COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
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Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chair 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 2023-2024 amendment cycle.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues relating to the administration of criminal law. The Committee provides comments about the amendments proposed by the Sentencing Commission (Commission) for the 2023-2024 amendment cycle as part of its oversight role regarding sentencing guidelines and its monitoring role regarding the workload and operation of probation offices. 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] Moreover, the Judicial Conference has resolved that "the federal judiciary

[1] JCUS-SEP 90, 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

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 expressing support for Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments focus on four of the proposed amendments, specifically, those that seek to:

1. Amend §2B1.1 regarding the Commentary at Application Note 3(A);
2. Eliminate or limit most consideration of acquitted conduct at sentencing;
3. Reconsider the impact of prior offenses committed before the age of 18 (Part A), and the departure provision regarding age at sentencing (Part B); and
4. Simplify the current "three-step process" courts use to sentence under the Guidelines Manual.

Discussion

I. Proposed Loss Amendment at §2B1.1

This proposed amendment is part of the Commission's multiyear study to address case law concerning the validity and enforceability of Guideline commentary in the Guidelines Manual. Specifically, this particular amendment would address the Third Circuit's decision in *United States v. Banks*—which held that the Commentary to §2B1.1 in Application Note 3(A) impermissibly instructs courts to consider intended loss—and ensure that all circuits can similarly consider and apply the language in question.[3]

The proposed amendment is intended to ensure consistent loss calculations across circuits and address the Third Circuit decision by adding a "Notes" section to the loss table in §2B1.1(b)(1) and by moving the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the Guideline itself, to be included as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm," from the commentary to the Notes.

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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] *See United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (holding that Application Note 3(A) to §2B1.1, which defines "loss" as the greater of actual loss or intended loss, is inconsistent with the ordinary meaning of loss, which is limited to actual loss). As a result, the loss calculations for defendants in the Third Circuit are now calculated differently than in circuits that continue to apply Application Note 3(A).

The Committee supports this amendment and the Commission's efforts to amend the Guidelines in this manner to avoid disparity and to clarify application of the loss rules. Without endorsing any particular methodology for calculating loss, the Committee favors amending the Guideline to ensure more consistent application of the Guideline language and to clarify its validity and enforceability.

II. Proposed Acquitted Conduct Amendment

This proposed amendment is a result of the Commission's reconsideration of how acquitted conduct is considered in applying the Guidelines.[4] The proposed amendment would eliminate or limit the consideration of acquitted conduct at sentencing pursuant to one of three options, all of which would add the following definition of "acquitted conduct."

> "Acquitted Conduct" means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 1 would prohibit a court from considering acquitted conduct when calculating a defendant's Guideline range. Option 2 would allow for consideration of acquitted conduct but provide a new downward departure if it has either a "disproportionate" or "extremely disproportionate" impact (depending on which bracketed language is ultimately adopted) in determining the Guideline range relative to the offense of conviction. Option 3 would change the standard of proof for consideration of acquitted conduct from a "preponderance of the evidence" standard, used for other relevant conduct, to a "clear and convincing evidence" standard.

For the reasons discussed below, the Committee does not support eliminating or limiting consideration of acquitted conduct or other relevant conduct at sentencing because: (1) the proposed definition of acquitted conduct lacks clarity; (2) the proposed amendment would be unduly difficult to administer; and (3) excluding or limiting acquitted conduct would arguably prevent courts from making fully informed decisions on the statutory goals of sentencing. Instead, the Committee believes that the concerns that appear to underlie this proposed amendment are best addressed through the already-existing discretion of judges to mitigate a sentence when the offense level is based in some part on acquitted conduct. Relying on this existing, well-understood mechanism would avoid the problems associated with having to craft a workable, universal definition of acquitted conduct. Nonetheless, if the Commission chooses to adopt one of the three proposed options, then Option 2 would be the least difficult to administer.

[4] *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023) (cited in the Synopsis to the Proposed Amendment).

A. Any Definition of Acquitted Conduct Should Exclude Conduct Established by a Trial

The Commission seeks comment on whether it should include bracketed language in Option 1 that would exclude from the definition of "acquitted conduct" conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. At the outset, if the amendment were adopted without some version of the language in brackets that would exclude any facts that were found or admitted to "establish, in whole or in part, the instant offense of conviction," then it is likely that Option 1 would frequently render unworkable any attempt to calculate the offense level for the counts of conviction. Given the rules on joinder, Fed. R. Crim. P. 8(a), there often is overlap in alleged conduct from count to count. Absent the exclusion for trial-proven facts from the acquitted conduct definition, it is not clear how a court would calculate an offense level in the many cases with factual overlap. For example, consider a drug distribution case with a conspiracy-to-distribute count and a substantive distribution count. If there is an acquittal on either charge and a conviction on the other, then there arguably would be *no* conduct on which to calculate the offense level absent the bracketed exclusion from the definition of acquitted conduct. Putting this fundamental problem to the side, the following comments assume that the bracketed exclusion language would be incorporated into Option 1.

B. Proposed Definition of Acquitted Conduct Lacks Clarity

The proposed definition of acquitted conduct —as well as the alternative definitions mentioned in the Issues for Comment—lack clarity and will likely result in protracted litigation, particularly in cases where the sentencing judge is unable to readily discern between underlying conduct that was accepted or rejected by the jury. The Committee is concerned about the impact this would have on the fair and timely administration of justice.

