those very factors under § 3553(a) and often arrive at sentences below the guidelines range as a result of such consideration . . ."[7] Judge Saris, on behalf of the full Commission, asked Congress to resolve the disconnect between the directives to the Commission and the directives to the courts. It never did. And because the Guidelines Manual generally limits the use of offender factors, the complexity and confusion have persisted, with two separate paths (steps) – with different

[4] *Booker*, 543 U.S. at 265.
[5] Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary, United States House of Representatives, October 12, 2011.
[6] *See also*, 18 U.S.C. § 3661.
[7] *Id.*

application standards in the district court and review standards in the appellate court – to considering offense factors not articulated in the Guidelines and offender factors generally.

Resolving that complexity and confusion would be a good thing for many reasons. But to do it, as Judge Saris recognized, requires amendments to the SRA to create a consistent body of law (statutory and case law) and policy. If the "tensions" identified by Judge Saris are resolved, the Guidelines could then follow best practice in the states and around the world of a two-step sentencing guidelines process. But under current law, we believe simply eliminating all departures from the Guidelines Manual and leaving sentencing judges with no guidance on Step Two of the sentencing process would be both inconsistent with current statutory law and a grave policy mistake.

Eliminating departure guidance from the Guidelines Manual would be inconsistent with much of the Commission's statutory role as laid out in the SRA – to guide the exercise of judicial sentencing discretion – and would lead to even more inconsistent outcomes and even greater unwarranted sentencing disparities. It would also encourage adding more factors to Step One – greater "factor creep" beyond what's already occurred – and would be inconsistent with the SRA and various congressional directives to the Commission, including 28 U.S.C. § 994(e).

Judge Saris also recognized in her testimony – which was based on the Commission's lengthy departure report in 2003 – that underlying the PROTECT Act was a clear recognition and endorsement of the role departures play in the federal sentencing process. While the PROTECT Act came before *Booker* and was certainly mostly about curtailing departures, its provisions can't simply be ignored. With the Act, Congress directly amended the Guidelines Manual to regulate the use of departures. It did not eliminate departures. It recognized and authorized their use, including upward departures, in specifically delineated circumstances. The Commission has not made public any legal analysis nor suggested any legal basis or authority simply to overrule those laws and strike all departure provisions from the Guidelines (including provisions added by law). Especially in light of the recent Supreme Court decisions on the role of administrative agencies, we think the Commission ought to be extremely cautious before moving so directly against acts of Congress. At the very least, the Commission should publish for comment any legal analysis that it might have done around its authority in this area.

The better approach for the Commission to take, we believe, both from a legal and policy perspective, is for the Commission to draft an amended Guidelines Manual that creates a two-step process that includes departure-like guidance from the Commission to sentencing courts on Step Two. This guidance would identify in the Guidelines Manual those "secondary" offense factors – factors not included as Specific Offense Characteristics (SOCs) or other offense level adjustments in Step One – courts ought to consider in determining whether to sentence outside that recommended range or at a particular point within the range. This guidance would be based on the Commission's genuine expertise in crafting the Guidelines and identifying grounds, particularly offense-based grounds, for sentencing outside the otherwise-applicable range or at a particular point within the range.

As to offender factors, the Commission will need to revisit the existing policy statements, mostly in Chapter Five of the Guidelines Manual, in light of the post-*Booker* relevance of them in all cases. The Commission should review judicial experience and practice surrounding these factors and also social science studies and findings around them. This could lead to the type of guidance on these factors in the Manual as the Commission provided this past amendment year in relation to youthful offenders.

All of this policy development should include working collaboratively with Commission stakeholders – as the Commission often does – to try to develop a consensus proposal. But it should be done in the context of a genuine understanding of and vision for the overall architecture of federal sentencing and federal criminal

law. We outline, below, why we think so, what a better two-step process might look like, and why it all leads us to the policy conclusion not to eliminate all departures from the Manual.

We think this more holistic perspective and process, which would simplify the Guidelines, address mandatory minimum sentencing statutes, and reform federal criminal law – could lead to a far better, politically viable, and sustainable sentencing system – and criminal justice system – for the coming decades. Yes, the Commission would have to work with Congress to enact amendments to the Sentencing Reform Act – and perhaps later, the federal criminal code itself – to ultimately implement this better system. We view the Commission as an essential leader in creating this better system and progress on this proposal as an essential step in the path towards it.

Why Departure Factors Are Critical to an Effective Two-Step Architecture, and Why the Overarching Federal Criminal Law Architecture Must Be Considered and Should Be Reformed

As the Commission recognized in the introduction to the original Guidelines Manual, the intent of Congress in enacting the Sentencing Reform Act was to create a system of guidelines that achieved the goals of proportionality – "a system that imposes appropriately different sentences for criminal conduct of differing severity" – and reasonable uniformity – "narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[8] To that set of congressional goals, the Commission added a third goal of its own, avoiding complexity in the guidelines system in order to better achieve the two congressional goals. The Commission concluded that "[t]he greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce."[9]

For many state sentencing commissions, meeting these three goals – proportionality, reasonable uniformity, and avoiding excessive complexity – in Step One of the sentencing process is not all that difficult. This is because many state criminal codes that were adopted after the American Law Institute issued the Model Penal Code in the 1960s adequately differentiate crime severity in their criminal laws through a statutorily defined severity grading system. Factors that distinguish grades of theft or assault, for example, are built into these state codes, so that assault causing great bodily injury may be graded as Assault in the First Degree, with lesser degrees of assault (Second Degree, Third Degree, etc.) defined not just by the absence of great bodily injury but based on other defined offense factors, like weapon use.

These codes embraced the principles the Supreme Court partially adopted in a series of cases in the 1970s, *In re Winship*,[10] *Mullaney v. Wilbur*,[11] and *Patterson v. New York*,[12] that if a factor makes a substantial difference in "punishment and stigma" it ought to be codified and proven by the government beyond a reasonable doubt.[13] When a criminal code is well constructed in this way, the sentencing commission need not generally build in non-statutory aggravating and mitigating factors into a sentencing Step One algorithm. It can avoid most of the controversy around "relevant conduct," for the code achieves adequate proportionality. The result is a relatively simple process for Step One of sentencing for the commission, the litigants, and the judge. The Minnesota Sentencing Guidelines Grid, attached as Appendix A, is an example of a simple sentencing grid based on the proportionality embodied in a reformed criminal code.

[8] U.S. SENT'G COMM'N, Guidelines Manual, Chapter 1, Part A (2024).
[9] *Id.*
[10] 397 U.S. 358 (1970).
[11] 421 U.S. 684 (1975).
[12] 432 U.S. 197 (1977).
[13] *Patterson v. New York*, 432 U.S. at 226 (1977) (Justices Powell, Brennan, and Marshall dissenting).

In nearly all states, the counts of conviction along with criminal history are the primary, if not sole, determining factors used to set the sentencing range. This was hoped for in the federal system too, when code reform was proposed and when it passed the Senate. The Sentencing Reform Act was part of that legislation, and the sentencing guidelines were intended to work hand-in-hand with the reformed code.

However, code reform was not enacted in the federal system. The Sentencing Reform Act was severed from the legislation and enacted separately. And as a result, the 1987 Commission was pushed to embrace a modified real-offense approach. That approach necessitated fact-finding by judges about key offense facts that might have otherwise been offense elements and that raised the constitutional problems leading to the *Booker* ruling. We think the Commission must consider this history in its deliberations about Guideline architecture. The Commission should design a reformed Guideline architecture that is part of a larger vision of a reformed criminal law and sentencing system. Such a system would ultimately include a charge-driven sentencing system where judicial fact-finding would play a significantly reduced role in Step 1, setting the guideline range, but where judicial sentencing judgment would still be central to Step 2, deciding on the ultimate sentence.

The failure of federal code reform means that the current federal criminal code does not generally do a good job of differentiating crimes of differing severity. There are, to be sure, some crimes for which the federal code adequately differentiates severity, such as homicide, and for those crimes, the Guidelines can and are generally simpler. But for most federal crimes, including the "big four" – fraud/theft, drugs, immigration, and firearms – the code does not well-differentiate offense severity, requiring the Commission to fill the void to achieve proportionality. A $100 wire fraud and a $1 billion wire fraud are embodied in a single statutory crime.

The 1987 Commission recognized that to achieve proportionality given the nature of the federal criminal code, the federal guidelines had to identify those factors that made "a substantial difference in punishment and stigma" and build them into Step One. The Commission also recognized that there is a "tension" among the mandates of uniformity, proportionality, and simplicity. It set out its thinking on this tension in the introduction to the Guidelines Manual:

> Simple uniformity – sentencing every offender to five years – destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.
>
> A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.
>
> The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless.[14]

The first Commission readily conceded that the appropriate relationship among different factors is difficult to establish, "for they are often context specific." It also appreciated that "[t]he larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity

[14] U.S. SENT'G COMM'N, Guidelines Manual, Chapter 1, Part A (2024).

and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system."

In the end, the Commission tried to identify and build into Step One the distinctions that made a significant difference in sentencing decisions – a "heartland" of factors and how they apply in typical cases – and to leave to departures less frequently occurring factors and where the identified factors, in context, "significantly differ from the norm." Departures would have a significant role in such a system. The Commission decided that to achieve the balance of uniformity, proportionality, and simplicity, it needed to identify those non-heartland factors and situations in the Guidelines Manual to guide judges in Step Two. This guidance was based on the Commission's expertise in developing the Guidelines and the empirical analysis it used to develop the Guidelines.

Of course, over the last 38 years, there has been much "factor creep" and with it, growing complexity and the addition into Step One of factors of lesser importance. The Guidelines Manual has grown significantly since 1987 as the Step One algorithms have added new factors. We think part of the Commission's simplification project must consider and ultimately address factor creep, consider the larger goals of code reform, and create a system that at Step One is largely driven by primary offense factors proven beyond a reasonable doubt. As to Step Two, we believe the guidance contained in the current commentary – guidance for non-SOC factors or the unusual context for SOCs or other adjustments – is critically important in encouraging judges to consistently reach an appropriate sentence. As a matter of sound sentencing policy, we do not believe that vital guidance should be lost.

For example, in the guideline for second-degree murder, the commentary includes this: "[i]f the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted." In the drug guideline, the commentary includes this: "If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted." This type of guidance is valuable for encouraging a more consistent approach to the sentencing process. Of course, the guidance on reverse stings begs the question of whether quantity should be a driving (primary) sentencing factor in drug cases and makes clear why the Commission's simplification project must take on more.

The alternative – striking all commentary – will leave litigants, judges, and probation officers with no guidance on Step Two. We think that would be a big mistake. It is inconsistent with the Commission's mandate under the Sentencing Reform Act to leave the various courtroom actors bereft of this centralized advice. Even if the Commission simply lists in each Chapter Two and Three guideline aggravating and mitigating factors not contained in the guideline that may be relevant (or in Chapter Four for criminal history that over- or understates a criminal record), sentencing participants will have a common foundation and starting point as they engage with the Step Two process. And with that foundation, they are more likely to follow a consistent and transparent path to reach a sentence that fits the crime. Moreover, that list of aggravating and mitigating factors, which should be heavily influenced by judicial and case experience as filtered through the Commission's normative judgment, will facilitate important data collection at the Commission for the listed factors and analysis of the efficacy of the applicable guideline. This virtuous circle of advice and feedback only works if the Commission continues to provide comprehensive guidance and collect relevant data.

