



**U.S. Department of Justice**

Criminal Division

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*Office of Policy and Legislation*

*Washington, D.C. 20530*

February 22, 2024

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 United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.<sup>1</sup> We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

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 to improve public safety and further the cause of justice for all.

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<sup>1</sup> U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at [Federal Register : Sentencing Guidelines for United States Courts](#).

## **VI. Miscellaneous**

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**e. *Death or Serious Bodily Injury Resulting from Controlled Substances***

**i. *Summary***

It is the policy of this Administration that the mandatory minimum penalties set forth in 21 U.S.C. §§ 841 and 960 should be applied cautiously and only in cases that merit them. As Attorney General Garland stated in his December 16, 2022 charging policy memorandum, “[the] proliferation of provisions carrying mandatory minimum sentences has often caused unwarranted disproportionality in sentencing and disproportionately severe sentences.”<sup>120</sup> Mandatory-minimum penalties should be reserved for instances in which the remaining charges “would not sufficiently reflect the seriousness of the defendant’s criminal conduct, danger to the community, [and] harm to victims” and serve the punishment, public safety, deterrence, and rehabilitation purposes of criminal law.<sup>121</sup> We also recognize that fentanyl and other controlled substances have led to an unprecedented number of overdose and drug poisoning deaths, and that traffickers should be held accountable when death or serious bodily injury results from their conduct. In some cases, it will be appropriate to charge an offense carrying a mandatory minimum penalty, and the government will do so. In others, the statutory mandatory minimum will not be

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<sup>120</sup> Att’y Gen. Merrick Garland, *General Department Policies Regarding Charging, Pleas, and Sentencing*, December 16, 2022, available at [Attorney General Memorandum - General Department Policies Regarding Charging Pleas and Sentencing \(justice.gov\)](#).

<sup>121</sup> Att’y Gen. Merrick Garland, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases*, December 16, 2022, available at [Attorney General Memorandum - Additional Department Policies Regarding Charges Pleas and Sentencing in Drug Cases \(justice.gov\)](#)

appropriate, and judicial consideration of a sentence below the mandatory minimum – but often above the quantity-driven guideline range – will be appropriate.

We advanced a proposal to accomplish this approach in our annual report to the Commission last year. We recommended that the Commission “adopt a new base offense level and enhancements” that “meaningfully account[] for death and serious bodily injury resulting from drug distribution, regardless of whether charges carrying mandatory minimum terms of imprisonment were brought.”<sup>122</sup> As we noted, “consistent with the Department’s charging policy, there may be particular cases where the circumstances suggest that it is inappropriate to pursue charges carrying a 20-year mandatory minimum term of imprisonment.”<sup>123 124</sup> This approach would still provide accountability when drug trafficking results in death or serious bodily injury without requiring reflexive charging and application of mandatory minimum penalties. It would allow consistent and more moderate sentences, reserving the highest penalties only for cases that warrant them. We continue to support that approach, and we ask the Commission to defer consideration of this issue so that it can consider other options – including ours – to assist judges in these difficult cases.

The Commission’s proposed amendments to §2D1.1 would remove options that judges around the country are using to resolve these cases fairly, and it would result in negative unintended consequences. Option One would require the government either to charge an offense carrying a mandatory-minimum penalty or leave conduct resulting from death or serious bodily injury unaddressed in the guideline calculation. In many cases, neither result is appropriate. Should the Commission pursue Option One, we recommend adding language that would trigger the alternative base offense levels when prosecutors and defense counsel enter a stipulation establishing death or serious bodily injury without charging the offense carrying a mandatory-minimum penalty. This would enable the parties to resolve cases equitably. The government can avoid charging an offense carrying a mandatory minimum for the sake of ensuring that the guidelines range appropriately reflects the seriousness of the offense, and courts would have discretion to impose an appropriate sentence below what could have been the mandatory minimum. We think Option Two would partially accomplish the same result. We believe the same considerations suggest retaining the options that are being used now by judges and parties around the country to resolve these cases fairly.