The Committee suggests that, if the Commission adopts Option 1, any proposed definition of acquitted conduct must be revised to ensure that it is clear, especially in application. Currently, the proposal defines "acquitted conduct" to mean "conduct (i.e., any acts or omission)" either "underlying" or "constituting an element of" "a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal." The proposed definition thus directs courts to decide what is the conduct "underlying" a charge or (as an alternative) "constituting an element" of a charge, but the definition does not further elaborate on those terms. Regarding the term "underlying," it does not appear that the term arises from an analogous doctrine in criminal law, that is, a doctrine that examines what conduct "underlies" a charge. One view might be that any conduct that was *relevant* to the charge would be considered acquitted conduct, but perhaps the term "underlie" is not coextensive with relevancy. Regarding the phrase "constituting an element," many federal offenses are comprised of elements that do not correspond directly and narrowly to specific conduct. For example, federal fraud statutes require proof of a scheme to defraud (e.g., 18 U.S.C. § 1343), and the breadth of that element could make it difficult to discern what conduct "constitutes" that element.

C. Proposed Amendment Would be Difficult to Administer

Excluding acquitted conduct from relevant conduct could create overly difficult or anomalous situations for sentencing judges when trying to determine the appropriate offense level. Option 1 would prohibit courts from considering acquitted conduct and Option 2 would make it less likely to be considered but still permit consideration of *uncharged* or *dismissed* conduct as part of relevant conduct. This would likely yield anomalous results in sentencing, insofar as the options would allow courts to consider reliable information about uncharged or dismissed conduct while prohibiting or limiting their consideration of equally reliable—or perhaps even more reliable—information about conduct that was charged but then the subject of an acquittal.

The proposed amendment's Synopsis states that in Fiscal Year 2022, there were 286 sentenced individuals with at least one count acquitted at trial. To assist in evaluating the proposed amendment, it would be helpful to apply the proposed amendment options and definition of acquitted conduct to a sample of these cases to illustrate how courts would apply the amendment. Presumably some of those sentenced individuals appealed their convictions and a trial transcript is available, along with the charging instrument and the jury instructions. That would be the same record on which courts would apply the acquitted-conduct definition.

To help demonstrate the anticipated application issues discussed above, the Committee offers two scenarios.

Scenario One

The defendant was charged with one count of criminal sexual abuse of a thirteen-year-old female, Minor A, and one count of criminal sexual abuse of her sister, fifteen-year-old Minor B (both violations of 18 U.S.C. § 2243). The offense conduct describes an evening when the minors' aunt babysat them overnight, and her boyfriend (the defendant) came over. On two separate occasions during the evening, he sexually abused each minor. The defendant proceeded to trial and was convicted of the sexual abuse of Minor A but acquitted of the charge against Minor B, after conceding that the abuse happened but successfully arguing the affirmative defense that he believed Minor B was sixteen years old.[5] Under current application of the Guidelines, a five-level enhancement pursuant to §4B1.5(b) (Repeat and Dangerous Sex Offender Against Minors) would apply based on how the enhancement defines a minor.[6] Under Option 1, would this five-level enhancement not apply because he was acquitted of the count as to Minor B? Or, instead, would the enhancement still apply because the acquitted-conduct definition refers to "conduct," which he conceded at trial? Relatedly, if the same defendant pled guilty to only the count involving Minor A, the §4B1.5 enhancement would apply based on the dismissed conduct (but proven at sentencing) involving Minor B. In this example, the defendant will receive a higher Guideline range if he accepts responsibility and pleads guilty than he would if he proceeded to trial.

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[5] Pursuant to 18 U.S.C. § 2243(d), "In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years."

[6] This enhancement defines "minor" as any individual under the age of eighteen. USSG §4B1.5, App. Note 1(A).

Scenario Two

Two codefendants were indicted on 13 counts of distribution of cocaine base, distributing 28 grams each time. Defendant A pled guilty to one count of distribution and was held accountable at sentencing for the other 12 distributions with Defendant B, pursuant to §1B1.3 (Relevant Conduct), totaling 364 grams of crack. Defendant B exercised his right to a jury trial, and the jury acquitted him of 10 of the 13 counts. The three counts of which Defendant B was found guilty totaled 84 grams of crack; however, at the sentencing hearing, the sentencing judge concluded that, based on a preponderance of the evidence, Defendant B participated in all 13 distributions. Both defendants were in Criminal History Category I. Under the current Guidelines, after acceptance of responsibility, Defendant A would have a Guideline range of 70 to 87 months' imprisonment. Defendant B's range would be 97 to 121 months' imprisonment. Under Option 1, where the conduct underlying Defendant B's acquitted charges could not be considered, Defendant B's range would be 51 to 63 months' imprisonment. This would result in a significant difference between similarly situated codefendants driven by the different treatment of dismissed versus acquitted conduct. To address the disparity, should the court vary upward in the imposition of Defendant B's sentence or vary downward in Defendant A's sentence—or not take the disparity into account either way?

