Before the United States Sentencing Commission
Public Hearing on Proposal 4: Circuit Conflicts

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February 27, 2024

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My name is Deirdre D. von Dornum, and I am an Assistant Federal Public Defender in the Eastern District of New York. I have been practicing indigent federal criminal defense for 21 years. Thank you for inviting me to testify on behalf of the Federal Public and Community Defenders. This statement explains Defenders' position on Proposal 4, regarding the circuit split surrounding the application of the 4-level increase in §2K2.1(b)(4)(B)(i) for a firearm that has an altered or obliterated serial number, as well as the circuit conflict concerning the interaction between §2K2.4 and §3D1.2(c).

A. Circuit Split Part A: §2K2.1(b)(4)(B)(i).

In response to Part A of the proposed amendment addressing a circuit split on the meaning of the term "altered" and the degree of alteration required, Defenders urge the Commission to adopt Option 1's "unaided eye test" regarding application of the 4-level increase in §2K2.1(b)(4)(B)(i) for an altered or obliterated serial number ("the Enhancement"). Option 1 is a better policy choice than Option 2 for the following reasons:[1]

- First, Option 1 will better further the Commission's stated policy rationale for the Enhancement—enabling tracing by law enforcement—as well as the statutory purposes of sentencing.
- Second, Option 1 is narrower than Option 2. The Commission should not broaden the existing Enhancement because it lacks an empirical basis, it disparately impacts Black people, and its lack of mens rea requirement leads to unwarranted disparity.

[1] Option 1 defines "altered or obliterated serial number" to mean a serial number that "has been changed, modified, affected, defaced, scratched, erased, or replaced such that the original information is *rendered illegible or unrecognizable to the unaided eye*." USSC, 2024 Proposed Amendments at 51, http://tinyurl.com/2tttp8ey (emphasis added). On the other hand, Option 2 defines altered or obliterated serial number" as a serial number that has been "changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information *less accessible, even if such information remains legible*." *Id.* at 52 (emphasis added).

I. Option 1 will better further the policy rationale behind the Enhancement as well as the statutory purposes of sentencing.

Of the two options presented, Defenders urge adoption of the unaided eye test in Option 1, which would further the Commission's previously stated policy objectives behind the Enhancement and would provide a bright-line test that better serves the statutory purposes of sentencing.

1. Option 1 better fits the policy goals of the Enhancement.

The Commission has previously stated that the Enhancement reflects the difficulty in tracing firearms with altered or obliterated serial numbers.[2] As explained below, this traceability rationale lacks an empirical basis and does not further the statutory purposes of punishment.[3] However, in terms of furthering such a policy, Option 1 is clearly the better choice for several reasons.

As the Sixth Circuit explained in *Sands*, even if a serial number is scratched, if it is "still discernible to the reader without aid, ... [t]he number remains the same, even to the casual observer."[4] A reasonable person would understand that a legible, yet defaced, serial number can be traced by law enforcement, as the serial number is available to any "person with basic

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[2] *See* USSG App. C, Amend. 691 (Nov. 1, 2006) ("This increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."); *see also* USSG App. C, Amend. 819 (Nov. 1, 2023) (explaining PMFs "share the traits that led the Commission to implement a 4-level enhancement for firearms with altered or obliterated serial numbers" namely "difficulty in tracing firearms with altered or obliterated serial numbers" (citation and quotation marks omitted)). *But see infra* notes 48–55 and accompanying text (discussing lack of connection between traceability and purposes of punishment). While the Guideline history originally did not specify why the phrase "altered or obliterated" was chosen, Courts have independently posited that this traceability concern motivated the Enhancement. *United States v. Carter*, 421 F.3d 909, 914 (9th Cir. 2005) (noting that the Guideline history "does not specify why §2K2.1(b)(4) was originally enacted or why the phrase 'altered or obliterated' was chosen" but that the Ninth Circuit previously determined its purpose to be to "'discourag[e] the use of untraceable weaponry'" (quoting *United States v. Seesing*, 234 F.3d 456, 460 (9th Cir. 2001))) (alteration in original).

[3] *See infra* Part II.1.

[4] *United States v. Sands*, 948 F.3d 709, 715 (6th Cir. 2020).

vision and reading ability."[5] Applying the Enhancement "only where the firearm's serial number is not discernible to the naked eye" is consistent with the Enhancement's purpose.[6] And as the *Sands* court noted, such a test comports with other courts' application of the Enhancement in real world situations involving firearms with serial numbers altered to the point where they were not legible to the naked eye.[7] *Carter* itself dealt with a weapon with a serial number that was unobservable to the naked eye, not a partially altered, yet still legible, serial number.[8]

On the other hand, the overbroad reading of "altered" in Option 2 would result in increased punishment for a serial number that was legible and thus for an easily traceable firearm, undermining the stated purpose of the amendment. Additionally, especially given (b)(4)(B)(i)'s lack of mens rea requirement, Option 2 risks "penalizing accidental damage,"[9] which would further frustrate the traceability rationale behind the Enhancement.