As described above, we think the Commission should capitalize on its unique position and composition to improve the federal sentencing system. While it cannot accomplish this alone, it can be the

catalyst for a better criminal justice future. A modest start could be to convert existing departure language into a list of aggravating and mitigating factors for courts to consider in Step Two. There are, of course, other ways to move things forward. However, abandoning all the current departure-style recommendations for sentencing judges would be an abdication of the Commission's responsibilities and a body blow to the goal of consistent, proportionate sentencing in the federal courts.

The Commission should, over the next year or so, commit to the difficult task of laying out a vision for a reformed criminal law and sentencing system that would reduce the number of primary factors already in the Guidelines that may be used infrequently or that are not making a substantial difference in "punishment and stigma" and provide guidance for judges to consider recurring aggravating and mitigating considerations in Step Two. This could ultimately lead to a bipartisan adoption of a reformed criminal and sentencing law that is simpler, more consistent with the *Booker* jurisprudence and its constitutional lineage, and more effective at meeting the goals of the Sentencing Reform Act.

- - -

We know this is a lot to chew on. We hope some of these comments and suggestions are helpful to you. We know that we are asking the Commission to do great work. We do so, because we think the Commission is an institution capable of it.

Please let us know if there's anything more we might do to assist you in your work. We are grateful for this opportunity to weigh in. And please know we are pulling for your success and for the best possible federal criminal law and sentencing system.

Sincerely,

/s/ Jonathan J. Wroblewski
Jonathan J. Wroblewski
Director, Semester in Washington Program
and Lecturer on Law
Harvard Law School[15]

/s/ Steven Chanenson
Steven Chanenson
Professor of Law
Faculty Director, David F. and Constance B. Girard DiCarlo
Center for Ethics, Integrity and Compliance
Charles Widger School of Law
Villanova University

[15] Both of our affiliations are included here for identification purposes only.

APPENDIX A

4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		**CRIMINAL HISTORY SCORE**						
		0	**1**	**2**	**3**	**4**	**5**	**6 or more**
Murder, 2nd Degree (Intentional; Drive-By-Shootings)	**11**	306 *261-367*	326 *278-391*	346 *295-415*	366 *312-439*	386 *329-463*	406 *346-480*[2]	426 *363-480*[2]
Murder, 2nd Degree (Unintentional) *Murder, 3rd Degree (Depraved Mind)*	**10**	150 *128-180*	165 *141-198*	180 *153-216*	195 *166-234*	210 *179-252*	225 *192-270*	240 *204-288*
Murder, 3rd Degree (Drugs) *Assault, 1st Degree (Great Bodily Harm)*	**9**	86 *74-103*	98 *84-117*	110 *94-132*	122 *104-146*	134 *114-160*	146 *125-175*	158 *135-189*
Agg. Robbery, 1st Degree *Burglary, 1st Degree (w/ Weapon or Assault)*	**8**	48 *41-57*	58 *50-69*	68 *58-81*	78 *67-93*	88 *75-105*	98 *84-117*	108 *92-129*
Felony DWI *Financial Exploitation of a Vulnerable Adult*	**7**	36	42	48	54 *46-64*	60 *51-72*	66 *57-79*	72 *62-84*[2, 3]
Assault, 2nd Degree *Burglary, 1st Degree (Occupied Dwelling)*	**6**	21	27	33	39 *34-46*	45 *39-54*	51 *44-61*	57 *49-68*
Residential Burglary *Simple Robbery*	**5**	18	23	28	33 *29-39*	38 *33-45*	43 *37-51*	48 *41-57*
Nonresidential Burglary	**4**	12[1]	15	18	21	24 *21-28*	27 *23-32*	30 *26-36*
Theft Crimes (Over $5,000)	**3**	12[1]	13	15	17	19 *17-22*	21 *18-25*	23 *20-27*
Theft Crimes ($5,000 or less) *Check Forgery ($251-$2,500)*	**2**	12[1]	12[1]	13	15	17	19	21 *18-25*
Assault, 4th Degree *Fleeing a Peace Officer*	**1**	12[1]	12[1]	12[1]	13	15	17	19 *17-22*

[1] 12[1]=One year and one day

Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.

Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

[2] Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

[3] The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Kameron Cantrell, Tennessee, Western

Topics:

Firearms Offenses

Comments:

Over the course of my career as a presentence writer, i have written several cases for felon in possession of firearms. Unfortunately, this seems to be an area of high recidivism issue.

I would like to propose an enhancement for multiple convictions for being a felon in possessions of a firearm.

Submitted on: January 14, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Jaime Muse, Arizona

Topics:

Career Offender

Firearms Offenses

Simplification

Comments:

Career Offender- It would be beyond helpful to provide definitions of crime of violence and controlled substance offense.

Firearms Offenses- I would propose that if mens rea is adopted for a stolen weapon that it require a conviction. I am curious if mens rea were to be applied to the modified serial number, how often it would be applied. It would be difficult to prove mens rea for modified serial number. Is it worth having the enhancement at all if it would rarely, if ever, be applied?

Simplication- Yes PLEASE! There is no need for most departures when we have variance language.

Submitted on: December 26, 2024

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

American Judges Association

Topics:

Career Offender

Firearms Offenses

Comments:

I'm really concerned about the easy accessible access to firearms in our country.

Submitted on: January 13, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Yadirah Rodriguez, Ms

Topics:

Career Offender

Firearms Offenses

Comments:

The career offender and firearm offense statutes should be revised. In a system where most crimes are resolved by plea, many people specially minorities, end up pleading guilty to cases to avoid the uncertainty of a trial. Most of the times, they do so not because they are in fact guilty but because they see it as the quick way out, not knowing that a withhold of adjudication is not recognized in the federal system. Furthermore, not knowing that eventually such convictions can subject them to higher sentences if tried in federal court.

Submitted on: January 29, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Daren Schumaker, Iowa, Northern

Topics:

Career Offender

Comments:

With regard to the proposed amendments to the career offender guideline, I would encourage the Commission to rely on the sentence imposed rather than the prior time served on a qualifying offense.

In short, use of sentence imposed would be consistent with the scoring of criminal history points in Chapter Four and is easily determined by referencing sentencing orders.

On the other hand, use of the prior time served on a qualifying sentence would require probation officers and the Court to rely on parole and release records from state prisons, which are often incomplete, difficult to obtain, and unclear if available.

In summary, records used to determine the sentence imposed are more readily accessible and accurate than records used to determine the amount of a prior sentence actually served.

Submitted on: January 10, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Emily Ward, Partner

Topics:

Circuit Conflicts

Comments:

I urge the Commission to revise the proposed new Guideline section 4C1.1 which now lists 11 preconditions to receiving the 2-point reduction, including "(10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role)." I am a white-collar practitioner and see the Aggravating Role enhancement added to almost every case I have, regardless of true culpability or leadership. I don't think it should be a barrier to this adjustment, but at a minimum, believe some distinction should be made between organizer/leader on the one hand, and manager/supervisor on the other because being a manager/supervisor doesn't genuinely correspond to increased culpability and recidivism.

Submitted on: December 23, 2024

From: [redacted]
Subject: [External] ***Request to Staff*** AGUIAR, STEPHEN, Reg# [redacted]
Date: Tuesday, January 14, 2025 3:05:09 PM

To: Sentencing Commission
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Stephen Aguiar
Reg. [redacted]
FMC Devens
P.O. Box 879
Ayer, MA 01432

United States Sentencing Commission
Washington, DC 20001

In re Public Comment to U.S.S.G. Amendments

Dear United States Sentencing Commission:

I want to comment on the Commission's consideration to amend the career offender provision under U.S.S.G. Section 4B1.2(c) and vote to enact Option 3 (Limiting Prior Convictions Through a Time Served Approach), Suboption 2B (Limitation applicable to both "crime of violence" and controlled substance offense"). Under U.S.S.G. Section 4B1.2(c)(2), "each of the aforementioned felony convictions...(B) resulted in a sentence for which the defendant served [five years]." Id. (alteration in original).

Taking a time-served approach to career offender and voting to enact this option as detailed above falls within the scope of the Commission's mission statement. First, when originally enacted, the career offender provision (as it relates to controlled substance offenses) was enacted during a time in which high profile organized crime distributions king pins were targets of the government. As decades passed, street level drug dealers became the new career offenders and these defendants are the majority of career offender defendants incarcerated today. I am one of them.

The Commission should vote limiting prior convictions through a time-served approach using the five year requirement because career offenders fit best under such a requirement. I am serving a 30 year sentence as a career offender that would have otherwise been 168 months were I not deemed a career offender. Moreover, I do not qualify for any any Guidelines Amendments because of my Section 4B1.1 sentence. I am a member of the Jailhouse Lawyer's Initiative run out of the Bernstein Institute for Human Rights at NYU in New York City. I speak on behalf of the many with whom I am incarcerated who cannot speak. I hope that the Commission votes this Amendment as detailed above in full. If the Commission has an questions or concerns regarding this e-mail, please feel free contact me. The time for this change has been long overdue.

Thank you for your time and consideration in this matter.

Sincerely,

/s/ Stephen Aguiar

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Sarah Anderson

Topics:

Career Offender

Comments:

A categorical approach to determining career offender status should be eliminated and definitions do need to be updated. I believe this amendment should be accepted, and just as importantly, should be make retroactive. Thank you.

Submitted on: February 1, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** ARGUELLES, CHRISTOPHER, [redacted]
Date: Tuesday, January 14, 2025 2:34:06 PM

To: Sentencing Commission
Inmate Work Assignment: Orderly

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Replies to this message will not be delivered.

Inmate Message Below

I believe that the amendments made will definately simplify things. But I do want to state that removing Chapter 5k2.0 onward is not a great idea especially given the fact that research shows in a overwhelming amount of studies that Adverse Childhood Experiances definately play a huge part in why individuals commit crimes. Futher I dont believe that individuals should be punished because of them being in the midist of their addiction or because they have a mental health issue. To do would definately not fullfill the requirements of 3582 and the list of 3553 factors.

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Paula Baird

Topics:

Career Offender

Comments:

thank you for taking the time and reading my comment. I am commenting on the career offender status. I, along with others in my community feel that career offender status is an unjust and harsh penalty. I don't feel that one should be charged with this especially when they have already completed their time on the said charge that activated career offender. nonviolent drug offenders should never be charged with career offender status, this needs to be changed and made retroactive. As a United States taxpayer, I feel that such offenders would be better off in the communities where there are resources readily available to them verses the amount it takes to house just ONE for the duration of such a lengthy sentence. I have read studies showing career criminal status is nothing but harmful to all involved. i pray this commission sees just that, makes the best decision available and makes this retroactive. Again, thank you for your time regarding such an urgent and important matter.

Submitted on: January 19, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Toby Bartels

Topics:

Career Offender

Comments:

The image conjured by "career offender" often bears little or no resemblance to the individuals sentenced with that label.

For too long, many people have been subject to heightened punishment under the career offender guideline, receiving lengthy prison sentences based on crimes that simply do not fit the punishment. The designation "career offender" was created to target serial recidivists. But for too long, it has swept in people with substance abuse disorder; people who are street-level drug dealers; people who are simply not "career criminals." Moreover, the career offender guideline exacerbates racial disparities in sentencing; over half of the people subject to these enhanced penalties are Black.

I hope that any change the Commission makes will cure these problems, and will help reduce the number of people subject to the career offender guideline.

Submitted on: January 27, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** BERARD, CHARLES, [redacted]
Date: Wednesday, January 15, 2025 3:05:09 PM

To: sentencing commision
Inmate Work Assignment: na

ATTENTION

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Inmate Message Below

i think restructuring the guide lines is a great thing to happen. as it will help those with non violent crimes and especially non violent first offenders. and a first offense. it will help a lot of individuals get back to a regular meaningful life. i believe a lot of people regret and oofense involving a firearm espiaclly a first offense. i speak for myself as being a first offender at the age of 39. was set back in life due to a severe hand injury, and made some regretably poor decisions, with a great carrer for the city of w.springfield massachusettes and because of this mistake it really destroyed my life with no priors and being punished as if i was a career offender does not seem right.