D. Excluding Acquitted Conduct Removes Information Relevant to Statutory Goals

Section 3661 of Title 18 states: "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." This statute allows sentencing courts to consider all reliable and relevant information in determining an appropriate sentence. Prohibiting, or even limiting, a sentencing court's consideration of reliable information about a defendant's acquitted conduct may undermine the statutory purpose.

In addition, prohibiting the use of acquitted conduct in calculating the Guideline range could produce a significant gap between application of the Guidelines and application of 18 U.S.C. § 3553(a). If proven by a preponderance at sentencing, courts may consider acquitted conduct in deciding whether a sentence adequately provides for specific deterrence, § 3553(a)(2)(B), or protects the public from further crimes, § 3553(a)(2)(C). Also, eliminating consideration of acquitted conduct in determining the Guideline range could undermine the Guidelines' relevant-conduct concept altogether, leading to an even larger gap. The overarching purpose of relevant conduct is to emphasize real-offense sentencing instead of charge-offense sentencing, and the omission of acquitted conduct—when otherwise proven at sentencing—would undermine that purpose.[7]

III. Proposed Amendment on Youthful Offenders and Offenses

The proposed amendment addressed in this section contains two parts related to "youthful individuals." Part A would change the computation of criminal history points at §4A1.2(d) for

[7] *See* "Real Offense vs. Charge Offense Sentencing" at USSG Ch.1, Pt.(4)(a).

offenses committed prior to age eighteen. Part B would amend the departure provision at §5H1.1 related to age, including youth. Consistent with the statutory requirements set out in 18 U.S.C. § 3553(a)(2), the Committee supports the court's consideration at sentencing of each individual's history and characteristics, including youthful age, as part of its broad consideration of the statutory sentencing factors. Because criminal history points should reflect (at least in part) the risk of recidivism, however, the computation of criminal history points should not be altered to categorically exclude or further limit offenses committed prior to the age of eighteen. For that reason and others, the Committee does not support Part A of the amendment to the extent that it would exclude criminal history from consideration. At the same time, the Committee supports the intent of Part B, allowing for consideration of youthful age as a ground for departure, with a caveat about some of the language proposed in it. Our reasons are discussed in more detail below.

A. Proposed Amendment Part A (§4A1.2): Computing Criminal History for Offenses Committed Prior to Age Eighteen

Part A provides three options to either limit or eliminate the court's consideration of offenses committed prior to age eighteen in the calculation of a defendant's criminal history score. For several reasons, the Committee does not support any of these options. As explained below, Part A of the proposed amendment is arguably inconsistent with the statutory and Guideline mandates, and it is in tension with empirical research on recidivism. The Commission's recidivism research, consistent with other recidivism literature, shows that young adult defendants are arrested at a higher rate than older defendants.[8] Also, focusing specifically on juvenile adjudications, the Commission's recently published supplemental data shows that 66.9% of those defendants with at least one criminal history point for a juvenile adjudication were rearrested within three years, compared with 43.4% of defendants with at least one criminal history point but none based on a juvenile adjudication.[9] Even when compared to the subset of under-26-year-old defendants, defendants with a prior juvenile adjudication were nearly 12%

[8] According to the 2021 recidivism study cited in the Synopsis, 72.5% of defendants younger than age twenty-one were rearrested during the eight-year study period compared to an overall rearrest rate of 49.3% for federal defendants of all ages. *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* at 24 (2021). *See also* Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects Of Aging on Recidivism Among Federal Offenders* (2017); Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)* at 6 (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

[9] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 10. In addition, the median months to rearrest was ten months for those with at least one criminal history point for a prior juvenile adjudication, compared with twelve months for those with at least one criminal history point without a juvenile adjudication. *Id.*

more likely to garner a new arrest than defendants under the age of 26 without a juvenile adjudication.[10]

In addition, the current criminal history scoring rules at §4A1.2(d) already place reasonable, empirically appropriate limits on which offenses committed before the age of eighteen can be considered by courts. Moreover, when considering an individual defendant's prior juvenile record in light of the section 3553(a) factors, judges already may consider (at appropriate places in the sentencing process) the factors raised in the amendment's Synopsis, including brain development science and culpability.

1. Part A is in Tension with Statutory Mandates and the Purposes of the Criminal History Guidelines

In determining what sentence to impose on a particular individual, section 3553(a) requires courts to consider a broad range of factors, including the criminal history of the defendant.[11] In addition, as noted earlier, section 3661 instructs that "[n]o limitation shall be placed on the information concerning the background" of a defendant. Limiting a court's consideration of a defendant's prior criminal history, as Part A proposes in calculating criminal history, would be in tension with these statutory mandates, especially given that the majority of the impacted prior offenses are recent in time to the federal offense, due to the five-year limitations in §4A1.2(d)(1) and (2).

Section 3553(a) also requires courts, in determining a particular sentence, to consider the need for the sentence imposed to serve the purposes of sentencing.[12] Specifically, courts must consider the need for the sentence imposed to:

- reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense;
- afford adequate deterrence to criminal conduct;
- protect the public from further crimes of the defendant; and
- provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[13]

By restricting a court from considering a portion of the defendant's criminal history (which might also be recent) as part of the Guideline calculation, the proposed amendment

[10] *Id.* at Slide 12 (66.9% of defendants in the study group with at least one criminal history point for a prior juvenile adjudication were rearrested compared to 60.0% of those who were under 26 at the time of sentencing with no prior juvenile adjudications).