The unaided eye test also better comports with the common-sense definition of altered.[10] As the Second Circuit explained, "[t]aking the

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[5] *Id. at* 717.

[6] *Id.*

[7] *Id.* at 715–16 (collecting cases and describing them as "united by two critical facts: (1) none of the serial numbers were visible to the unaided eye and (2) each court upheld the application of § 2K2.1(b)(4)(B)."); *see also United States v. Hayes*, 872 F.3d 843, 846 (7th Cir. 2017) ("[The serial number] was not visible because it was covered with a 'paint-like substance,' and . . . forensic specialists had to use a 'chemical solvent' to uncover it."); *United States v. Harris*, 720 F.3d 499, 504 (4th Cir. 2013) ("[The weapon] had gouges and scratches across the serial number that precluded [the district court] from reading the serial number correctly, even as it attempted to do so 'carefully.'"); *United States v. Justice*, 679 F.3d 1251, 1253 (10th Cir. 2012) ("The serial number on the pistol was illegible, appearing to have been ground down with sandpaper or a tool; but a crime laboratory restored it by smoothing the metal surface and applying acid and water."); *United States v. Salinas*, 462 F. App'x 635, 637 (7th Cir. 2012) (serial number had been filed off and "made to be unreadable by the naked eye" before it was recovered by the crime lab); *Carter*, 421 F.3d at 910 (serial number not legible to naked eye).

[8] *See Carter*, 421 F.3d at 914.

[9] *United States v. St. Hilaire*, 960 F.3d 61, 66 (2d Cir. 2020).

[10] *See Sands*, 948 F.3d at 715 (if serial number is still "discernible to the reader without aid, then the number itself has not been 'ma[de] different in some

dictionary definitions together in the context of serial numbers, 'alteration' is to make different."[11]

Regardless, Defenders note that the current proposed amendment presents not a mere question of textual interpretation, but a policy choice. The "sentencing guidelines are to govern the practical world."[12] Any reasonable person able to read a firearm's defaced-but-legible serial number, knows that for practical purposes, it is a traceable firearm. The need to squint ones' eyes to read a serial number does not make it less traceable. Thus Option 1 is the more appropriate choice to further a policy that seeks to discourage the use of untraceable firearms.

2. Option 1 is the better choice to further the Commission's statutory purposes and the purposes of sentencing.

Option 1 better advances the statutory purposes of sentencing than Option 2 for four reasons.[13] First, Option 1 is more likely to support a deterrence rationale than Option 2.[14] Second, Option 1 better reflects the seriousness of the offense.[15] Third, Option 1 would help avoid unwarranted similarities between individuals who differ in relevant ways (a type of

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particular, as size, style, course, or the like.'" (quoting Random House Webster's Unabridged Dictionary 60 (2d ed. 2001))).

[11] *St. Hilaire*, 960 F.3d at 66 ("This 'naked eye test' best comports with the ordinary meaning of 'altered[.]'"). The Second Circuit also explained it was "unpersuaded by courts that reject legibility as a standard on the ground that it would render 'obliterated' superfluous," since that fails to "take into account the many ways of tampering with a serial number, or the ways the terms can overlap: a serial number can be altered by obliteration of one or more characters; and the inability to read any appreciable part of a serial number can amount to obliteration in effect". *Id*. at 67–68.

[12] *Justice*, 679 F.3d at 1254.

[13] *See* 28 U.S.C. § 991(b)(1) (directing the Commission to establish sentencing policies that "assure the meeting of the purposes of sentencing" pursuant to 18 U.S.C. § 3553(a)(2) and that provide certainty and fairness and avoid unwarranted disparities in sentencing).

[14] *See* 18 U.S.C. § 3553(a)(2)(B).

[15] *See id*. § 3553(a)(2)(A).

unwarranted sentencing disparity).[16] Finally, Option 1's bright line test is more workable and will better promote respect for the law.[17]

While both options as written are inherently ineffective deterrents given their strict liability nature,[18] Option 1 is the better choice if the Commission hopes to discourage the use of "untraceable" firearms. Option 2 would not effectively do so. Punishing offenses involving firearms with defaced-yet-legible serial numbers is not an effective way to deter the use of untraceable weapons, since such firearms are, in fact, easily traceable. Option 1's unaided eye test is superior. Thus "individuals may be discouraged from acquiring weapons that fall within the ambit of § 2K2.1(b)(4)(B), with serial numbers they cannot read,"[19] and "it discourages the use of untraceable weapons without penalizing accidental damage or half-hearted efforts."[20]

Second, Option 1 is a better choice to address the seriousness of the offense conduct. If the Commission views the knowing use of untraceable firearms as more serious conduct that merits an increase in offense level, it should choose the construction that only encompasses such conduct, rather than instances of accidental or slight damage.[21]

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[16] *See id.* § 3553(a)(6).

[17] *See id.* § 3553(A)(2)(A).