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Kimberly Blair

Topics:

Career Offender

Comments:

The career offender should fall under the double Jeopardy claws a man should not be punished for something he have already served time . That should be a violation of the Constitution my husband is doing time for something that should have been a state case. This career offender statue is destroying families it should be done away with.

Submitted on: December 23, 2024

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Hamah Bradley, Inmate

Topics:

Career Offender

Firearms Offenses

Circuit Conflicts

Simplification

Comments:

The United States Sentencing Commission For Proposed Amendment to the sentencing Guidelines (Preliminary) For comment period through February 3, 2025 and a reply comment period running through February 18, 2025. Proposed amendment Career Offender. The first question you asked is: 1.Are there federal offenses that are covered by the proposed amendment but should not be? Yes, there is a federal offense that should not be and that's marijuana. Marijuana should not be define a "controlled substance offense", Marijuana is now legal in more than 75% of the United States. Its being used for medical in 39 states and recreational in 39 states across the United States. In the federal district you have some circuits that found defendants was career offenders because marijuana was a "controlled substance offense" under 4B1.2. Also other circuits found that defendants was not a career offenders because marijuana was a "controlled substance offense under 4B1.2. See United States v House 31 F.4th 745, 2022 U.S. App. Lexis 102222 No. 20-30165 November 10, 2021 (where marijuana was not a "controlled substance offense" under 4B1.2) United States v Gordon 2024 U.S. App. LEXIS 19455 No. 23-2930 April 12, 2024 (where marijuana was a "controlled substance offense" under 4B1.2) With marijuana being legal in over 75% of the United States it should not be defined as a "controlled substance offense" under 4B1.2. 2. Are there federal drug offenses that are not covered by the proposed amendment but should be? No, all the dangerous drugs are covered in the proposed amendment career offender. 3. Instead of excluding state offenses, it should limit the definition of "controlled substance offense" in some other way? The State courts do not use prior convictions from other states to enhance defendants, nor does state courts use prior federal convictions to enhance defendants because its different jurisdictions and for those reasons and ore will be stated below , so the answer to that is no. state and Federal are two separate jurisdictions with different penalties for the same offenses. In the state for example if a defendant

is facing a crime that carries a 0-5 year sentence, it turns into 5-40 year sentence with possible enhancements if the Federal Government picks up the case. And that is unfair to the defendant and does not promote respect for the law. 4.Should the Commission keep the current definition of "controlled substance offense" and limit qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served ? If so, how should the Commission set that limit and why? Criminal History points range from 0-7 with 0 being the lowest severity and 7 being the greatest severity. If a defendant received 1 criminal history point for purposes of the career offender guidelines under 4B1.2, that defendant is treated the same as a defendant with greatest severity level prior conviction. which is unjust, unfair and does not promote respect for the law. Even a defendant with 3 points is treated as a 7 point defendant. There has to be some way to separate the lowest severity from the greatest severity on the scales of justice. For example 0-3 criminal history points should not be counted, if you leave the definition intact. Also there are defendants that only served a term of probation for their prior conviction, with no jail time that has that prior used to enhance there sentence under 4B1.2. Also if 18 U.S.C. 851 requires defendants to have at least 3 "serious drug felony" charges that are punishable by 10 years or more, you would think the time served in prison and how much a crime is punishable for 2 prior convictions of a "controlled substance offense" under4B1.2 would be more than 18 U.S.C. 851 requirements. Closing statement for the scope and purpose of the Career Offender Guidelines under 4B1.2, We the people of the United States Of America suggest that no state conviction should be used to enhance a defendant in Federal Court. State laws are changing years before Federal laws, where laws in the state are removing elements of a crime and federal laws are adopting 3, 4, and maybe 5 years later making these prior state convictions over broad on its face when used in federal court to enhance a defendant. Also Federal courts are using prior marijuana convictions that's in most states legal now. With that being said, in the best interest of the People of the United States Of America suggest that you , the United States Sentencing Commission, should exclude the use of prior state convictions qualifying as a "controlled substance offense" under 4B1.2 career offender. Thanks you, the United States Sentencing Commission for your service and for taking your time to listen to us the People of the United States Of America. sincerely

Submitted on: January 28, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** BURKE, GREGORY, Reg# [redacted]
Date: Tuesday, February 4, 2025 9:49:30 AM

To: RE: 2025 USSG Proposals comment
Inmate Work Assignment: Snow Removal

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Hello. Regarding "Issues for Comment" issue #3 of the proposal to streamline the three-step process down to two steps, I am in favor of eliminating the script pertaining to Departure Conditions, especially "5K2.0 Grounds for Departure", as doing so would eliminate the bifurcation relating to non-sex offenses v. sex offenses. As it stands now, 5K2.0 only allows for AGGRAVATING circumstances to be considered as grounds for departure (Upward) and not for MITIGATING factors to be considered as grounds for departure (Downward), and such treatment disallows the use of situational discernment and nuance of INDIVIDUAL circumstance. Such a bifurcation of treatment between sex offenses and ALL other offenses is indeed rife within the U.S. judicial system, and is patently unfair. Your proposal to eliminate such text as 5K2.0 within the Sentencing Guidelines would hopefully minimize this noted disparity. I realize that the PROTECT Act of 2003 is a Congressional Act and not limited nor contravened by the USSG proposals, but at least it is a step. Thank you.

From: [redacted]
Subject: [External] ***Request to Staff*** CANNON, FRANK, Reg# [redacted]
Date: Thursday, January 16, 2025 9:49:15 AM

To:
Inmate Work Assignment: Vocational Tutor

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

All states sentence people to different amounts of time and also different lengths of incarceration. For example Iowa might give someone a 25 year sentence for distrubution and 4 years might be the time served in prison. Wisconsin for example, a person for the exact same crime with exact same criminal history as the person in Iowa, could receive a 7 year sentence and would have to serve 7 years. I might be reading what is being proposed wrong. I just wanted to address that if you use state controlled substance crimes and then use the amount of time sentenced to or amount of time served both could vary greatly from state to state. Thank you for your time

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Cash Richard

Topics:

Career Offender

Comments:

I agree that state prior offenses shout not be used to enhance federal sentences for the same reasons the Commission found i.e. they do not contain the same elements as the federal definition and it results in unfair sentencing. This should be retroactive so it applies equally to all those effected by it"

Submitted on: January 22, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Laurie Chambers

Topics:

Career Offender

Comments:

Why Career Criminal Enhancements Are Harmful and Unfair

Career criminal enhancements, while intended to deter repeat offenses and protect public safety, often result in disproportionate and counterproductive outcomes. These enhancements impose significantly longer sentences on individuals with prior convictions, sometimes leading to life sentences for offenses that would otherwise warrant far less severe punishment. Here's why these policies are flawed and fail to achieve justice:

1. Disproportionate Sentences
Career criminal enhancements often escalate sentences to extreme lengths that far exceed the severity of the offense. For example, minor, nonviolent crimes can result in decades behind bars simply because of an individual's prior record. This one-size-fits-all approach ignores the nuances of each case and often punishes individuals far beyond what is reasonable or necessary.

2. Overlooks Rehabilitation
The focus on punitive measures over rehabilitation fails to address the root causes of criminal behavior, such as poverty, addiction, or lack of education. People are capable of change, but career criminal enhancements shut the door on second chances, perpetuating cycles of incarceration without offering pathways to redemption.

3. Punishes People for Their Past
Career criminal laws penalize individuals not for the crime they are currently being sentenced for but for their criminal history. This undermines the principle that punishment should fit the specific offense and creates a system where past mistakes haunt individuals indefinitely, even after they've paid their dues.

4. Disproportionate Impact on Marginalized Communities

These enhancements disproportionately affect low-income individuals and communities of color, who are often more likely to encounter the criminal justice system due to systemic inequalities. As a result, career criminal enhancements exacerbate racial and economic disparities in sentencing.

5. Fails to Reduce Crime
There is little evidence to suggest that career criminal enhancements deter crime. Instead, these policies often lead to overcrowded prisons, strained resources, and higher costs for taxpayers, all without making communities safer. Investing in prevention, education, and rehabilitation programs is far more effective in reducing recidivism.

6. Denies Opportunity for Redemption
By locking individuals away for excessive periods, career criminal enhancements deny people the opportunity to turn their lives around. Many individuals with prior convictions are trying to rebuild their lives, but harsh sentencing enhancements cut them off from society and the chance to contribute positively to their communities.

A Call for Reform
Justice should be fair, proportional, and focused on rehabilitation, not perpetual punishment. Instead of career criminal enhancements, we should implement policies that prioritize individualized sentencing, rehabilitation, and support for reintegration into society.

By reforming these outdated and punitive policies, we can create a criminal justice system that values fairness, second chances, and the belief that people can change.

Submitted on: January 14, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** CHENG, SHENG-WEN, [redacted]
Date: Wednesday, January 15, 2025 11:33:54 AM

To: USSC
Inmate Work Assignment: Wheelchair

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

The USSC should not rename the departure part of the Sentencing Guideline to Assistance to the government; otherwise any prisoner who assisted or refused to assisted the government will be noticed by the prisoner community immediately after being asked about their guideline range during sentencing or from the PSI/PSR

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Jeff Childress

Topics:

Career Offender

Comments:

If the career criminal enhancement can not be eliminated, I agree with the time served proposal for drug offenders, being 5 years or more to qualify as a predicating offense. Some of these people are nonviolent drug offenders that struggle with their addiction and are caught up in a system where they are sent to prison rather than getting the rehabilitation they need. Then these enhancements are used to further punish them and triple the amount of time they would normally receive.

Submitted on: December 24, 2024

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Victoria Couch

Topics:

Career Offender

Comments:

The image conjured by "career offender" often bears little or no resemblance to the individuals sentenced with that label.

For too long, many people have been subject to heightened punishment under the career offender guideline, receiving lengthy prison sentences based on crimes that simply do not fit the punishment. The designation "career offender" was created to target serial recidivists. But for too long, it has swept in people with substance abuse disorder; people who are street-level drug dealers; people who are simply not "career criminals." Moreover, the career offender guideline exacerbates racial disparities in sentencing; over half of the people subject to these enhanced penalties are Black.

These issues with the career offender guidelines certainly applied to my loved one's case. My brother would have received decades less of a sentence had he not been convicted of a crime of violence under US statute 924c. After 2018, newly sentenced people get lower sentences for 924c offenses due to The First Step Act. However my brother has not benefited by the First Step Act because it was not made retroactive for inmates sentenced prior to 2018.

I hope that any change the Commission makes will cure these problems, and will help reduce the number of people subject to the career offender guideline.