[11] Specifically, section 3553(a)(1) states that a sentencing court "*shall consider* the nature and circumstances of the offense *and the history* and characteristics of the defendant." *See* 18 U.S.C. § 3553(a)(1) (emphasis added).

[12] *See* 18 U.S.C. § 3553(a)(2)(A)-(D).

[13] *See* 18 U.S.C. § 3553(a)(2).

would arguably not reflect some of the statutory purposes of sentencing, especially: promoting respect for the law (as evidenced by the number and recency of prior offenses); specific deterrence (including the defendant's likelihood to recidivate); and protection of the public (as reflected by the type, recency, and frequency of the defendant's criminal history).

The proposed amendment is also contrary to the intent of the criminal history rules themselves. The Introductory Commentary to the Criminal History chapter of the Guidelines Manual states:

> 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.[14]

Turning to the three options, Option 1 would amend §4A1.2(d)(2)(A) to exclude any juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences of imprisonment of at least sixty days. All juvenile sentences, regardless of violence or other severity, would be treated equally, despite the Commission's own research on violence, dangerousness, and recidivism. The Commission's recently released data provides empirical support for maintaining the current distinction, based on recency and sentence length, between one-point juvenile adjudications and two-point juvenile adjudications.[15] Compared to defendants who had only one-point juvenile adjudications, the data shows that defendants with a prior two-point juvenile adjudication had a history of more violent juvenile offenses, were more often convicted of an instant firearms offense, and were in higher criminal history categories (with 87% in Criminal History Category III, IV, V, and VI).[16] According to the Commission's

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[14] *See* Guidelines Manual, Chapter Four, Part A. The Introductory Commentary goes on to emphasize "the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior," and concludes by saying that "the Commission will review additional data insofar as they become available in the future."

[15] *See* U.S. Sent'g Comm'n, *2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* (Jan. 2024).

[16] S*ee id.* at Slides 9, 11, 12. Based on the Commission's data from Fiscal Year 2022, there were 363 prior two-point juvenile offenses that would be reduced to one-point offenses. *Id.* at Slide 7. According to this data, more than half of the juvenile offenses that received two points were violent offenses (robbery, assault, and other violent offenses) compared to approximately one-third of the one-point offenses, and an additional 23% of the two-point juvenile offenses were weapons offenses. *Id.* at Slide 9. In addition, the most common instant federal offense for defendants with a prior two-point juvenile adjudication was a firearms offense (38.3% of two-point offenders), while those with one-point juvenile priors had more instant drug trafficking and immigration offenses. *Id.* at Slide 11.

recent recidivism study, defendants with a prior two-point juvenile adjudication also had a significantly higher three-year rearrest percentage (more than 72% were rearrested) than those with a prior one-point juvenile adjudication, and they were rearrested sooner than defendants with only one-point juvenile adjudications.[17] Option 1, which would move most defendants with prior two-point offenses down one or more criminal history categories, is not supported by the Commission's recidivism research.[18]

In addition, under Option 1, a repeat juvenile defendant who avoided transfer to adult court could incur a substantial number of prior sentences while only receiving a total of four criminal history points due to the limit in §4A1.1(c). This presents a significant risk of anomalous outcomes. For example, a person with several prior juvenile shoplifting offenses could easily end up with a higher criminal history score than someone who committed a murder or two armed robberies but was not charged as an adult. One of the reasons for this amendment, according to the Synopsis, is that state laws also vary widely as to when (by age, or offense type, or both) a minor can be charged and sentenced as an adult. But Option 1 could widen these geographical disparities, because individuals who commit similar crimes and who receive similar sentences—save for the adult/juvenile distinction—would be treated differently. Consider an example: two fifteen-year-olds committed identical violent crimes; one received an eight-month adult sentence while the other (in a state where a person must be sixteen or older to be charged in adult court) received an eight-month juvenile sentence. Because of this state-law difference, the first defendant would receive two points while the second defendant would receive one point. Additionally, the difference in how the five-year period is calculated between two-point and one-point offenses means that the first defendant's sentence will receive points for a longer period of time than the second defendant's sentence.

Option 2 would amend §4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score. As a result, although offenses committed prior to age eighteen would be counted if the defendant had been convicted and sentenced as an adult, this option would prohibit courts from scoring criminal history points based on juvenile convictions that were not sentenced as adult convictions even if they involved violent crimes and weapons.[19] In addition, Option 2 would prohibit consideration, in calculating

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[17] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 17. According to the Commission's recent recidivism study, defendants with only one-point juvenile adjudications had a three-year rearrest rate of 63.5%, and those with at least one criminal history point that did not include a prior juvenile adjudication had a three-year rearrest rate of 44.4%. *Id.* at Slides 7, 17. In addition, the median months to rearrest was eight months for those with at least one two-point prior juvenile adjudication, compared with ten months to rearrest for those with prior one-point juvenile adjudications. *Id.* at 7.

[18] Under Option 1, a majority of those defendants with prior two-point offenses would move down one or more criminal history categories, despite the fact that courts currently appear to be departing upwards more frequently in cases with a prior two-point juvenile adjudication. *See* U.S. Sent'g Comm'n*, 2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* (Jan. 2024) at Slides 13, 14.