## ii. *Background*

The courts of appeals that have considered this issue have held that guideline offense levels for death or serious bodily injury are only triggered when the defendant is convicted of an offense that requires proof of death or serious bodily injury as an element because these provisions specifically refer to death or serious bodily injury being established by the “offense of

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<sup>122</sup> Letter from Jonathan J. Wroblewski, Director, Off. of Pol’y and Legis., Crim. Div., U.S. DEP’T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 31, 2023), available at [Public Comment Received on Proposed Priorities \(ussc.gov\)](#).

<sup>123</sup> In instances where death or serious bodily injury results, the “safety valve” would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

<sup>124</sup> Letter from Jonathan J. Wroblewski, Director, Off. of Pol’y and Legis., Crim. Div., U.S. DEP’T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (July 31, 2023), available at [Public Comment Received on Proposed Priorities \(ussc.gov\)](#).

conviction.”<sup>125</sup> Although some cases have upheld the application of the death or serious bodily injury offense levels absent a death-resulting conviction under specific circumstances, as the Seventh Circuit noted in *Lawler*, “these opinions are not on point.”<sup>126</sup> Without a genuine circuit conflict on either the need for a conviction for the enhancement or on the newly-amended language in the recidivist provisions, we do not view these amendments as necessary at this time. And in light of possible negative unintended consequences, we think the Commission should consider a more holistic review of §2D1.1 as part of its multi-year simplification efforts. If the Commission proceeds with an amendment this cycle, we have concerns about the proposed options and recommend changes to them.

### iii. *Option One’s Unintended Consequences*

The portion of Option One that limits the death or serious bodily injury offense levels to cases where the government has charged and proven that death or serious bodily injury resulted from the drug trafficking offense reflects current case law. But because Option One would seem to permit these heightened offense levels only when an offense carrying a mandatory minimum has been charged, we are concerned that it would no longer allow us to charge statutes without mandatory minimums yet account for the death or serious bodily injury by stipulating to the application of these base offense levels.<sup>127</sup> These stipulations have been used to allow judges to account for the death or serious bodily injury resulting from the offense in the sentencing guidelines calculation without triggering the statutory mandatory-minimum sentence. As a result, we think Option One may lead to an increase in charges carrying mandatory-minimum penalties to account for the conduct’s result, including in cases where such a charge would not otherwise be warranted. To avoid this, we recommend that the guidelines make clear that prosecutors and defendants may continue to stipulate to the application of these provisions in the absence of charged offense carrying a mandatory minimum. Although Option One with the stipulation provision would constrain the parties to the base offense levels at or near the mandatory-minimum penalties, it would allow for downward adjustments when warranted.

Even with these changes, we are concerned that Option One’s changes to requiring § 851 filings for application of the recidivist provisions will have the unintended result of more

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<sup>125</sup> *United States v. Lawler*, 818 F.3d 281, 283-85 (7th Cir. 2016) (the death resulting enhancement applies only when the elemental facts supporting the ‘offense of conviction’ establish beyond a reasonable doubt that death resulted from the use of the controlled substance and not through relevant conduct) (internal citations omitted); *United States v. Greenough*, 669 F.3d 567, 573-76 (5th Cir. 2012); *United States v. Rebmann*, 321 F.3d 540, 543-44 (6th Cir. 2003). The Third Circuit expressed the same view in dicta. *United States v. Pressler*, 256 F.3d 144, 157 n. 7 (3d Cir. 2001).

<sup>126</sup> *Lawler*, 818 F.3d at 284, n. 4 (distinguishing as “not on point”: *United States v. Shah*, 453 F.3d 520 (D.C. Cir. 2006) (no plain error to apply §2D.1.1(a)(2) without charging death-results element when defendant plead guilty to causing death); *United States v. Rodriguez*, 279 F.3d 947 (11th Cir. 2002) (upholding judge finding of death resulting under preponderance standard and rejecting *Apprendi* claim because sentence did not exceed 20-year maximum under 21 U.S.C. § 841(b)(1)(C)); and *United States v. Deeks*, 303 Fed. Appx. 507 (9th Cir. 2008) (unpublished)).