Submitted on: February 2, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Lisa Cowley

Topics:

Career Offender

Comments:

THE QUALIFYING PRIORS SHOULD NO LONGER INCLUDE STATE PRIORS ONLY FEDERAL OFFENSES,
WHY - BECAUSE THE PRIORS THAT ARE BEING USED ARE VERY OLD FOR VERY MINOR OFFENSES IN REGARDS TO CONTROLLED SUBSTANCE OFFENSE, FOR INSTANCE MY HUSBAND IS SERVING A 27 YEAR SENTENCE UNDER 4B1.1 BECAUSE HE WAS IN POSSESSION OF 9 BAGS OF MARIJUANA OVER 23 YEARS AGO, WHICH IS NOW LEGAL IN THE STATE OF MICHIGAN WHERE HE WAS SENTENCED FOR THIS PRIOR OFFENSE WHICH HE SERVED LESS THAN A YEAR IN THE COUNTY JAIL FOR....
IF YOU DECIDED TO USE STATE PRIORS THEY SHOULD ONLY BE ONES FOR CRIMES IN WHICH THE PERSON WAS SENTENCED TO SERVE MORE THEN FIVE YEARS IN STATE PRISON FOR NOT COUNTY JAIL CONVICTIONS.
BECAUSE THE STATE KNOWS WHICH CONVICTIONS QUALIFY AS SERIOUS CONTROLLED SUBSTANCE OFFENSES AND IF THEY SAW FIT TO GIVE THE PERSON ONLY COUNTY TIME THEN IT SHOULD NOT QUALIFY AS A CONVICTION FOR THE PURPOSE OF A THREE STRIKES ENHANCEMENT.

WHY DO I ASK THESE THINGS AND TAKE THIS POSITION - BECAUSE MY HUSBAND WHOM I LOVE, MISS, AND ADORE HAS BEEN ABSENT FROM OUR LIVES FOR OVER 14 YEARS IN THE FEDERAL SYSTEM AND THERE HAVE BEEN PEOPLE CONVICTED OF SECOND DEGREE MURDER WHO ARE NOT SERVING SENTENCE AS LONG AS WHAT HE IS. THAT IS ONE REASON. ANOTHER REASON IS BECAUSE THE EFFECT THAT THIS IS HAVING ON OUR LIVES IS OVER BEARING BECAUSE THE MINOR CRIME FROM MY HUSBANDS PAST IS CAUSING THE FEDERAL COURT TO BOOST HIS GUIDELINES FROM 77-96 MONTHS ALL THE WAY TO 262-327 WITH A TOTAL OF 324 MONTHS THIS WOULD NOT EVEN BE POSSIBLE IF THE GUIDELINES WERE CORRECTED AND THEN HE COULD PRESENT HIS ISSUES TO THE

SENTENCING JUDGE WHO WOULD THEN TAKE THIS INTO CONSIDERATION UPON RESENTENCING HIM. THERE IS NOTHING MORE THEN I WANT MY HUSBAND TO COME HOME AND ALTHOUGH HE HAS MISSED OUT ON HIS CHILDRENS LIVES HE WOULD HAVE THE OPPORTUNITY TO BE IN OUR GRANDCHILDRENS LIVES. THANK YOU FOR YOUR TIME AND CONSIDERATION ON THIS MATTER. NOT ONLY WILL THIS HELP MY HUSBAND BUT IT WILL HELP MANY OTHER FAMILIES AS WELL.

Submitted on: January 9, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** DAVIS, JONATHAN, Reg# [redacted]
Date: Tuesday, January 14, 2025 7:34:17 PM

To: Entire Commission
Inmate Work Assignment: Suicide Com./Ed. Law Cler

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing nd would like to comment on the proposed amendments, startign with the question of retroactivity; my unequivocal answer is as dollows YES THE PORTION REGARDING CAREER OFFENDER SHOULD BE BACKWORDS LOOKING IN ORDER TO CORRECT THE DECADES LONG OVERREACH OF THE SENTENCING GUIDELINES WHICH WERE WORDED AS BEING ADVISORY BUT DISPROPORTIONATELY APPLIED TO BLACK AND BROWN OFFEDERS AS IF THEY WERE MANDATORY.

The removal of the state controlled substance priors is a ideal and realistic option and it will solve many circuit conflicts and that is truly the ideal and the scope of the commission and in line with congressional intent so that is another thumbs up for that proposal. Also the proposal as far as the suboptions in regards to applicable time periods should account for the reality that many states do not judge some offenses as harsh as the sentencing guideline may make them seem due to the fact that county jail and probation was the only time imposed the first soverign with jurisdiction is capable of making sure the proper sentence is imposed and when it comes to whether it should be counted for the purpose of a predicate most county jails won't allow for terms of incarceration above two years therefore that shuold be the threshold as far as whether those priors should be counted.

All the propsed amendments and united sentencing guidelines manuals should be placed on the law libraries as well as at least one hard copy forwrded to the institutions law library. there is a lot of information in there to digest and this leaves room for speculation and rumors from the less legally inclined readers among us. I work in the law library and the questions that come through there due to the lack of training within the staffs ranks leads to confusion, so that would be a great plus.

There should be some clarification to the removal of the categorical and modified categorical approach if it will be removed from the entire manual or just from the career criminal 4b1.1 portion which only creates addition disparity and issues for a later date it has to remove the ability for a prosecutor in one jurisdiction to treat a otherwise similarly situated person differently. It must work hard to bring forth uniformity, i have been waiting years to hear this about the career criminal no longer utilizing state controlled substance priors. Yet can there be more clairty in regards to EXPUNGED priors, some circuits are not utilizing expunged priors if they were expunged under the claen slate state marijuana reforms as long as it was done prior to the Defendant commencing his current offense, yet that EXPUNGEMENT was not for a constitutional purpose nor was it due to innocence. yet it was not counted but the current sentencing guideline manual would and does still count them if they are expunged during your current offense. this should be clarified.

lastly, the amendment like 821 which effect status points don't always release an AIC but the probation should always correct the points becasue it effects the custody classification and the recidivism score and that should not be discretionary if my crimnal history points are wrong and that is brought to the attention of the unit team and the probation office that should be corrected regardless if it does not effect the sentece. This must be clarified and corrected, other than that i am extrememly happy and satisfied with these proposals and excited that i amy now have the oppotunity to return to my family and have a release after 15 years incarceration sometime in the fall or winter of this year. have a blessed day and keep up the good work. you are making a difference.

respectfully submitted.

From: [redacted]
Subject: [External] ***Request to Staff*** DYER, CAMERON, Reg# [redacted]
Date: Tuesday, January 14, 2025 7:05:15 PM

To: USSC Public Comment on Proposed Amendments
Inmate Work Assignment: Print 1

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Under your issue for comment on 2K2.1 about MCD's, I believe it should only apply if such device was affixed to a semiautomatic firearm, successfully converting it into a fully automatic firearm. If it is affixed and successfully functions (firing more than once per pull of the trigger), then there should be enhanced penalties.

While a MCD, commonly referred to as a "glock switch", "DIAS (Drop in auto sear)", Lightning-Link, etc. pose a risk, they only really pose a risk if installed successfully on a firearm, and used to commit a crime of violence. Enabling the user to potentially cause large amounts of casualties and destruction. Which in fact, should be addressed already under the NFA Definition of a "machinegun". In a country where firearm ownership is so wide and prevalent, we must consider this legislation carefully. Make no mistake, gun violence has no part in a civilized society.

Further legislation of this subject only serves to controvert and allow larger discretion for the government to regulate a part, which is essentially a paperweight until installed. The same could be said for a metal coat-hanger. Until properly bent into a specific shape, and cut, cannot be used to convert a firearm into a machinegun. Although, If the material is manipulated into a specific shape and size, can essentially and has successfully been done (seen all over the internet with open-source directions) convert a Semiautomatic AR-15 style firearm into a Machinegun. So I ask you a question, Should we call a coat hanger a MCD just because someone possesses one, without the intent for it to be modified and put into a firearm? Further enhancing penalties for someone? Further legislation can be a slippery slope, and must be carefully crafted as such to avoid vague and irresponsible use as an add-on charge/enhancement that the Government, and it's prosecuting attorney's in order to coerce and use as a scare-tactic to get defendants to enhance the already dismally high conviction rate in this country through the plea process, scaring a defendant to exercise their right to a fair trial.

Thank You For Your Time and Consideration,
Cameron R. Dyer

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Michael Foreman

Topics:

Career Offender

Comments:

To whom it may concern: Good afternoon, I am a former prisoner that was sentenced as a career offender. In 2012 I pleaded guilty to conspiracy to commit Hobbs act (Robbery), I had prior convictions for robbery and attempted distribution in the state of Maryland city of Baltimore. The federal court labeled me as a career offender due to those convictions. The robbery conviction was used even though the records from the Baltimore City courts showed that I wasn't properly represented. The attempted distribution was used by the federal courts when the records from the Baltimore city's courts showed that the alleged crime wasn't a codified offense as well as no records of representation but the federal court still used those convictions to ultimately sentencing me to a 144 month prison term with 3yrs of supervised probation. I've completed my sentence and probation but the disparity of the sentence was unjustified due to many violations of my amendment rights. I strongly believe that the sentencing commission should make changes on how the federal court system can institute the career offender on inmates. I also strongly believe that state convictions should not be used as basis to punish inmates to extremely harsh and lengthy sentences. Career offender should be exactly what it says career meaning that inmates whom allegedly committed crimes as a career! Not just because a person has convictions for different crimes committed! Also I strongly believe that when an inmate is sentenced, the procedures should be examined to ensure that the inmate had a fair and proper procedure for the sentence. Unlike myself where my 5th amendment rights were violated!!! Please I would love to discuss further about my case even though I've completed my sentence, I would like to make sure that it doesn't happen to others. Thank you

Submitted on: January 30, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** GRAVES, KANE, [redacted]
Date: Wednesday, January 15, 2025 10:18:55 AM

To:
Inmate Work Assignment: C - Recreation

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am a paralegal and AIC in the federal system who has over four years won over twenty years in favorable decisions. The sheer number of individuals I have seen serving sentences enhanced under the Career Offender provision or 21 U.S.C. Sec. 851 where the categorical approach was unjustly applied to minor state controlled substance offenses is egregious. The First Step Act amended Sec. 851 to use the 'serious drug felony' definition, which is a time-served approach similar to option 3A; it is my belief that as far as controlled substance offenses are concerned, the career offender guidelines should take the same approach.

In many cases, defendants are 'careered out' on what is truly only their first real experience committing a serious drug crime. Crimes of possession or petty distribution (in which the defendant is almost invariably an addict who interacts with the black market to purchase drugs or facilitate through operating as a 'middleman' acquisition of narcotics for personal use). While a first-time offender myself and not subject to these provisions, this has been my own experience as well, and I have been both shocked and appalled that there are so many people serving fifteen, twenty, thirty years for what amounts to a first serious drug felony, as a result of the so-called 'categorical approach'.

In one recent compassionate release granted here in South Carolina, the defendant received a Sec. 851 enhancement based on a prior misdemeanor drug possession charge, for which he received probation and was not even represented by an attorney. He could not have known that this would add an addition twelve years to his sentence, one that he would service nineteen years of before relief was granted under the FSA and USSG Sec. 1B1.13.

Following this victory, I was approached by another gentleman who was ten years into a similar sentence. He had virtually the same background (two prior offenses resulting from his own personal struggle with drug addiction, for which he received probation or less than six months of jail time). It was his first federal case and first serious drug felony. However, because the career offender guidelines are governed by the USSG, and as all nonretroactive amendments are precluded from relief under 18 U.S.C. Sec. 3582(c), he could not be helped, and will serve his full sentence if action is not taken by the Commission.

Violent crime is a serious social problem that requires a serious governmental response. It should be the ethos of the Commission to tailor the career offender guidelines to explicitly target violence, particularly sexual violence, and for this reason I recommend a time-served approach of six months. Anyone who is capable of committing three separate violent acts requires the sort of lengthy sentence that we are issuing far more often to drug offenders than violent criminals. I urge an overall shift of focus from controlled substance offenders to violent offenders, particularly where the career offender guidelines are concerned. As such, I support the clarification and enumeration of violent offenses, the firearms amendments, and the amendments to the three-step approach, and urge the Commission to look further at the big picture of mass incarceration and where our taxpayer resources are allocated, and where they could do the most good.