[18] *See United States v. Handy*, 570 F. Supp. 2d 437, 478, 479 (E.D.N.Y. 2008) (Weinstein, J.) (noting strict liability enhancement for possession of a stolen firearm is an ineffective deterrent "since a person cannot be deterred from doing what he or she does not know is being done"); *see also infra*, Part II.3. (discussing lack of mens rea requirement); Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments, Firearms Offenses, at 26 (PDF 29) (Mar. 14, 2023) ("2023 Defender Firearm Comments"), http://tinyurl.com/2b9v624r ("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." (citation and quotation marks omitted)).

[19] *Sands*, 948 F.3d at 717.

[20] *St. Hilaire*, 960 F.3d at 66.

[21] *See id.*; *Sands*, 948 F.3d at 715 ("[A]ny defacement that slight does not constitute a 'material[ ] change,' even if it does make the serial number's information technically 'less accessible' by requiring one to squint or view the number from a closer position.").

Third, Option 1 would better prevent unwarranted disparities in sentences. Under Option 2, an individual who possessed a firearm with one serial number badly scratched, but legible, would be treated the same as an individual who knowingly completely obliterated all the serial numbers from a firearm. The two possessed firearms are not actually "similar," yet Option 2 would create an unwarranted disparity in that both would receive the Enhancement.[22]

Fourth, the unaided eye test provides a clear bright-line test that is most workable. Option 1's test "draws a clear line that should lessen confusion and inconsistency in the guideline's application, while at the same time leaving the district courts with appropriate discretion to conduct necessary factfinding at sentencing."[23] And "it is readily applied in the field and in the courtroom," providing a clear, workable standard that will promote respect for the law by providing courts and sentenced individuals with an objective test.[24]

II. The Commission should not expand the application of the empirically deficient strict liability Enhancement that compounds racial disparities.

As laid out below, additional sound policy reasons support choosing the narrower Option 1, instead of broadening the application of the Enhancement through Option 2. First, the Enhancement lacks an empirical basis. Second, the Enhancement exacerbates racial disparities. Third, the Enhancement's lack of scienter requirement results in unwarranted disparities. For these three reasons, the Enhancement should not be expanded.

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[22] *See* § 3553(a)(6); *see also Carter*, 421 F.3d at 915 (discussing forensic recovery and focusing on an individual's unaided eye view of a serial number, explaining that if "a defendant cannot visually distinguish—at the moment he contemplates taking possession—a would-be untraceable firearm from one that is in fact untraceable, it makes little sense for him to be punished in the latter circumstance but to escape punishment in the former.").

[23] *Sands*, 948 F.3d at 717.

[24] *St. Hilaire*, 960 F.3d at 66.

1. §2K2.1 and the Enhancement lack an empirical basis and should not be expanded.

As discussed below, the Commission has acknowledged that the firearms guideline and the Enhancement were not grounded in empirical evidence.

Prior to the introduction of the Guidelines, the average time served in prison for a firearms offense was 14.1 months; the Commission projected a modest increase to an average of 15.2 months.[25] Likewise, 37% of people sentenced for firearms offenses before the Guidelines received "straight probation," but the Commission projected this number to drop to 9% post-Guidelines.[26] While an exact comparison is not possible given changes in statutes, guidelines, and other variables, the contrast with modern firearms offense sentences proves stark. In fiscal year 2022, the average imprisonment length in all explosive and firearm cases was 47 months, with less than 5% of cases receiving probation-only sentences.[27]

In the beginning, the Commission synthesized Guidelines ranges using an "empirical approach based on data about past sentencing practices," for many categories of offenses.[28] Not so for firearms offenses.[29] Instead, the Commission developed the firearms guidelines by reviewing a sample of presentence reports and consulting "with practitioners and probation officers"

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[25] *See* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 69 tbl. 3, (1987) ("1987 Supplementary Report"), http://tinyurl.com/3pzz3dw7 ("Imprisonment includes confinement in prison, jail or a community corrections facility" and probation sentences treated as zero months).

[26] *Id.* at 68 tbl. 2.

[27] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" for fiscal year 2022, which are available at https://bityl.co/HBGG. Alternative months were included, and probation sentences were included as zero months.

[28] *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

[29] *See* 1987 Supplementary Report, *supra* note 25, at 18 ("[S]tatistical analyses usually provided the starting point for the guidelines that were adopted, [but] in some instances these analyses were of little value in explaining or rationalizing current sentences. Firearms violations provide a notable example.").

and attempting to identify a rationale that it believed "generally explain[ed] and [was] reasonably consistent with current sentencing practice."[30]

The original 1987 manual had four separate firearms offense guidelines located in Section 2K2.[31] Three of them applied a one-level enhancement if a firearm was stolen or had an altered or obliterated serial number.[32] As with the firearms guidelines generally, the Commission noted that the stolen-firearm enhancement was not grounded in past practice because "[a]vailable data [were] not sufficient to determine the effect a stolen firearm has on the average sentence."[33] And the original manual was silent altogether on the origin of the Enhancement. The pre-Guidelines dataset on which the original Commission had relied to develop the first set of Guidelines[34] did not contain data that would indicate sentencing outcomes for firearms cases involving issues with serial numbers.[35] Thus, there is no evidence that the Enhancement is based on an empirical assessment of sentencing outcomes.