[19] Under Option 2, 940 defendants would no longer receive criminal history points for their prior juvenile convictions, even though nearly half of those prior convictions were for violent offenses (robbery, assault and other

criminal history points, of a defendant's juvenile record no matter how lengthy, serious, similar, or recent it was to the instant offense, and no matter how predictive it might be of the defendant's likelihood of recidivating. The Commission's recently published supplemental data shows that 66.9% of those defendants with at least one criminal history point for a juvenile adjudication were rearrested within three years, compared with 43.4% of defendants with at least one criminal history point but none based on a juvenile adjudication.[20] Even when compared to the subset of under-26-year-old defendants, defendants with a prior juvenile adjudication were nearly 12% more likely to garner a new arrest than defendants under the age of 26 without a juvenile adjudication.[21]

As for violent offenses, approximately 27%-28% of defendants with a prior juvenile adjudication, a prior juvenile adjudication resulting in a confinement sentence, or an offense committed prior to the age of 18 were rearrested for violent offenses; in comparison, the violent rearrest rates for defendants without any offenses committed before the age of 18 was 20%. Although the supplemental data show that the percentage of rearrests for violent offenses is similar for the defendants with juvenile adjudications and those without among defendants in matched age groups, there remain relatively more rearrests for serious crimes: 20.7% more rearrests for homicide; 12.2% more arrests for drug trafficking; and 35.1% more arrests for weapons offenses.[22] Option 2 would prevent sentencing courts from considering, as part of the Guideline calculation, the section 3553(a)(2) statutory purposes of sentencing—promoting respect for the law, affording adequate deterrence, providing effective correctional treatment—and hamper their ability to meaningfully assess whether the defendant poses a risk to public safety.

Further, by allowing consideration of only adult sentences, Option 2 would not address the variation in laws related to trying juveniles as adults, which the proposal cites as a reason for the amendment. As the Synopsis to the amendment emphasizes, states vary with respect to the minimum age at which an individual can be transferred to adult status (ranging from age ten to

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violent offenses) and an additional 18% were prior convictions for weapons offenses. *See* U.S. Sent'g Comm'n, *2024 Public Data Briefing: Proposed Amendment on Youthful Individuals* at Slides 17, 18. When looking at the instant crime type, a higher proportion of defendants with points that included a prior juvenile adjudication were sentenced for firearms crimes while a higher proportion of defendants with no prior juvenile adjudications were sentenced for an instant federal immigration offense. *Id*. at Slide 20. Nearly 70% of defendants with a prior juvenile adjudication were in Criminal History Category III, IV, V and VI. *Id*. at 21. Under Option 2, nearly 62% of individuals would move down one or more criminal history categories, and more than 25% of these defendants would receive zero criminal history points. *Id*. at Slide 23.

[20] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024) at Slide 10.

[21] *Id.* at Slide 12 (66.9% of defendants in the study group with at least one criminal history point for a prior juvenile adjudication were rearrested compared to 60.0% of those who were under 26 at the time of sentencing with no points for juvenile adjudications).

[22] *Id.* at Slide 13 (3.5% versus 2.9% for homicides; 9.2% versus 8.2% for drug trafficking; and 5.0% versus 3.7% for weapons offenses).

sixteen), and state and local rules vary with respect to the adult status determination; some jurisdictions base the determination on the type of offense and others base the determination on a finding that the defendant would not benefit from juvenile court. As a result, Option 2 would only widen that disparity.

Option 3 would amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. In other words, this option would not count these offenses even if the defendant had been sentenced as an adult, which is an indication in many jurisdictions that the prior offense was particularly serious. Option 3 would prohibit consideration of offenses committed prior to age eighteen even if they involved crimes of violence or firearms. [23] In addition, Option 3 would prohibit consideration of a defendant's juvenile record no matter how lengthy, serious, similar, or recent his past offenses were to the instant offense, and no matter how predictive it might be of the defendant's risk of recidivism. This option would again prevent sentencing courts from considering, as part of the Guideline calculation, the statutory purposes of sentencing—that is, promoting respect for the law and affording adequate deterrence—and hamper their ability to meaningfully assess whether the defendant poses a risk to public safety.

Options 2 and 3 include optional bracketed language providing that juvenile sentences may be considered for purposes of an upward departure under §4A1.3. If the Commission were to limit the criminal history points or eliminate consideration of juvenile offenses, as proposed in the amendment, providing for an upward departure would not resolve one of the primary purposes of the amendment, that is, to address the difficulties and disparities in obtaining juvenile records. Given the departure provision, officers would still have the sometimes-difficult task of gathering those records. Further, although adding an upward departure may ameliorate some concerns about excluding criminal history from a sentencing courts' consideration, generally speaking upward departures are rarely imposed. Moreover, given the recidivism-prediction goal of criminal history points, it would be more appropriate for the scoring to be reflective of recidivism data in the first instance rather than leave that to a departure.