It is the massive number of cases like this, the low likelihood of recidivism I have seen in the majority of these individuals, the effects of mass incarceration on society as a whole, and the entirely unjustified taxpayer expense, that I firmly implore the Commission to not only take action in making the changes to the career offender guideline to do away with the categorical approach, restrict the career offender guideline to the federal statutes enumerated, and select OPTION 3A to implement a time-served approach consistent with the model reforms to 21 U.S.C. Sec. 851 implemented by President Trump and Congress in the First Step Act.

I believe that the large number of eccentric court decisions pertaining to the categorical approach, inchoate offenses, and the career offender guidelines are partly resultant from the fact that these judges are faced with defendants serving preposterously long sentences as a result of winning (or, rather, losing) the Pre-Sentence Investigation lottery and meeting an often arbitrary set of criteria that has little bearing on the reality of the situation. The thousands, perhaps tens of thousands, of drug offenders with substance abuse histories who received a career offender enhancement for what amounts to their first serious drug felony can do nothing but exist and endure through decades-long sentences as a cautionary tale that leaves myself and the informed public wondering 'what exactly is the point?' That there is no remedy available to a court to resolve the resultant disparities and inequities because the issue is a Sentencing Guideline is nothing short of an injustice. For these reasons, I implore the Court to consider and ultimately consent to making the career offender guideline amendment RETROACTIVE, to empower courts across the country to use their God-given judgment to grant relief only where it is applicable, upon consideration of the factors set forth in Sec. 3553(a).

Thank you for your time.

~K. Graves
FPC Edgefield

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Melissa Hampton

Topics:

Career Offender

Firearms Offenses

Comments:

I think career offender is a cruel sentence my son is serving 15 years and this is his first time ever being in jail he had a 2 prior Marijuana charges which was made on the same day which enhanced his charge to a career offender with a firearm which was found under his girlfriend and I don't believe 15 years is anywhere near a fair sentence unless you pull a gun and intend to use it which he did not not to mention he was pulled outta the car in which he layed on the ground while the officers football kicked a 120 lb man and beat in the head with their sticks where he got 36 staples and had brain bleeds so that being said 15 years is a hard unfair sentence

Submitted on: January 28, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Alexis Holmes

Topics:

Career Offender

Firearms Offenses

Circuit Conflicts

Comments:

Firearm Offenses/Circuit Conflicts - This section needs a lot of attention. 1. There should be one definition when it comes to MCD's. They are either considered a firearm or they are not. Also eliminate the picking and choosing when to consider which definition. Firearm offenses already carry harsh, cruel and unusual punishments. If you are considering studies, facts and or algorithm the punishment does nothing for the offender. This amendment should also propose judge discretion to sentenced under the mandatory minimum ESPECIALLY depending on the type of gun. If you are going to pick and choose which definition of firearm you will use in determining an enhancement. NFA states that MCD's are machineguns if a firearm has an option to be single shot firearm is it really a "Machinegun". Clarity on elements of a "Firearm" "machinegun" are especially needed as each term carries different punishments.

Circuit Conflicts - *BIGGEST* Mandatory minimums need to be discussed reviewed and amended. Also, there are too many Vague definitions to subparts of offenses and if a first-time offender is of all crimes or just federal crimes. Which does refer back to career offenders. There might be state career offenders and federal career ofenders. Most inmates charged with federal crimes with sentences over 10yrs do not repeat offenses. Alot of citizens are 1 and done when it comes to federal offenses. I will urge the First-time offender definition also include such as the Jurisdiction.

Submitted on: January 14, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Ashley Horne, Advocate

Topics:

Career Offender

Firearms Offenses

Circuit Conflicts

Simplification

Comments:

I write to strongly advocate for reforms that promote fairness, proportionality, and rehabilitation in the sentencing of individuals under federal guidelines. The proposed amendments address critical areas, and I urge the Commission to prioritize policies that ensure justice is both equitable and humane.

1. §4B1.2 – Defining "Crime of Violence" and "Controlled Substance Offense"

Eliminating the categorical and modified categorical approaches is a necessary step to prevent the overbroad application of sentencing enhancements. Defining "crime of violence" based on actual conduct, rather than vague statutory definitions, helps prevent unjustly severe penalties for individuals whose offenses did not involve significant harm or risk. Likewise, explicitly listing federal drug statutes for "controlled substance offenses" is essential to prevent disparities in sentencing, particularly in cases where state drug laws are more expansive than federal definitions. This change will improve consistency and fairness in sentencing while reducing the disproportionate impact of drug-related offenses, especially on marginalized communities.

2. §2K2.1 – Firearms Sentencing Enhancements and Mens Rea Requirement

The proposed amendment to require a mens rea (intent) element for enhancements related to stolen firearms and altered serial numbers is a welcome and necessary reform. Strict liability enhancements disproportionately punish individuals who may not have known about the firearm's status. Requiring intent ensures that only those who knowingly engage in unlawful conduct receive enhanced penalties, aligning the guideline with fundamental principles of justice.

3. Circuit Conflicts: §2B3.1 (Robbery) and §4A1.2 (Criminal History Calculations)

The Commission must carefully consider the circuit conflicts regarding "physically restrained" enhancements in robbery cases. Applying this enhancement to situations where a victim is merely threatened at gunpoint—without actual restraint—expands punishment in a way that is

neither consistent nor just. A clear, narrow definition of physical restraint will ensure enhancements are applied appropriately and do not unfairly extend sentences.
Similarly, resolving disparities in criminal history scoring is essential for fairness. Counting traffic stops as "intervening arrests" leads to arbitrary sentencing disparities and disproportionately impacts defendants with minor, non-violent offenses. The Commission should adopt a uniform approach that prevents unnecessary sentence stacking.

4. Restructuring the Guidelines for Simplification and Consideration of Personal Circumstances

The proposed simplification of the guidelines is commendable, but it is crucial that any restructuring maintains or enhances judicial discretion to consider the personal circumstances of defendants. Factors such as socioeconomic background, history of trauma, mental illness, and efforts at rehabilitation should play a meaningful role in sentencing decisions. Sentencing should reflect not only the nature of the offense but also the individual's potential for reintegration into society.

5. Retroactive Application of Amendments

It is imperative that any amendments leading to reduced guideline ranges be made retroactive under §1B1.10. Thousands of individuals remain incarcerated under outdated sentencing schemes that have since been deemed excessive or unjust. Granting retroactivity ensures that justice is not only forward-looking but also rectifies past disparities. The Commission should prioritize fairness and equity by allowing those already sentenced to benefit from these critical reforms.

In closing, I urge the Commission to adopt these amendments in a way that prioritizes justice, rehabilitation, and proportionality. Overly harsh and rigid sentencing guidelines have contributed to mass incarceration without demonstrably improving public safety. Reforming these guidelines is a necessary step toward a more fair and effective criminal justice system.

Respectfully submitted,
Ashley Horne

Submitted on: January 20, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** HOUGEN, OLE, Reg# [redacted]
Date: Tuesday, January 14, 2025 6:49:22 PM

To: SENTENCING COMMISSION
Inmate Work Assignment: Unassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Ole Hougen
[redacted]
FMC Devens
P.O. Box 878
Ayer, MA 01432

Date: January 15, 2025

United States Sentencing Commission
Washington, DC 20001

In re PUBLIC COMMENTS ON PROPOSED 2025-2015 U.S. GUIDELINES AMENDMENTS TO U.S.S.G. SECTION 4B1.2

Dear United States Sentencing Commission:

I ask that the Commission consider amending U.S.S.G. Section 4B1.2(c) and to vote in Option 3 (Limiting Prior Convictions Through a Time Served Approach), Suboption 2B (Limitation applicable to both "crime of violence" and "controlled substance offense"). Under the proposed amendment of U.S.S.G. Section 4B1.2(c)(2), "each of the aforementioned felony convictions...
(B) resulted in a sentence for which the defendant served [five years]...or more in prison...."

I believe that option 3, suboption 2B is the best approach in which the amendment as detailed above should be adopted and voted in by the Commission and still maintains the objectives of the Commission. For example, this Commission once reported to Congress that "Drug trafficking only career offenders are not meaningfully different from other drug trafficking offenders and should not be categorically be subject to the significant increase in penalties required by the career offender directive. See Sent. Comm. Report to Congress: Career offender Sentencing Enhancements 15, https://www.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf. The amendments, however, make no distinction between drug and violent crimes, but the time has come to make the best change possible for career offenders who have prior minor drug offense for which they served less than 5 years in prison. Oftentimes, defendants are sentenced concurrently in prior drug convictions grouped with higher controlling convictions but are used by the current practice of the Guidelines. This change as detailed above would cast the net wide enough to allow those defendants with SERIOUS DRUG/VIOLENT PRIOR OFFENSES FOR WHICH THEY SERVED SIGNIFICANT PRISON TIME which would set them apart from other defendants whose offenses were minor but were found to be career offenders. For example, a friend of mine had two separate offense for possessing a firearm (level 20 of the Guidelines) and a drug offense (level 12 of the Guidelines) and was sentenced to 48 months on both convictions

pursuant to a plea agreement. Because his drug conviction was grouped with the firearm offense, the government relied on this conviction to increase his punishment under Section 4B1.1. Were the Guidelines changed as detailed above, he would no longer be a career offender today were the amendment made retroactive.

In sum, I PRAY THAT THE COMMISSION WILL VOTE TO MAKE THIS CHANGE AS DETAILED ABOVE AND MAKE THIS AMENDMENT AS DETAILED ABOVE RETROACTIVE.

Thank you for your time and consideration in this matter.

Respectfully submitted,

Ole Hougen

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Kelly Hunter

Topics:

Career Offender

Comments:

To the United States Sentencing Commission,

I am writing to express my strong support for the proposed amendments to the career offender guideline, specifically the elimination of the categorical approach and the revised definition of "controlled substance offense." These changes represent a crucial step towards a fairer and more effective criminal justice system.

By removing the categorical approach, the Commission acknowledges the inherent limitations and often arbitrary outcomes associated with this method. This shift allows for a more individualized assessment of each defendant's circumstances and conduct, ensuring that sentences are proportionate to the actual offense committed. This focus on individual culpability promotes fairness and reduces the likelihood of excessive punishment.

Furthermore, the revised definition of "controlled substance offense" recognizes the significant differences between state and federal drug laws. By excluding state drug offenses, the amendment prevents individuals from being unfairly categorized as career offenders based on prior convictions that may not reflect the seriousness of their current offense. This change is particularly important in light of the evolving landscape of drug policy and the growing recognition of the need for alternatives to incarceration for non-violent drug offenses.

These amendments offer a second chance to individuals who have served their time for past mistakes and are now seeking to reintegrate into society. By reducing the likelihood of lengthy sentences for non-violent offenses, the proposed changes create opportunities for rehabilitation and reduce the burden on taxpayers. This not only benefits the individuals involved but also strengthens families and communities.

The proposed amendments are a positive step towards a more just and equitable criminal justice

system. They promote fairness, reduce recidivism, and offer a second chance to those who have paid their debt to society. I urge the Commission to adopt these amendments and continue its efforts to create a sentencing system that is both effective and humane.

Submitted on: January 21, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** HUTTON, MATTHEW, [redacted]
Date: Wednesday, January 15, 2025 12:34:07 PM

To:
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Before the Sentencing Commission can take up (Simplification of the three-step Process) they should first ask What is grater than necessary? The Sentencing Reform Act of 1984 provides that a sentencing court "SHALL impose a sentence sufficient, BUT NOT GRATER THAN NECESSARY". The laws are not clear and are conflicting, on one hand you have 18 USC 3553(a) and then you may have a law with a mandatory minimum. So I ask what is sufficient, but not greater than necessary? I can tell you that a sentence, in most cases is much more than time. The day that I was sentenced, I lost my career, my wife, my retirement and my rights. For that day I lost everything that I had and loved. Yes I done something wrong and yes I should be punished, but you the Sentencing Commission should look at the full sentence and know what is sufficient.