In 1989, the Commission increased the Enhancement from one to two levels, stating only that the increase would "better reflect the seriousness of

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[30] *Id.*

[31] *See* USSG §2K2 (1987) (§2K2.1, for prohibited possessor offenses; §2K2.2, for prohibited weapon offenses; §2K2.3, for prohibited transaction offenses; and §2K2.4 for use of firearms or armor-piercing ammunition during or in relation to certain crimes).

[32] *See* USSG §§ 2K2.1(b)(1), 2K2.2(b)(1), 2K2.3(b)(2)(C) (1987). Section 2K2.3(b)(2)(C) included an explicit mens rea requirement for the Enhancement, which applied "[i]f the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number." In addition, at the time, §1B1.3 directed courts that "conduct and circumstances relevant to the offense of conviction" includes acts by the individual that "are relevant to the [individual's] state of mind or motive in committing the offense of conviction."

[33] USSG §2K2.1, comment. (Background) (1987). Section 2K2.1's background commentary noted that "reviews of actual cases suggest that this is a factor that tends to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes." *Id.*

[34] *See* 1987 Supplementary Report, *supra* note 25, at 21 (discussing dataset).

[35] *See* USSC, *Augmented Federal Probation, Sentencing, and Supervision Information System, 1985 (ICPSR 9664)* (Jan. 10, 1992, updated Jan. 12, 2006), http://tinyurl.com/yus3d8fc (no variable regarding serial numbers).

this conduct."[36] Soon after, in 1990, the Commission's Firearms and Explosive Materials Working Group recommended an overhaul and consolidation of the firearms guidelines with many increases in base offense level severity.[37] The Working Group reviewed whether "certain specific factors [had] potential relevance to sentencing decisions under firearms guidelines."[38] Notably missing among the factors studied was any characteristic related to serial numbers.[39] Despite not confirming whether the Enhancement was empirically informed, the Working Group recommended retaining it.[40]

Despite flaws in the Working Group's methodology and recommendations,[41] the Commission went on to adopt many of the Report's recommendations. It retained the 2-level Enhancement and consolidated the firearms guidelines into one in 1991, with increased base offense levels.[42]

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[36] USSG App C., Amend. 189, Reason for Amendment (Nov. 1, 1989).

[37] *See* USSC, *Firearms and Explosive Materials Working Group Report* 8, 12, 24 (1990), http://tinyurl.com/2p3xaky4 ("1990 Firearms Report") ("The working group undertook extensive review of case files in order to ascertain the aspects of the firearms and explosives guidelines that worked well, and to determine the issues that appeared to raise the greatest concerns in the field.").

[38] *Id*. at App'x D at 7 (PDF 155) (conducting a case file review of cases sentenced under §2K2.1); App'x G. at 5 (PDF 210) (conducting a case file review or cases sentenced under §2K2.2); *see also id*. at App'x H (PDF 218–22) (review of 1987 §2K2.2 case file summaries).

[39] *Id*. at 9–10 (PDF 20–21) (noting that "review of case files alerted the working group to offense characteristics that correlated with higher average sentences," such as actual or intended unlawful or criminal use of the firearm, possession of the firearm for personal protection, sporting or collection, drug-related conduct purposes, N.F A. firearms, and destructive devices).

[40] *See id*. at 49 (PDF 64).

[41] For a discussion of some of the additional shortcomings of the Working Group Report and its recommendations, *see* Statement of Michael Carter on behalf of Fed. Defenders to the U.S. Sent'g Comm. on Firearms Offenses, at 20–21 & n. 72 (PDF 56, 59–60) (Mar. 7, 2023), http://tinyurl.com/2b9v624r.

[42] USSG App. C, Amend. 374, Reason for Amendment (Nov. 1, 1991). *Compare* USSG §§2K2.1, 2K2.2 (Nov. 1, 1990) (highest base offense level of 18) *with* USSG §2K2.1 (Nov. 1, 1991) (highest base offense level of 26).

Then in 1993, the Commission made explicit the strict liability nature of the Enhancement; but it did not explain the rationale behind this choice.[43]

In 2006, DOJ urged the Commission to again increase the Enhancement. It argued: "the *intentional* obliteration or alteration of serial number" is a "clear indicator of firearms trafficking or an intent to otherwise use the firearm unlawfully."[44] The Commission responded by raising the Enhancement from two to four levels.[45] According to the Reason for Amendment, this reflected "both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."[46]

This decision was ill-conceived for several reasons.

First, DOJ was concerned about individuals acting with intent, yet the strict liability Enhancement applies whether the conduct was intentional or not.[47] Second, §2K2.1 already contained enhancements for trafficking and use of a weapon in connection with another felony offense.[48]

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[43] *See* USSG App. C, Amend. 478 (Nov. 1, 1993) ("[T]his amendment clarifies that the enhancement in §2K2.1(b)(4) applies whether or not the defendant knew or had reason to believe the firearm was stolen or had an altered or obliterated serial number.").