<sup>127</sup> Some districts have used plea agreements to provide for the application of these higher base offense levels without the application of mandatory minimum sentences. Although the parties could also agree to a lower offense level or to an agreed-upon sentence, explicitly allowing stipulations is a reasoned alternative to pursuing charges carrying mandatory minimum penalties and can yield results that are more individually tailored to the circumstances of particular cases.

mandatory life sentences being sought and imposed.<sup>128</sup> Because the § 851 notice affects the applicable mandatory-minimum sentence, the adoption of Option One may significantly increase the sentences for individuals with prior convictions in cases in which death or serious bodily injury resulted. A conviction for a drug offense that resulted in death or serious bodily injury in a case where a notice of prior conviction under § 851 is filed triggers a mandatory-minimum life sentence under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 960(b)(1), 960(b)(2), and 960(b)(3). In that situation, the sentencing guideline calculations are no longer relevant to determining the actual sentence imposed and the sentencing court has no discretion in determining the final sentence.

#### iv. *Option Two*

The Department does not oppose the portion of Option Two that removes the term “offense of conviction” from §2D1.1(a). This option would permit judges to apply the death or serious bodily injury offense levels without requiring prosecutors to charge offenses carrying mandatory-minimum penalties.<sup>129</sup> In cases where the statutory mandatory-minimum sentence is not applicable, applying these guidelines would provide a mechanism for holding defendants accountable for the death or serious bodily injury that resulted from their conduct. It also would provide sentencing judges with the flexibility to grant departures or variances and make individualized sentencing determinations that are not limited by mandatory-minimum sentences. The parties also would be free to argue for, or stipulate to, variances or departures from the applicable base offense level.

The Seventh Circuit’s *Lawler* case provides an example of how Option Two could affect charging decisions. In *Lawler*, the defendant was a heroin trafficker who pleaded guilty to selling heroin to an individual who died from its use. Without accounting for the death, the defendant’s guideline range was 15 to 21 months.<sup>130</sup> If the defendant had been charged with and convicted of a death-resulting offense, she would have faced a 20-year mandatory-minimum sentence. But under Option Two, although the defendant’s base offense level would be 38, the sentencing judge would have the discretion to adjust the sentence based upon individualized sentencing factors, likely resulting in a sentence below the otherwise-applicable 20-year mandatory minimum but higher than the 15 to 21 months that would be applicable if the death were not accounted for at all. The parties also would have the flexibility to negotiate a plea agreement under Fed. R. Crim. P. 11(c)(1)(B) or (C) that is lower than the otherwise-applicable mandatory-

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<sup>128</sup> This will have an effect in at least some circuits. For example, in the Sixth Circuit *Johnson* interpreted “prior similar offense” (the prior guideline language) to be synonymous with “felony drug offense” (the language in 21 U.S.C. § 841(b)(1)(C) that has now been added to §§ 2D1.1(a)(1)(B) and 2D1.1(a)(3)) and has held that 21 U.S.C. § 851 notices are not required to trigger the increased recidivism penalty. *United States v. Johnson*, 706 F.3d 728, 731 (6th Cir 2013). Thus, under current Sixth Circuit precedent, courts would likely continue to apply the guidelines recidivism provisions even without the filing of a § 851 notice. The adoption of Option One would necessarily change that practice and result in lower guidelines sentences for recidivists if the § 851 enhancement is not filed.

<sup>129</sup> Option Two would apply the same base offense levels to death and serious bodily injury cases regardless of whether the death or serious bodily injury was charged and proved beyond a reasonable doubt or proven by a preponderance of evidence at sentencing. The Department’s proposal would have retained the higher base offense levels of §2D1.1(a)(1)-(4) for those cases where the death or serious bodily injury was charged and proved but provided for a lower base offense level for cases where the death or serious bodily injury was proved by a preponderance of evidence during a sentencing proceeding.

<sup>130</sup> *Lawler*, 818 F.3d at 282.

minimum sentence. Should the Commission adopt this portion of Option Two, the additional flexibility provided by this option is likely to be beneficial to defendants, attorneys, and judges and may limit the circumstances under which the Department pursues mandatory-minimum sentences in these cases.

Our concerns about the effect of the recidivism provisions in Option One also apply to Option Two, although the concerns are somewhat diminished. Even absent a death-resulting conviction, filing the § 851 notice will increase any applicable mandatory-minimum sentence, thus curtailing judicial discretion and likely resulting in longer sentences.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW

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*ex-officio* Member, U.S. Sentencing Commission

cc: Commissioners  
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