From: [redacted]
Subject: [External] ***Request to Staff*** JIVENS, JIMMY, Reg# [redacted]
Date: Wednesday, January 15, 2025 1:34:23 PM

To: United States Sentencing Amendment Commission
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In re PROPOSED UNITED STATES SENTENCING GUIDELINE AMENDMENTS TO U.S.S.G. SECTION 4B1.2(c)(2)(A)(B)

To: United States Sentencing Guidelines Amendment Commission
From: Jimmy Jivens, FMC Devens, P.O. Box 879, Ayer, MA 01432
Date: January 15, 2025

I am a prisoner confined to FMC Devens and urge the Commission to adopt and enact make retroactive the amendment to the career offender provisions set for public comment under U.S.S.G. Section 4B1.2(c)(2)(A) and (B). I also ask that the Commission consider eliminating all state convictions for controlled substance offenses that are mostly broader that the federal statute.

I am a career offender that was sentenced under U.S.S.G. Section 4B1.1 based on my prior offense conduct. I submit that the Commission should consider amending the Guidelines and making retroactive to those incarcerated Option 3 (Limiting Prior Convictions Through a Time-Served Approach), Suboption3A (Limitation applicable to both "crime of violence" and "controlled substance offense").

Specifically, the Commission should limit career offender defendants to only those defendants who have who have qualifying prior "felony convictions (A) counted separately under [Section] 4A1.1(a)..., and (b) resulted in a sentence for which the defendant served {five years]...or more in prison." See proposed U.S.S.G. Section 4B1.2(c)(2).

I submit that requiring a defendant having previously served five years or more in prison is the best choice under the aforementioned option because such a choice falls in line closer to someone who Congress intended to be a so-called career offender. Today, defendants with minor state drug offenses and other federal offenses are serving decades longer in prison based on sentences that have exceeded one year and one month long. In sum, I ask that state offenses be eliminated from the career offender provision as detailed above and that the Commission make the aforementioned changes under Option 3 in the greatest favor to those incarcerated and consider making these amendments retroactive to myself and others who are incarcerated at career offenders.

Thank you for your consideration.

Sincerely,
Jimmy Jivens

From: [redacted]
Subject: [External] ***Request to Staff*** JORDAN, JOSEPH, [redacted]
Date: Tuesday, January 14, 2025 12:19:02 PM

To: U.S.S.C. - Simplification?
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Attention members and chairperson of the U.S. Sentencing Commission

To the extent you want truthful and productive comment, as opposed to just acting like you do, here it is:

I can't wait to use your 665 pages of so-called "Simplified Sentencing Guidelines" in an Op Ed for the Washington Post. You people are the epitome of Washington Bureaucracy. Add 2, subtract 4, add 7 except in cases where, go over 3 categories, blah blah blah. DO YOU NOT REALIZE HOW CRAZY YOUR GUIDELINES SOUND?

And are you not afraid that a Republican Congress will end your jobs?

As you know, imprisonment over 2 years has little to no additional affect on recidivism. And add to that fact your crazy guidelines - which kill deterrence because they make it impossible for a potential law-breaker to know what the sentence for any particular offense is until a bunch of junk is calculated.

Plus you have multiple places where a judge may rely on uncharged conduct. You are wasting tax dollars. I mean no offense. But apparently unlike you, I care about having an effective and efficient system, as opposed to trying to protect your job. You are unneeded, and multiple organizations are going to start making this known to Congress and the public. Please quit your jobs and move to China if you think what you have produced is even near good work.

Thank you.

From: [redacted]
Subject: [External] ***Request to Staff*** MCRAE, ANDRE, Reg# [redacted]
Date: Wednesday, January 15, 2025 10:48:52 AM

To: Chairman
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear U.S. Sentencing Commission,
I am hereby forwarding my comments to this commission in concerns to the upcoming proposed amendments that this commission is considering making changes to in regards to the Career Offender Guidelines.
In December/2007, I was sentenced to a total of 687 months (57 years), after being convicted of 4 counts of possession of crack cocaine, each count was under 28 grams. I was given 327 months (27 years), on all four counts 841 (b)1(b), to run concurrent with each other. But for, my being a career offender this sentence resulted in what it did. Which I also was give a 60 month sentence, and another 300 month sentence consecutive to each sentence given for 924 (c), possessing a firearm during a drug trafficking offense.

I have been in Federal Prison for 20 1/2 years, I was previously resentenced under the First Step Act due to my having crack cocaine in my case. Not given a full resentencing on my Stacked counts which was very unfortunate. See case number; [redacted], Western District Of North Carolina (Charlotte Division)

The priors that were used to put me in Career Offender category was from 1991,92, and 93. I was 20, 21, and 22 years old when these offenses occurred. At this time I was a young drug addict raised by a mother who was a crack cocaine addict herself, which I was forced to leave the house and drop out of High school just so I can go sell crack cocaine so myself and my younger brother would have at the least some Chinese Food from the take out to eat for dinner while our mother was out in the streets prostituting to provide for her crack habit.

I was raised in the streets of Brooklyn, New York, where life was tough and as a child, I had to learn how to be a man before I could know what it was to be a teenager. The crack cocaine that i was in possession of back then was User amounts and was trying to sell it so I can buy more crack to smoke for my own habits that I picked up from my mother and other family members. The amount on each offense was; 0.2 grams, 0.4 grams, and 1.5 grams, each of which was used to put me in Career offender category 16 years later at my Federal sentencing. I don't even think my mind was fully developed during that time of my life when I was offered probation to stay out of prison and the prison sentences I did receive back then was like something I did not understand but needed to help my addiction.

Now, I have been incarcerated for 20 plus years for a drug that If sentenced today devoid the career offender enhancement I would be home with my family now watching my granddaughters grow that I have yet to ever touch, smell, or see in person but for my being here in prison for so long. It is my prayer that this Commission will consider getting rid of the career offender so defendants/prisoners' such as myself can make it home to our families after being gone for 2 decades for a non-violent offense such as my case which does NOT have any violence whatsoever.

The categorical approach is a conversation this commission should have and use a case such as mine as an example

that the career offender has been applied in a very harsh, and draconian manner that has effected lives and families such as myself because I was basically give a walking death sentence because of my petty drug offenses that was necessary just to get me by and help with my bills, and family that I had to take care of. I am now a 54 years old man, hoping that this commission can understand that I did not deserve such a sentence and assuming this proposal is voted in it will be made retroactive for people such as myself to get relief from.

I would like to thank this entire U.S. Sentencing Commission for allowing us Federal inmates a place to voice our concerns and comments and I pray these messages are not overlooked.

Thank you for your attention with this matter and I look forward to being home with my granddaughter soon. God bless this whole Commission...

Respectfully,

From: [redacted]
Subject: [External] ***Request to Staff*** MILES, ARTHUR, Reg# [redacted]
Date: Wednesday, January 15, 2025 10:34:58 AM

To: Sentencing Guidelines Amendment Commission
Inmate Work Assignment: Unassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Dear United States Sentencing Guidelines Amendment Commission:

This Commission has stated

> Drug trafficking only career offenders are not meaningfully different from other drug trafficking offenders and should not categorically be subject to the significant increase in penalties required by the career offender directive.

See U.S. Sent. Comm. (Aug. 2016) available at: https://www.usssc.gov/sites/default/filed/pdf/news/congressional-testimony-and-reports/criminal-history/201607-RtC-Career-Offenders.pdf.

Per the Commission's public comment consideration, I ask that the Commission amend U.S.S.G. Section 4B1.2(c) by implementing and adopting Option 3 (Limiting Prior Convictions Through a Time-Served Approach): Suboption 3A (Limitation applicable to both "crime of violence" and "controlled substance offense") in its entirety SPECIFICALLY RELYING ON DEFENDANTS HAVING SERVED FIVE YEARS OR MORE IN PRISON under the proposed amendment under Section 4B1.2(c)(2)(B) and voting the make the amendment retroactive to include it under U.S.S.G. Section 1B1.10(d) so that those incarcerated can submit motions under 18 U.S.C. Section 3582(c)(2) to obtain relief especially those convicted of non-violent controlled substance offenses.

Using Option 3, Suboption 3A best serves the interests and mission statement of the Commission and of those defendants incarcerated and at the same time maintains Congress's intent under 18 U.S.C. Section 3553(a). Relying on the defendant having served "[five years]...or more in prison" option under Section 4B1.2(c)(2)(B) best captures Congress's intent of what a career offender is given that significant prior sentences served weeds out those less culpable defendants with priors having served controlled substance offenses for minor criminal conduct. I pray that the Commission takes these comments into consideration and elects to amend the Guidelines in full as detailed above and makes the amendments available retroactively to those incarcerated.

Thank you for your time and consideration concerning this matter.

Respectfully submitted,
Arthur Miles

From: [redacted]
Subject: [External] ***Request to Staff*** MILLER, MCCLENDON, Reg# [redacted]
Date: Wednesday, January 15, 2025 2:19:12 PM

To: Career offender
Inmate Work Assignment: none

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was sentenced under the career offender statue in 2019 for a conspiracy to distribute crack cocaine. One of the predicates used to enhance me was a 2004 conviction in Minnesota for second degree assaults'. Although the charge seems to be a violent charge i never harmed anyone or even attempted to harm anyone. In court a tool a plea and admitted to discharging a firearm in the air with no intention to harm anyone. My sentencing transcripts support the finding but since the charge has certain elements it seems as though I assaulted someone. I appealed to state court to try to get the charge changed to reckless discharge of a firearm because the charge doesn't fit crime and the state responded that although they see the error I was time barred from appealing to switch it to the correct charge. If the courts were to look at my conduct instead of the statue of the charge I think i would not be sentenced as a career offender.

From: [redacted]
Subject: [External] ***Request to Staff*** RAFIQ, SHAMOON, Reg# [redacted]
Date: Thursday, January 16, 2025 9:19:05 AM

To: Sentencing Commission Amendments
Inmate Work Assignment: N/A

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

In re Public Comment to U.S.S.G. Amendments

Dear United States Sentencing Commission:

I want to comment on the Commission's consideration to amend the career offender provision under U.S.S.G. Section 4B1.2 (c) and vote to enact Option 3, Suboption 3A. Under U.S.S.G. Section 4B1.2(c)(2), "each of the aforementioned felony convictions...(B) resulted in a sentence for which the defendant [five years]...."

Taking a time-served approach to career offender and voting to enact this option as detailed above falls within the scope of the Commission's objectives. First, originally enacted, the career offender provision for controlled substance defendants was created during a time in which high-profile organized crime drug-distribution kingpins were the intended targets of government investigations and prosecutions. As decades past, street-level drugdealers became the new career offenders and these defendants have become the vast majority of career offenders defendants incarcerated today. Requiring a defendant to serve a five-year period for a prior conviction encompasses the scope of a what true career offender would be as Congress intended.

Thank you for your time and consideration in this matter.

Sincerely yours,

S. Rafiq

From: [redacted]
Subject: [External] ***Request to Staff*** RICHARDSON, WILLIAM, Reg# [redacted]
Date: Wednesday, January 15, 2025 4:04:59 PM

To: Public Comments
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

With regards to the Proposed Amendments to the Sentencing Guidelines posted by this Commission on December 19, 2024, I'm asking or moving this Comission to not only adopt the proposed Amendments to 4B1.2 definitions as they relate to controlled substances , the elimination of the use of prior state offenses, and Inchoate Offense provisions, that the Commission will make those changes retroactive and place them in the list of retroactive amendments under 1B1.10(d) Covered Amendments.