[44] DOJ Comments on the Sent'g Comm's Proposed Amendments, at 8 (March 28, 2006), https://bityl.co/Hdxx (emphasis added); *see also* DOJ Annual Letter to the U.S. Sent'g Comm, at 3 (Aug. 15, 2005), https://bit.ly/3l3AUns ("The Commission also should consider whether to increase the sentencing enhancement in §2K2.1(b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers, as these offenses are often committed in furtherance of firearms trafficking.").

[45] USSG App. C, Amend. 691 (Nov. 1, 2006). As Defenders have previously pointed out, the rate at which the Enhancement was applied after 2006 has not decreased, indicating the negligible deterrent value of this specific offense characteristic. *See* 2023 Defender Firearm Comments, *supra* note 18, at 26 (PDF 101).

[46] USSG App. C, Amend. 691, Reason for Amendment (Nov. 1, 2006).

[47] *See* Part II.3 *infra* (discussing lack of mens rea requirement).

[48] *See* §§2K2.1(b)(5) (2006) (trafficking of firearms), 2K2.1(b)(6) (2006) (in connection with another felony offense).

Third, the data do not support the claim that possession of a firearm with an altered or obliterated serial number indicates an intent to traffic or use such a firearm unlawfully. "Time-to-crime" (TTC) is the ATF term for "the length of time between the date of a firearm's last known purchase . . . to the date of its recovery by law enforcement as a crime gun."[49] According to ATF, "a short TTC can be an indicator of illegal firearms trafficking."[50] ATF data show that to the extent that obliterated serial numbers can be recovered with forensic techniques and traced, "[t]raced crime guns with obliterated serial numbers had a much *longer* median [TTC period] relative to traced crime guns that did not have obliterated serial numbers."[51] Thus, ATF data suggest that the possession of traced crime guns with obliterated serial numbers alone is not indicative of illegal guns trafficking. Additionally, Commission data reveal that the pre-2023 (b)(4)(B) enhancements were exceedingly rarely applied in cases that received the (b)(5) enhancement for trafficking, or in cases that received the (b)(6)(B) enhancement for involvement in another felony offense.[52]

Fourth, Defenders and other stakeholders have long pointed out the lack of rational relationship between traceability and the purposes of punishment for the vast majority of §2K2.1 offenses in which the prohibited conduct is mere possession of a firearm by a prohibited person.[53] As many

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[49] Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns – Volume Two*, *Part III: Crime Guns Recovered and Traced within the United States and its Territories*, 23 (last visited Feb. 24, 2024), http://tinyurl.com/54h2cnh8.

[50] *Id.*

[51] *Id.* at 33 (emphasis added).

[52] From fiscal years 2018 through 2022, less than 2% of §2K2.1 cases involved the application of both the enhancements in (b)(4)(B) and (b)(6)(B), which covered use or possession "in connection with another felony offense." And during the same period, less than 1% of §2K2.1 cases involved the application of both the enhancements in (b)(4)(B) and (b)(5), which covers trafficking in firearms. The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022, which are available at https://bityl.co/HBGG. These numbers are based on Guideline Amendment years 2006 forward, as that is the year that (b)(4) distinguished altered or obliterated serial number in (b)(4)(B) from stolen firearms in (b)(4)(A).

[53] 2023 Defender Firearm Comments, *supra* note 18, at 31–33 ("The difficulty . . . for government investigations is not a legitimate purpose of sentencing under

stakeholders have noted, the lack of serial number does not make that offense or firearm itself inherently more dangerous.[54] The difficulty that the lack of serialization can create for government investigations is not a rational purpose of punishment under § 3553(a), particularly given that federal law prohibits a registration requirement for most firearms,[55] and tracing firearms to their initial purchaser often proves of limited utility to the investigation of firearms used in crime.[56] Thus, the Enhancement continues to lack an empirical basis and should not be expanded further.

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§ 3553(a)(2)."); Practitioner's Advisory Group Comments on the U.S. Sent'g Comm's 2019 Proposed Amendments, at 9 (PDF 118) (Mar. 15, 2006), http://tinyurl.com/36ns7a45 (explaining that the traceability of a firearm "does not have any relationship with the federal crime of being a felon-in-possession, or federal gun-possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an [individual] to escape detection"); Fed. Defender Comments on the U.S. Sent'g Comm's 2019 Proposed Amendments, at 16 (PDF 65) (Mar. 9, 2006), http://tinyurl.com/mptjwx78 (noting that serial numbers can frequently be "restored by a simple laboratory procedure"). Traceability is of limited value in investigation because "[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime." ATF, *Firearms Trace Data: Arizona-2022* (Sept. 27, 2023), http://tinyurl.com/yfhe8v9m.