In an Issue for Comment, the Commission asks whether it should limit any of the proposed options based on the type of crimes involved in the offenses committed before age eighteen. The Committee is hesitant to support such a limitation because it might very well

[23] Option 3 would impact nearly 8% of all defendants (3,112) who received criminal history points in Fiscal Year 2022, with all 3,112 defendants who received points for offense committed prior to age 18, whether adult or juvenile, getting zero points. *Id.* at Slide 26. For these 3,112 defendants whose prior record before age 18 would be excluded under Option 3, more than 50% of those prior convictions were for violent offenses, including homicides (3.7%), and an additional 15% were for weapons offenses. *Id.* at Slide 27. Looking at the instant federal offense of conviction, a much higher proportion of defendants who received points for a prior offense committed before the age of 18 was convicted of a federal firearms offense, and criminal history categories were higher for those with prior offenses committed before the age of eighteen compared to those without. *Id.* at Slides 29, 30. Ultimately, if Option 3 were adopted, more than 68% of the 3,112 defendants sentenced in Fiscal Year 2022 would move down one or more criminal history categories, and over 16% of those defendants would receive zero criminal history points. *Id.* at Slide 32.

require courts to engage in difficult line drawing. It is even possible that the problematic "categorical approach" would be deployed for the limitation.

2. Part A is Contrary to Empirical Recidivism Research

To the extent that criminal history is used to measure the risk of recidivism, there does not appear to be an empirical basis for excluding or limiting courts' consideration of offenses committed prior to age eighteen, some of which may be close in time to the federal offense. In fact, the recidivism research, including the Commission's recent study, shows that a criminal record before the age of eighteen *is* predictive of recidivism as a young adult.[24] The Introduction to the Guidelines Manual states that the Guidelines "represent an approach that begins with, and builds upon, empirical data."[25]

Empirical research on the impact of a defendant's juvenile record on the individual's risk of recidivism as an adult has consistently demonstrated that defendants with a prior record of offenses committed before the age of eighteen – irrespective of whether they were charged as a juvenile or adult - have a higher rate of adult recidivism than those without prior convictions before the age of eighteen.[26] The Commission recently released data studying the three-year rearrest rate for over 23,381 defendants who had received at least one criminal history point at sentencing. It showed that those defendants with at least one criminal history point for a juvenile offense were rearrested at substantially higher rates, and sooner after release, than those whose criminal history points did not include a juvenile offense.[27] Defendants with a prior adjudication before the age of eighteen were substantially more likely to recidivate than the other defendants

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[24] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*). See also* Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

[25] Chapter I, Part A(3).

[26] *See* U.S. Sent'g Comm'n, *2024 Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*). See also* Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

In addition, we note that nearly every state-guidelines jurisdiction includes prior juvenile adjudications in their criminal history scores. *See* Richard S. Frase, Julian R. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook* at 47 (2015), https://robinainstitute.umn.edu/criminal-history-enhancements.

[27] *See* U.S. Sent'g Comm'n, 2024 *Youthful Individuals Data Briefing: Supplemental Recidivism Data* (Feb. 2024*)* at Slide 15. For this reason, before making any of the changes to the criminal history calculations proposed here, the Commission should consider whether those changes would alter the predictive strength of the criminal history categories on recidivism for defendants with a prior offenses committed prior to the age of eighteen. For example, if Part A had been in effect in past study periods, would the predictive strength of criminal history categories on recidivism be reduced, improved, or stay the same? Further investigation into this issue should be conducted.

in the study group.[28] Specifically, the percentage of defendants rearrested for any offense within the three-year timeframe was 72% for defendants with a two-point prior juvenile adjudication and 63.5% for those with a one-point prior adjudication; the three-year recidivism rate was 44% for the other defendants in the study group.[29] Particularly notable, the rearrest rate for violent offenses was higher for defendants with at least one criminal history point for a juvenile offense than for defendants in the study group who did not have a prior juvenile offense.[30] In addition, defendants in the study group with a prior juvenile adjudication were rearrested sooner than those without a prior juvenile adjudication. The median time to rearrest was twelve months for defendants in the study who did not have a prior juvenile adjudication, eight months for defendants with a prior two-point juvenile adjudication, and ten months for defendants with at least one prior one-point juvenile adjudication.[31]

The two research reports cited in the proposal's Synopsis, both of which were published by the Commission, showed a correlation between age and rearrest rates, with younger individuals being rearrested at higher rates, and sooner after release, than older individuals.[32] As reported by the Commission's 2021 recidivism study, 72.5% of defendants younger than age 21 were rearrested during the eight-year study period (as compared to a rearrest rate of 49.3% for defendants of all ages), and the median time to rearrest was twelve months (as compared to fourteen months for defendants of all ages).[33] In addition, a record of repeated criminal behavior increases the risk of recidivism.[34]

A defendant's record of past criminal conduct, including recent offenses committed before the age of eighteen, is directly relevant to the four purposes of sentencing set out in the Guidelines and the Comprehensive Crime Control Act.[35] Without information about a defendant's repeated criminal behavior, courts would not be able to accurately assess the section

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[28] *Id.* at Slide 17.

[29] *Id.* at Slide 7, 17.

[30] *Id*. at Slide 11. Specifically, approximately 27-28% of defendants with a prior adjudication before the age of eighteen were rearrested for a violent offense while the violent rearrest rate for defendants without a prior juvenile adjudication before the age of eighteen was approximately 20%. *Id*. at Slides 11, 16.

[31] *Id*. at Slides 7, 10.

[32] *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* (2021); *See also* Kim Steven Hunt & Billy Easley, U.S. Sent'g Comm'n, *The Effects Of Aging on Recidivism Among Federal Offenders* (2017).