Letter to the U.S. Sentencing Commission Regarding the Career Offender Guideline

To the Honorable Members of the United States Sentencing Commission:

This letter addresses the critical issue of the "career offender" designation within the U.S. Sentencing Guidelines. As your Commission undertakes its review of this guideline, we urge you to consider the research and factual data presented herein to promote fairness, effectiveness, and equity in the federal sentencing system.

Definition of Career Offender

Under the U.S. Sentencing Guidelines, individuals convicted of a felony crime of violence or controlled substance offense may be designated as "career offenders" if they have at least two prior felony convictions for such offenses. This designation results in significant sentencing enhancements, including placement in the highest criminal history category (Category VI) and an offense level typically at or near the statutory maximum for the current offense (1).

The application of this designation is guided by specific criteria, such as time limits and intervening arrests. For example, prior sentences are considered separately if the offenses were separated by an intervening arrest. If no intervening arrest occurred, offenses are counted separately only if they resulted from different charging instruments or were imposed on different days (2). These rules highlight the complexity of determining career offender status and its potential for inconsistent application.

Impact on Sentence Length

The career offender designation has a profound impact on sentencing outcomes. According to the United States Sentencing Commission\u2019s data for fiscal year 2023, the average sentence for career offenders was 154 months, with 99.4% receiving prison sentences (1). In 40.1% of cases, the designation increased both the offense level and the criminal history category, leading to significant upward departures from sentences that would otherwise have been imposed.

The disparity is particularly stark in drug cases. Career offenders convicted of drug trafficking offenses often receive sentences far exceeding those prescribed by the drug guidelines. For example, in fiscal year 2020, career offenders convicted of drug trafficking offenses received an average sentence of 150 months, substantially higher than sentences for similar offenses without the designation (3).

Below is a breakdown of sentencing data for various career offender pathways:

Career Offender Pathway	Average Guideline Minimum	Average Sentence Imposed
Drug Trafficking Only	207 months (17.3 years)	134 months (11.2 years)
Mixed	212 months (17.7 years)	145 months (12.1 years)
Violent Only	209 months (17.4 years)	179 months (14.9 years)

This data underscores the severity of sentencing enhancements for career offenders, especially for those convicted of violent offenses (4).

Racial Disparities

The career offender guideline has consistently demonstrated troubling racial disparities. In 2014, Black offenders accounted for 59.7% of all individuals sentenced as career offenders, despite representing a smaller proportion of the overall federal offender population (5). Research has shown that Black males receive longer sentences than their White counterparts, even after accounting for offense type and criminal history (6).

This overrepresentation raises concerns about equitable application and highlights the need for reform to address systemic biases that exacerbate racial inequalities in sentencing outcomes.

Proposed Changes

The Commission\u2019s proposed amendments to the career offender guideline represent a positive step toward addressing these concerns. Specifically, the proposal to eliminate the categorical approach by redefining "crime of violence" based on a defendant\u2019s conduct and "controlled substance offense" through a list of federal drug statutes aims to correct arbitrary outcomes under the current framework (9).

It is estimated that these changes would affect approximately 1,351 individuals sentenced in fiscal year 2023. This reform offers an opportunity to reduce undue sentencing disparities while ensuring that guidelines more accurately reflect individual culpability (10).

Alternative Approaches to Sentencing Repeat Offenders

Beyond amendments to the career offender guideline, we strongly advocate for alternative approaches to sentencing repeat offenders. Programs such as drug courts, mental health courts, restorative justice initiatives, and community-based interventions address the underlying causes of criminal behavior, such as substance abuse and mental health issues, while prioritizing rehabilitation over punishment (11).

These alternatives are not only more effective at reducing recidivism but also cost-efficient. Studies indicate that such programs can significantly reduce re-offense rates and alleviate the financial burden on the criminal justice system (13).

Conclusion

The career offender guideline has contributed to excessively harsh sentences, exacerbated racial disparities, and failed to address the root causes of criminal behavior. The proposed amendments to \u00a74B1.2 are a critical first step toward reform, but broader changes are necessary to create a fairer and more effective sentencing system. By embracing alternative sentencing approaches that emphasize rehabilitation and address systemic inequities, the Commission can advance a more just and equitable federal sentencing framework.

Thank you for your attention to this important matter.

Sincerely,

Justin Rizzo-Weaver, Sonora, CA

Works Cited

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Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Michelle Rodriguez

Topics:

Career Offender

Comments:

Public Comment on Proposed Amendment to §4B1.2: Career Offender Categories

I am writing to provide my input on the proposed amendment to §4B1.2 concerning the definitions of "crime of violence" and "controlled substance offense" for the purpose of determining career offender status.

While I understand the intention behind eliminating the categorical approach, I would like to suggest an important consideration:

Consistency Within Offense Types: I propose that career offender categories should only include offenses of the same type. Specifically, if an individual has two drug convictions and one aggravated assault conviction that is separate from the drug offenses, the assault should not be used to determine career offender status. Career offender status should be reserved for individuals with three offenses of the same type (e.g., three drug offenses or three violent offenses), ensuring that the categorization accurately reflects the nature of their criminal history.

This approach would promote fairness by preventing the blending of distinct types of offenses and ensuring that career offender status is only applied to individuals with a consistent pattern of similar offenses.

Thank you for considering my comments on this important matter.

Submitted on: January 6, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Christal Sharp

Topics:

Career Offender

Comments:

The proposed amendments to the federal sentencing guidelines are crucial for addressing systemic disparities and excessive sentences that disproportionately affect minority communities. Marquis Tompkins ([redacted]), who was sentenced to 312 months with an additional 24 months of consecutive probation, exemplifies the need for these changes. Under the current guidelines, individuals like Mr. Tompkins often face sentences that are excessively harsh, fail to consider mitigating factors, and perpetuate racial disparities in sentencing outcomes.

Despite not being classified as a career offender, the 4B1.1 guideline was used as a scare tactic to pressure him during trial, a practice that disproportionately affects minorities. Judges are bending the application of 4B1.1, often stretching its intent to justify imposing harsher sentences on individuals, particularly those from marginalized communities. This misuse of the law reflects broader issues of implicit bias and systemic inequities that continue to plague the criminal justice system.

For minorities, the misuse of 4B1.1 reinforces existing disparities by unfairly inflating sentences and undermining the principle of equal treatment under the law. It perpetuates over-incarceration and destabilizes families and communities already disproportionately impacted by the justice system. For individuals like Marquis Tompkins, these amendments could provide a pathway to sentence reductions, fairer treatment, and opportunities for rehabilitation. These changes are necessary to curb the misuse of sentencing enhancements, ensure guidelines are applied consistently and fairly, and restore judicial integrity.

Minorities, particularly Black and Brown individuals, are more likely to receive longer sentences due to structural inequities, implicit biases, and rigid sentencing practices. These disparities erode trust in the justice system and disproportionately harm families and communities of color. The proposed changes are necessary to address these inequities, reduce over-incarceration, and align sentencing practices with modern understandings of fairness and rehabilitation.

These issues persist due to outdated policies, limited judicial discretion, and resistance to reform. By implementing these changes, the Commission can create a more equitable system, allowing individuals like Mr. Tompkins to seek sentence reductions that reflect a fairer and more just approach. The amendments will provide judges with the tools to impose sentences that prioritize rehabilitation and proportionality, ultimately reducing recidivism and fostering safer, more equitable communities.

Submitted on: January 22, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** SNIDER, GREG, Reg# [redacted]
Date: Tuesday, January 14, 2025 8:34:07 PM

To: SENTENCING COMMISSION
Inmate Work Assignment: Labor Pool

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

Greg Snider
Reg. No. [redacted]
FMC Devens
P.O. Box 879
Ayer, MA 01432

Date January 14, 2025

United States Sentencing Commission
Washington, DC 10007

In re 2025-2026 Proposed Amendment to U.S.S.G. Section 4A1.2

Dear Sentencing Commission:

Please vote yes to amend U.S.S.G. Section 4B1.2(c) relying on Option 3 (Limiting Prior Convictions Through a Time Served Approach), Suboption 3A (Limitation applicable to both "crime of violence" and "controlled substance offense") limiting a career offender qualifying defendant TO ONLY THOSE WHO HAVE ACTUALLY SERVED FIVE YEARS OR MORE IN PRISON. Under U.S.S.G. Section 4B1.2(c)(2), "each of the aforementioned felony convictions...resulted in a sentence for which the defendant served [five years] or more in prison...." Id. (alteration in the original).

The Commission should vote yes to limiting prior convictions through a time-served approach using the five year or more limitation period. At the time of the Sentencing Reform Act of 1986 and the creation of the United States Sentencing Guidelines, the career offender provision was created to target high-level organized crime and drug distribution so-called "king -pins" and such organizations have practically disappeared. Today, the so-called king pin career offenders are primarily low level street dealers with past minor drug charges. Taking the above approach would separate those with serious prior drug offenses (because they have served over 5 years in prison) from those who have had minor drug charges in the past who serve much less than five years in prison.

I hope that the Commission can see the logic in voting yes to the above approach and find that the Commission's directives and policies and studies would best be served by taking the aforementioned approach. A friend informed me that the Commission has stated that "Drug trafficking only career offenders are not meaningfully different from other drug trafficking offenders and should not categorically be subject to the significant increase in penalties required by the career offender directive." See U.S. Sent. Comm., Report to Congress: Career Offender Sentencing Enhancements 15, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607-RtC-Career-Offenders.pdf.

Although the controlled substances career offender amendments single out only crimes of violence but not

controlled substances offenses, it is the career offender penalty for controlled substances offense career offender defendants that need to be eliminated as quoted above by this Commission or amended to fall within limitation as detailed above by electing to vote yes on the time served approach limitation as detailed above.

Last, please vote yes and please consider the above amendment and make this amendment as detailed above retroactive.

Thank you for your attention in this matter.

Sincerely,

Greg Snider

From: [redacted]
Subject: [External] ***Request to Staff*** STEGEMANN, JOSHUA, Reg# [redacted]
Date: Wednesday, January 15, 2025 6:48:11 AM

To: Sentencing Commission
Inmate Work Assignment: Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I support the Proposed Amendment to U.S.S.G. Section 4B1.2 and implore the Commission/Congress to enact it insofar as it strikes the current definition of a Controlled Substance Offense in toto and substitutes a clearly defined list of Federal Controlled Substance Offense predicates thus eliminating the present patchwork application of prior State Controlled Substance Offenses to qualify the enhancement. This amendment aligns with the original true intent of the Career Offender Enhancement, which was to hold accountable the most severe federal dug traffickers, as opposed to inequitably punishing people with low-level State predicates in Federal court. My case is directly on point: I am sentenced to 30 years imprisonment and LIFETIME Supervised Release based upon application of U.S.S.G. Section 4B1.2; the Career Offender Enhancement in my case rests on two (2) relatively minor non-violent prior Massachusetts Controlled Substance Offenses incurred when I was 20 years old, and 23 years old, respectively -- and at a time when I plainly suffered from Substance Abuse issues. Many years later, in 2013, when I was 36, I was again arrested by State authorities for a State Controlled Substance Offense; the United States Attorney's Office for the Northern District of New York adopted the case and prosecuted me Federally. After being convicted, the PSR placed my Advisory Guideline Range at CHC III, BOL 24 (68-72 Months); the minimum-mandatory Statutory sentencing range based upon the offense of conviction became 15 years to LIFE based on a predicate offender enhancement under 21 U.S.C. Section 851, which itself causes U.S.S.G Section 4B1.2 to be duplicative as it accounts for the predicate offenses and punishes for them already. Because the PSR also adjudged me a Career Offender under U.S.S.G. Section 4B1.2 based on the two Massachusetts Controlled Substance Offenses incurred years prior in my early twenties, my advisory guideline range became CHC VI, BOL 37 (360 Months to LIFE). The Court applied both Section 851 and Section 4B1.2 and sentenced me to 30 years to LIFE. The Career Offender enhancement doubled the 15-year-predicate-offender Statutory mandatory-minimum under U.S.C.Section 851, increasing my advisory range from 68-72 months to 360 months to LIFE. I am now 48 and have served 12 years imprisonment with nearly 15 years more imprisonment and LIFETIME Supervision thereafter based on nothing more than the two prior Massachusetts offenses. This is arbitrary and inequitable. Uniform Nationwide application of U.S.S.G. Section 4B1.2 based upon the proposed list of Federal Controlled Substance Offenses creates a far more equitable and commonsensical result. Please enact the proposed amendment and make it retroactively applicable to cases like mine. Thank you.