[54] *See, e.g.*, 2023 Defender Firearm Comments, *supra* note 18, at 31–33 (PDF 34–36) (discussing the lack of relationship between traceability, offense seriousness, and punishment for most §2K2.1 offenses); *see also United States v. Price*, 635 F. Supp. 3d 455, 463 (S.D. W. Va. 2022) ("In fact, as the Government points out, the commercial requirement that a serial number be placed on a firearm 'does not impair the use or functioning of a weapon in any way.'" (emphasis and citation omitted)).

[55] *See* 18 U.S.C. § 926(a)(3) ("No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that . . . any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.").

[56] *See* ATF, *Firearms Trace Data: Arizona 2022*, *supra* note 56, http://tinyurl.com/yfhe8v9m ("[f]irearms are normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime"); *see also* 2023 Defender Firearm Comments, *supra* note 18, at 31 (PDF 34) ("firearms experts disagree on the value of firearms tracing").

2. The Enhancement disparately impacts Black individuals.

The Commission should not amend the Enhancement to broaden its application given its disparate impact on Black individuals. Over time, as the firearms guideline's offense levels drifted upward, the demographics of individuals sentenced for firearms offenses also changed. In fiscal year 1990, of those sentenced under §2K2.1, the data indicate that 51% were White, 33% Black, and 9% Hispanic.[57]

Commission data confirm that Black individuals now comprise the largest percentage of individuals sentenced under §2K2.1.[58] A recent Commission report identified racial disparities in the contemporary enforcement of federal firearms offenses.[59] And as scholars and Defenders have noted, decades of federal firearm offense enforcement have disproportionately targeted Black and economically underserved communities, resulting in racial disparities in convictions and sentences.[60] Defenders remain troubled by such disparities, which are also seen in the application of the strict liability Enhancement.[61]

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[57] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" for fiscal year 1990 (the first year for which the dataset includes information on primary guideline). The overall population of those sentenced that year was 43% White, 26% Black, and 20% Hispanic. *Id*.

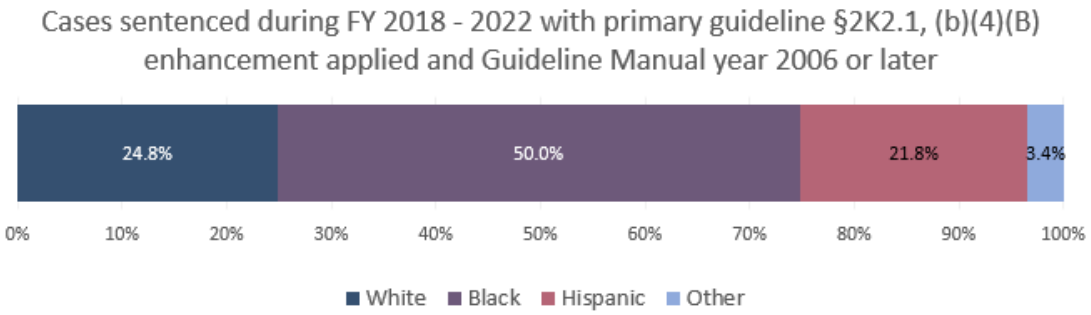
[58] USSC, *What Do Federal Firearms Offenses Really Look Like?* 10 (2022), https://tinyurl.com/6jsusejv ("2022 Firearms Report") (Black individuals comprised 55% of those sentenced under §2K2.1 in fiscal year 2021). Black individuals are 55% of those sentenced under §2K2.1 for the last five fiscal years (2018-2022). The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022.

[59] *See id*. at 33 ("Black firearms offenders represented a higher share of arrests following law enforcement conducting a routine street patrol (73.0%) and traffic stops (66.9%) compared to the overall percentage of Black firearms offenders in the sample.").

[60] *See* Statement of Michael Carter on behalf of Fed. Defenders to the U.S. Sent'g Comm on Proposed Firearms Amendments, *supra* note 41 at 8–11 (discussing scholarship documenting racially disparate enforcement of firearms offenses).

[61] *See* 2023 Defender Firearm Comments, *supra* note 18, at 23 (PDF 26) (pointing to data showing that Black individuals are overrepresented with respect to the "(b)(4) enhancement. And further, the data show that Black people who receive

For example, Black individuals made up 50% of those receiving the Enhancement in the past five fiscal years.[62]



And when they received the Enhancement, Black individuals received longer sentences than their white counterparts.[63]

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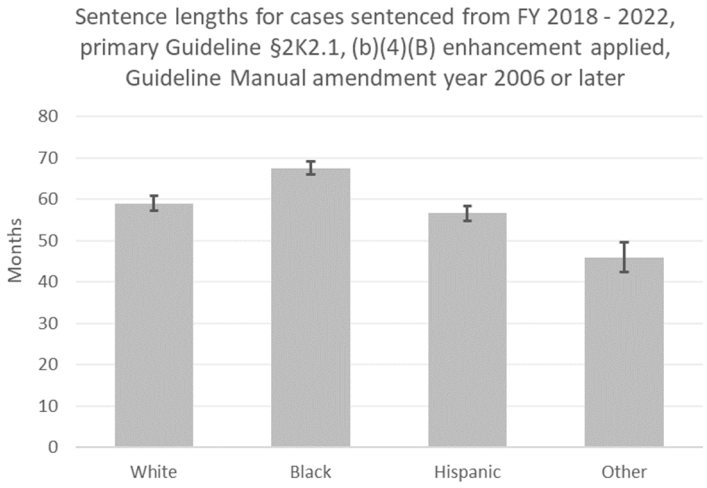
the (b)(4) enhancement are subjected to longer sentences than their white counterparts").