[33] *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent'g Comm'n, *Recidivism Of Federal Offenders Released in 2010* at 4 (2021).

[34] *See id.* at 25-26 (finding that defendants with more extensive criminal histories, as demonstrated by their criminal history category and criminal history score, had higher rearrest rates). *See also*, Leonardo Antenangeli & Matthew R. Durose, Bureau of Justice Statistics, *NCJ 256094 Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period* (2008–2018) at 6 (2021).

[35] *See* 18 U.S.C. § 3553(a)(2).

3553(a)(2) factors, including the likelihood that the defendant will commit further crimes and may present a greater danger to the community. For young adult defendants (from around ages eighteen to twenty-five), this may be the only criminal history they have and, without it, they could be zero-point offenders, even if they have a recent and lengthy record of serious crimes.

3. Current Criminal History Rules Already Include Reasonable Limits for Scoring Offenses Committed Before Age Eighteen

The current criminal history scoring rules at §4A1.2(d) already place reasonable limitations on offenses committed before the age of eighteen. The existing rules, which distinguish between an "adult sentence," where the offender was convicted as an adult, and a "juvenile sentence," resulting from a juvenile adjudication, provides shorter "lookback" limits for juvenile convictions than for adult convictions. Under §4A1.2(d), only those convictions that resulted in an adult sentence exceeding one year and a month are subject to the typical fifteen-year lookback period applicable to other adult convictions. Shorter adult sentences, and all juvenile sentences, only receive criminal history points during a much shorter five-year period, running from the date of release for two-point sentences or the date sentence was imposed for one-point sentences. As a result, most juvenile offenses do not receive criminal history points by the time defendants reach their mid-twenties. The current criminal history Guideline already excludes juvenile offenses sentenced (for one-point offenses) or released (for two-point offenses) more than five years before the instant offense, no matter the seriousness of the offense or the length of sentence. After five years, only those offenses deemed serious enough to warrant an adult sentence exceeding a year and a month receive criminal history points under the current Guideline. The current rules are consistent with the recidivism research on which offenses committed before the age of eighteen are predictive of future criminal behavior.

4. Judges Already Weigh the Factors at Issue When Considering Prior Juvenile Convictions

The proposal's Synopsis explains that the proposed amendment seeks to balance various considerations as they relate to the sentencing of youthful individuals. These considerations include evolving brain science research on culpability, studies showing high rates of recidivism for younger individuals, possible racial and ethnic disparities, the challenges of obtaining juvenile records, and protection of the public. These are all issues that courts can and do address when they consider an individual defendant's juvenile criminal history in weighing sentencing goals and factors under 18 U.S.C. § 3553(a). Courts are accustomed to weighing information about past records and are able to distinguish between youthful errors in judgment that should not weigh as heavily on the federal sentence and the kind of concerning conduct that indicates a greater need for deterrence and protection of the public. Rather than amend criminal-history calculations, the most appropriate place for considering youth is under 18 U.S.C. § 3553(a).

B. Proposed Amendment Part B: Departure Provisions §5H1.1

The Committee supports Part B of the proposed amendment with one exception. We support the amendment's proposed change to the first sentence of §5H1.1 as well as the proposed

addition of language specifically providing for a downward departure based on the defendant's "youthfulness" at the time of the offense. However, the Committee does not support the proposed language mandating that courts consider the two categories of listed research when determining whether a departure based on youth is warranted.[36] Not only does the proposed amendment require consideration of a very specific set of brain development and rearrest studies whose outcomes may evolve and be subject to scientific debate, the amendment seems to limit courts to only those two categories of studies in deciding whether to depart.

IV. Proposed Simplification Amendment

This proposed amendment is intended to simplify both (1) the current three-step process used 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 and certain offense characteristics. It would remove the second step in the §1B1.1(b) three-step process, which requires the court to consider the departure provisions, by moving the departure provisions currently set forth in Part H (Specific Offender Characteristics) and Part K (Departures) of Chapter Five to lists of factors outlined in Chapter Six. Departure provisions currently contained in the commentary to various Guidelines would be maintained in new sections of commentary titled "Additional Considerations" or into commentary to Chapter Two provisions as "Additional Offense Specific Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a). The proposed amendment also creates a new Chapter Six, titled "Determining the Sentence" which attempts to facilitate the court consideration of 18 U.S.C. §3553(a).

The Committee generally supports the Commission's commitment to simplify the Guidelines and acknowledges that the three-step process currently outlined in the Guidelines Manual may no longer reflect the practices of many courts, either due to case law or preference. This approach has the advantage of simplifying the sentencing process by avoiding consideration and litigation over departures that ultimately would be overridden by section 3553(a) goals and factors. At the same time, it is worth noting that some judges may find that the departure step promotes transparency and uniformity in their sentencings. Specifically, the advance-notice requirement of Criminal Rule 32(h) ensures that defendants know the grounds for potential departures. And the very fact that departures set forth requisite elements can provide structure to

[36] The proposed amendment states that

> the court should consider the following:
>
> > (1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decisionmaking, and resistance to peer pressure, is generally not developed until the mid-20s.
> >
> > (2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher rates and sooner after release than older individuals.

the sentencing judge across cases. At the same time, the Committee overall supports simplification to reflect how a growing number of courts approach sentencing.