From: [redacted]
Subject: [External] ***Request to Staff*** STREET, JAVONTAE, Reg# [redacted]
Date: Wednesday, January 15, 2025 10:18:59 AM

To:
Inmate Work Assignment: B-1 Unit Orderly

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I am writing in response to the Sentencing Comission's proposed amendments to the Career Offender guidlines. I think the proposed amendments reflect a more clear cut list of offenses that qualify as crimes of violence and not leaving it up to court's to make their own judgement with the more broad categorical approach. A lot of crimes are captured by default under the generic definitions that aren't actually crimes of violence. Another thing I believe is that the minimum sentence length should be amended because for instance in North Carolina every felony offense is punishable for a term exceeding one year no matter if it's your first offense or not. Also these crimes aren't exactly crimes of violence either or would be counted as felony convictions under the federal Sentencing Guidelines Manual because they never should have exceeded a term of one year at sentencing but the State of North Carolina added a term of post release supervision to the term of imprisonment for all felony convictions under the Justice Reinvestment Act of 2011. Under this law all defendants convicted of felony offenses in North Carolina are subject to a term of post release supervision and "must" (emphasis added) be released either 9 months less than the full term of imprisonment for "less serious"(non violent) offenses, or 12 months less than the full term of imprisonment for "more serious"(violent) offenses. So for instance a person convicted of an Class I felony (the lowest on the North Carolina sentencing chart) is subject to a term of 4 months imprisonment as a first time offender but the mandatory 9 months of post release supervision makes it seem like he or she was sentenced to a term of imprisonment exceeding one year (4-13 months) in all actuality he or she could only serve a maximum term of 4 months and then "must" (emphasis added) be released to a term of 9 months post release supervision. A defendant can not waive the term of post release supervision so clearly it's not a part of the term of imprisonment. For this reason alone is why I believe that there should be consideration as to the length of sentenced imposed on prior convictions. I can only speak for North Carolina because I don't know how other states treat such offenses. If you look into North Carolina though you will see a lot of people like myself at career offender status because of prior convictions of petty crimes and not only crimes of violence as my North Carolina Breaking and Entering offenses that are Class H offenses and would have only been punishable for a term of 6-8 months as a level 1 offender before the Justice Reinvestment Act of 2011 but you also have petty drug offenses that qualify as serious drug offenses as well. It's clear North Carolina did this after the ruling of U.S. v. Simmons 2011 on the federal level to make sure all prior offenses qualify as felony convictions under the Sentencing Guidelines Manual. I've served approximately 8 years at this point for being a felon in possession of a firearm under 924(e) Armed Career Criminal Act for my prior conviction of multiple Breaking Or Enterings committed in North Carolina at the young age of 18 years old. This is te most unconstitutional thing I've experienced being an American citizen.

From: [redacted]
Subject: [External] ***Request to Staff*** TALLEY, RAYMOND, Reg# [redacted]
Date: Thursday, January 16, 2025 10:05:10 AM

To: U.S. Sentencing Commission Amendment Comments
Inmate Work Assignment: Unassigned

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

To: U.S. Sentencing Commission
From: Raymond Talley
Re: Public Comments for U.S.S.G. Amendments

Per the Commission's public comment consideration, I ask that the Commission amend U.S.S.G. Section 4B1.1(c) by enacting Option 3, suboption 3A in its entirety specifically requiring defendants with prior convictions to have served five years or more in prison under the proposed amendment under Section 4B1.2(c)(2)(B) and voting to make this amendment retroactive to include the amendment under U.S.S.G. section 1B1.10 to those career offenders incarcerated. I also agree with the commissions intention to eliminate state convictions from prior conviction consideration under Section 4B1.1 for career offender defendants and make such an amendment also retroactive to those incarcerated.

Option 3, suboption 3A best serves the objectives of the Commission and of those incarcerated and at the same falls within the scope of 18 U.S.C. Section 3553 factors as Congress intended. Making these aforementioned amendments retroactive also allows district courts to grant relief of those career offender defendants incarcerated on a case-by-case basis and weeds out those less culpable defendants with prior sentences for minor past criminal conduct. I trust that the Commission can see the logic in enacting these amendments and making these amendments retroactive and take into consideration that the Federal Bureau of Prisons is not acting in accordance with the First Step Act and those of us incarcerated are suffering additional punishment every day we have been incarcerated since 2018 which is not what congress intended.

Thank you for your attention and consideration in this matter.

Respectfully,
Raymond Talley

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Dawna Terry

Topics:

Career Offender

Comments:

I agree with this commissions proposed amendment that the federal courts should not be able to use a prior state conviction to enhance a federal sentence. Not only has a defendant already served their time for their prior offenses, many state statutes are overbroad. This should be retroactive so all that was effected by this can have their sentences corrected.

Submitted on: January 22, 2025

From: [redacted]
Subject: [External] ***Request to Staff*** VASCO, GUILLERMO, Reg# [redacted]
Date: Tuesday, February 4, 2025 9:28:58 AM

To: THE U.S. SENTENCING COMMISSION
Inmate Work Assignment: Orderly

ATTENTION

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Inmate Message Below

The proposed amendment to the U.S. Sentencing Guidelines will dramatically decrease the repercussions for individuals implicated in all federal offenses including the Use of the Commerce Facilities in the Commission of Murder for Hire. This may develop an attitude of empathy, rehabilitation, and a hope of reform.

HARSH SENTENCING practices often inhibit a person's toward becoming a law abiding and productive member of society. Judges abused their discretion and judicial bias (known or unknown) have been creating a huge disparity across the United States Criminal system. The three steps approach must be focused on the characteristics of the individual and not much on the offense. Specially first time offenders should be allow to have the benefit of LINIENCE.

Furthermore, I command the decision to apply this proposed amendment "RETROACTIVELY" not only to United States citizens, but also to all immigrants who find themselves entangled in the federal legal complex sentencing proceedings. Justice should be blind to nationality and the opportunity for a SECOND CHANCE should be equally extended to all.

In the spirit of constructive dialogue I suggest periodic reviews of the impact of these amendments to the Sentencing Guidelines in order to provide valuable insights into whether this approach is needed and serving the intended purpose or if further amendments need to be made.

I support the implementation of these new amendments to the U.S. Sentencing Guidelines to finally "DELETE ALL ENHACEMENTS" to allow a compassionate approach during sentencing for all people that are cough in the judicial system

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Brandi Vaughn

Topics:

Career Offender

Comments:

The 15 year time for considering qualifying convictions in career criminal should be addressed. Conviction date to conviction date should not start after prison sentence, it should be the actual conviction dates.

Submitted on: February 1, 2025

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Linda Vaughn

Topics:

Career Offender

Comments:

I am writing in regards to the career criminal. A issue that I did not see addressed is the 15 year time frame to count the past charges against someone. Specifically how the the prior offense will still count if the individuals imprisonment runs into the the 15 year time frame. It should be conviction date to conviction date. A person may have committed the actual crime 20 or 25 years ago but the 15 year grace period doesn't start until the incarceration ended.

To the issues addressed in the proposed amendments, I agree with time served proposal. With prior offenses of a term of imprisonment in actual time served of 5 years or less not being used against individuals. Sentences for drugs are often lengthy sentences imposed but not the actual time incarcerated.
Nonviolent career criminal should really addressed, as a lot of the people are struggling with addiction and getting caught up in the system.

Submitted on: December 19, 2024

From: [redacted]
Subject: [External] ***Request to Staff*** VAUGHN NEWMAN, RONEICE, Reg# [redacted]
Date: Tuesday, January 14, 2025 2:34:06 PM

To: Sentencing commission
Inmate Work Assignment: HVAC

ATTENTION

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Inmate Message Below

I was sentenced under the 4b1.1 enhancement. I am nonviolent drug offender. A prior drug charge I committed 20 years ago was used to enhance me. I know this is not something that is being addressed, but the way the 15year time frame is worded, it should be amended to offense date to offense date, or conviction to conviction date, excluding the prison sentence. Sometimes, as for me, it took years to take me to court, so by the time I finished my prison sentence,, it was within a few days within the 15 year time frame.

As for the proposed enhancements under the career criminal. I would ask that you would use option 3 for drug offenders to have actually served 5 years or more in prison to be counted against them.

Again, I am nonviolent drug offender who has struggled with mental health and addiction for many years. This is the only reason I have found myself in these situations. I have no other criminal history other than drugs. My guidelines went from 70mths to 262.

I would also ask you to look into the RDAP program. I don't believe it is right that I can not retake the program with awarded time off since I already took on a previous sentence. I received less than 4 months when I took and I cant even retake to get the other 8 months to make the full year.

I greatly appreciate the upcoming changes. I pray that my sentence and many others will be impacted. Thank you

From: [redacted]
Subject: [External] ***Request to Staff*** WALLING, DAVID, Reg# [redacted]
Date: Tuesday, January 14, 2025 2:34:06 PM

To:
Inmate Work Assignment: Compund upper

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

I was charged as a career offender for have 46 grams of methamphetamine and because I had two prior convictions for possesion with intent to deliever was charged as a career offender and my guideline range was 188-235. I was given probation on the two predicate offense and completed the probation and never served a single day inside a fence or a prison. the two predicate offense amounts were 7 grams and 3.5 grams. since I never served a single day inside a prison for these prior offenses they should have NOT been counted as predicates.

Public Comment - Proposed 2024-2025 Amendments on Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification

Submitter:

Randy Wedgworth

Topics:

Career Offender

Comments:

I support the changes to career criminal limiting the qualifying convictions based on time actually served of 5 years or more.

I disagree with using the sentence imposed because often times struggling addicts will be revocated by failing drug screens and this may add to the sentence imposed.

The 15 year time frame should be reconsidered, not using the day the prison sentence ends, but the actual conviction dates.

Submitted on: December 20, 2024

From: [redacted]
Subject: [External] ***Request to Staff*** WHITE, WILLIAM, Reg# [redacted]
Date: Tuesday, January 14, 2025 10:48:58 AM

To: Guidelines
Inmate Work Assignment: Education

ATTENTION

Replies to this message will not be delivered.

Inmate Message Below

1/14/25

USSC:

The recently proposed amendments to the career offender guidelines seem intended to usurp Congressional authority by imposing a new definition of "career offender" that pleases the Sentencing Commission rather than reflects Congressional intent.

Deference to this kind of usurpation of another branch's powers was ended by Loper Bright, and the commission should reflect seriously on what is motivating it to make changes that are contrary to the laws and statutes imposed by Congress and interpreted by the Courts.

William White [redacted]

UNITED STATES SENTENCING COMMISSION
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