[62] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022. These numbers are based on Guideline Amendment years 2006 forward as that is the year that the SOC for (b)(4) distinguished altered or obliterated serial number (b)(4)(B) from stolen firearms (b)(4)(A).

[63] The mean sentence length (including sentences of probation only as 0 months and including months of alternative confinement) for Black individuals who received the altered or obliterated serial number enhancement was 68 months imprisonment, compared to 59 months imprisonment for white individuals who received the Enhancement. The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" spanning fiscal years 2018 to 2022.



3. The Enhancement lacks a mens rea requirement.

Finally, the Commission should not select the more expansive Option 2, because the already-expansive Enhancement currently lacks a mens rea requirement and leads to unwarranted disparities in sentencing outcomes. Defenders continue to urge the Commission to add a mens rea requirement to §2K2.1(b)(4)(A) and (B)(i) in the future, but for now, Option 1 is the better choice.

a. The lack of mens rea requirement leads to unwarranted disparity.

The Commission should narrow, not expand, the Enhancement. The Enhancement's lack of mens rea requirement leads to an increase in punishment regardless of an individual's culpability. As the Supreme Court has stated, mens rea remains a bedrock component of criminal law; a person must have a culpable mental state to be held criminally responsible for their acts.[64] Judges and scholars have long lamented the lack of mens rea requirements across the Guidelines.[65] Defenders too have stressed the

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[64] *Ruan v. United States*, 597 U.S. 450, 457, (2022) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

[65] *See* Jack B. Weinstein and Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent. Rep. 121, 121 (1994) ("It is at sentencing that mens rea is the most crucial."); Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 Fed. Sent. Rep. 112, 113 (1994) ("[I]t is difficult to imagine that guideline drafters who understood their role to be analogous to drafting a general

importance of mens rea within the Guidelines,[66] particularly with respect to the Enhancement.[67] The Supreme Court has reiterated that the "longstanding presumption" of mens rea should apply to firearms offenses.[68] The strict liability Enhancement relieves the government of its burden to establish culpability—of which scienter is a crucial element.[69]

Defenders have long decried the government's practice of employing the Enhancement as an end run around the culpability requirements in 18 U.S.C. § 922(k).[70] Commission data show that while there were only 258

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penal code would have failed to define culpability terms, and to make conscious decisions as to the kind of culpability required with respect to aggravating circumstances that can have a substantial effect on the degree of crime."); Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 128 (2009) (stressing need to "ensure that the acts which lead to criminal liability will be *sufficiently blameworthy* to deserve the sanctions imposed"). Indeed, the 1987 and 1988 iterations of §1B1.3 did direct courts to look at an individual's state of mind in applying the Guidelines. USSG §1B1.3(a) (Nov. 1, 1987) (instructing courts to look at acts or omissions "relevant to the defendant's state of mind or motive in committing the offense of conviction"); USSG §1B1.3(a)(4) (Nov. 1, 1988) (instructing courts to determine offense levels in part based on "the defendant's state of mind, intent, motive and purpose in committing the offense").

[66] Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 208 (Dec. 2, 1986) (Jack Lipson, Fed. Defenders), http://tinyurl.com/4mc5w46f ("We are particularly disturbed by the draft's focus on aggravating factors such as . . . unintended harm which do not reflect any mens rea, but which in many cases substantially enhance the prescribed penalty."); *see also* Fed. Defenders Leg. Comm. Memorandum to U.S. Sent'g Comm, Memorandum Regarding Ranking of Offense Seriousness, at 12, (1986), http://tinyurl.com/yeka6mev ("Considerations of the [individual]'s intent or lack of premeditation must also be taken into account.").

[67] *See* Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 18 (Aug. 1, 2023), http://tinyurl.com/35vpvxtu (urging mens rea reform); *accord* Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 9 (Oct. 17, 2022), http://tinyurl.com/4uftz987; Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 3–5 (Aug. 18, 2010), http://tinyurl.com/bdxftmpa.

[68] *Rehaif v. United States*, 139 S. Ct. 2191, 2195–96 (2019) (citing *United States v. X-Citement Video*, 513 U.S. 64, 72–73 n.3 (1994)*; see id.* at 2201 (Alito, J., dissenting) (noting that Court's decision overturned "every single Court of Appeals").

[69] *Id.* at 2198.