The Committee has concerns, however, with several aspects of this proposed amendment, including whether the Commission's authority extends to creating Guidelines for the statutory factors in section 3553(a) and whether the many changes to the text will engender litigation. As a result, the Committee believes the proposed amendment needs additional consideration before implementation.

A. Reclassified Text May Result in Excessive Litigation

It is difficult to determine, based on the Synopsis and the hundreds of marked-up pages that reflect the proposed revisions, if the text added in the redlines introduces new language or if it is identical to language that already exists in the Manual. Although the Synopsis of the proposed amendment states that the new "Additional Considerations" section is "intended to retain, to the extent possible, the guidance and considerations provided by the deleted provisions and to be neutral as to the scope and content of the conduct covered," there is no indication in the amendment text where relocated language has been changed or where new text has been introduced. The Committee is concerned that the introduction of new language throughout Chapter Two and Chapter Six will lead to litigation.

To demonstrate these problems, the Committee has identified several examples of new or changed language. The proposed redlined simplification amendment adds to §2B1.1 as a new mitigating factor that: "The defendant had little or no gain as related to the loss."[37] This does not appear to be a departure provision in the current Guidelines Manual, but it is a consideration in the application of §3B1.2 (Mitigating Role).[38] Another change to §2B1.1 includes voluntary reporting or cessation as a mitigating factor relating to the offense.[39] This does not appear to be a departure provision in the current Guidelines Manual, though these factors are considerations for an adjustment for acceptance of responsibility under §3E1.1.[40] Although the current departure at

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[37] Proposed §2B1.1(2)(B).

[38] Application Note 3(A) to §3B1.2 states, in relevant part:

> 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.

[39] Proposed §2B1.1 Additional Offense Specific Consideration 2(D) includes as a mitigating factor: "The defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense."

[40] Application Note 1(B) to §3E1.1 includes "voluntary termination or withdrawal from criminal conduct or associations" as an appropriate consideration in determining whether a defendant qualifies under §3E1.1(a).

§5K2.16 lists voluntary reporting of an offense, there is a significant distinction between stopping an offense (i.e., voluntary cessation) and taking the affirmative step of reporting one's own crime.[41]

These examples suggest that, although the proposed additions are intended to retain the guidance provided by the deleted provisions, there are at least some instances of new language resulting in substantive changes. Without identification of new language, it is difficult for the Committee to comment on the whether the changes will result in increased litigation or difficulties in implementation.

The Committee is also concerned about whether the courts will be *obligated* to consider the factors outlined in the proposed commentary to specific Chapter Two provisions, particularly in light of the Commission's proposal to move certain guidance in §2B1.1 from commentary to the Guideline itself, and the possibility of future revisions that enhance the enforceability of the commentary.

B. New Chapter Six Would Be Difficult to Administer

In the proposal's Synopsis, Issue for Comment No. 2 raises an important and unanswered inquiry regarding the statutory authority vested in the Commission to issue "guidance" on §3553(a) in the form of Commission Policy Statement. Though the Committee is not currently commenting on the authority or lack thereof, it nonetheless agrees that the question merits additional consideration and may, if the proposed amendment is adopted, result in substantial litigation absent a clear source of authority.

The proposal to add Chapter Six may present other significant administrability challenges and difficult litigation. The Committee understands the underlying goal of stating personal (§6A1.2) and offense (§6A1.3) factors neutrally and concisely; however, the enumeration of those factors itself invites litigation over the inclusion and meaning of each category. The judiciary has accumulated eighteen years of experience in the post-*Booker* era applying 18 U.S.C. §3553(a). Introducing an entirely new process rather than relying on this existing experience will likely only complicate, rather than simplify, the sentencing process.

Finally, although the Committee acknowledges that the introduction of Chapter Six may result in some potential benefits in terms of data collection, if the departure step is removed, then

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[41] The Policy Statement at §5K2.16 states:

> 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.

those data-collection benefits should still be achievable through continued use of the Judgment and Statement of Reasons forms.

C. Proposed Approach Runs Counter to Rule 32 and the Need for Notice

Rule 32 requires that a presentence report "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32. Absent a change to the criminal rule, the proposed amendment to eliminate the second step may result in presentence reports that do not comply with Rule 32 as currently written.

The rule also requires the court to give "reasonable notice" that the court is considering a departure from the Guideline range if the grounds for the particular departure is not outlined in the presentence report or a party's prehearing submission.[42] The Commission's Synopsis of the proposed amendment acknowledges this, noting that the proposed amendment would "better align the requirements placed on the court." Though the Committee agrees that the outcome would be more consistent, it has concerns that removing the notice requirement may negatively impact the adversarial process or lead to increased litigation.

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on its ambitious list of proposed amendments for the 2023-24 amendment cycle. The Committee members look forward to working with the Commission to pursue initiatives that will improve the overall effectiveness of the sentencing guidelines and the fair administration of criminal justice. We remain available to assist in any way we can.

Sincerely,

Edmond E. Chang
Chair, Committee on Criminal Law of the
Judicial Conference of the United States

[42] At least one reference to departures is also made in the statute at 18 U.S.C. §3553(b)(2)(A)(ii)(I).