[70] Fed. Defenders' Annual Letter to the U.S. Sent'g Comm, at 3–4 (Aug. 18, 2010), http://tinyurl.com/bdxftmpa ("To convict a defendant of such an offense, the prosecution would have to prove the scienter requirement beyond a reasonable doubt

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 applied.[71]

In addition, the lack of scienter requirement means the Enhancement cannot "provide certainty and fairness in meeting the purposes of sentencing," in accordance with the mandate of the Sentencing Reform Act.[72] It is often not apparent that a serial number has been altered,[73] particularly if it is scratched but remains legible.[74] For example, in *United States v. Johnson*, the Fifth Circuit overturned a conviction for possession of a pistol with an obliterated serial number because the accused only acknowledged noticing "silvery scratches" on the slide, which was insufficient to show "specific knowledge by Johnson that those scratches (a) were in the vicinity of the serial number, and (b) were sufficiently long, wide, and deep to 'obliterate' the serial number."[75] But the Enhancement would apply to individuals like Mr. Johnson, even if they did not notice that the serial number was altered. Thus, the strict liability Enhancement applies equally to individuals in dissimilar circumstances: those who know the firearm has an

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[but] [u]nder the current guideline, the prosecution can exact punishment without proving any mens rea.").

[71] The data used for these analyses were extracted from the Commission's "Individual Offender Datafiles" for fiscal years 2018 through 2022, which are available at https://bityl.co/HBGG.

[72] 28 U.S.C. § 991(b)(1)(B); *see also* 2023 Defender Firearm Comments, *supra* note 18, at 24–25 (PDF 27–28) (explaining that the strict liability Enhancement does not serve purposes of sentencing under § 3553(a)).

[73] *See, e.g.*, *United States v. Frett*, 492 F. Supp. 3d. 446, 454 (D.V.I. 2020) (granting a motion for a judgment of acquittal in § 922(k) case where the government failed to prove that the accused knew the firearm was obliterated); *United States v. Haile*, 685 F.3d 1211, 1221 (11th Cir. 2012) (evidence insufficient to show knowledge of obliteration where government proved only constructive possession, and put forth no evidence that accused possessed the gun for any significant length of time).

[74] *St. Hilaire*, 960 F.3d at 66 (noting possibility of accidental defacement).

[75] *United States v. Johnson*, 381 F. 3d 506, 509–11 (5th Cir. 2004).

altered serial number, and those who do not. Congress has cautioned the Commission to avoid this type of unwarranted disparity.[76]

This concern is heightened where only one out of several serial numbers on a single firearm has been altered or obliterated. Courts "that have considered the question hold that the [e]nhancement applies if any single iteration of a gun's serial number has been altered or obliterated."[77] Yet an individual might not inspect or notice defacement on every single iteration of the serial number, especially one on the underside of the firearm. The strict-liability enhancement cannot deter such unknowing or accidental conduct and serves no legitimate purpose of punishment. Judge Adelman has also noted the problem with the Enhancement's lack of scienter requirement, noting the Commission "never satisfactorily explained why an increase of this extent should apply on a strict liability basis."[78] He rejected the traceability policy rationale and declined to apply the Enhancement, noting the existence of "methods to restore obliterated serial numbers in an effort to trace guns and curb gun trafficking . . . and in any event, in a case like this one with no trafficking aspect, it is hard to see why a 4 level enhancement is needed to provide just punishment," noting that the Enhancement "nearly doubled the range" in that case.[79]

This is also true with respect to stolen firearms, which might bear intact serial numbers; a visual inspection of a firearm provides no notice that it might have been stolen. As courts have explained, because that "enhancement does not require the defendant to know or have reasonable cause to believe that the firearm he possessed was stolen, it does not provide

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[76] *See* 28 U.S.C. § 991(b)(1)(B); USSC, *Fifteen Years of Guideline Sentencing* 113 (2004), http://tinyurl.com/2mab7yzr (recognizing that unwarranted disparities occur not only when there is "different treatment of individual[s] who are similar in relevant ways," but also when there is "similar treatment of individual[s] who differ in characteristics that are relevant to the purposes of sentencing." (emphasis omitted)).

[77] *St. Hilaire*, 960 F.3d at 65 (collecting cases and holding that "courts need to separately evaluate each iteration of a gun's serial number, and that the Enhancement applies if just one has been altered or obliterated").

[78] *United States v. Jordan*, 740 F. Supp. 2d 1013, 1016 (E.D. Wis. 2010).

[79] *Id.* at 1017.

deterrence since a person cannot be deterred from doing what he or she does not know is being done."[80]

b. The Commission should add a mens rea requirement to the rest of (b)(4).

Finally, Defenders urge the Commission to finish what it started last year and amend the other enhancements in (b)(4) to add a mens rea requirement consistent with that in (b)(4)(B)(ii). While Defenders were disheartened in 2023 to see yet another unstudied enhancement added to the (b)(4) enhancement for unserialized or privately made firearms ("PMFs"), we were encouraged to see it carries a mens rea requirement.[81] In its Reason for Amendment, the Commission indicated that it added PMFs to §2K2.1(b)(4) because it believed "there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm that is not marked with a serial number."[82] If the Commission truly sees "no meaningful distinction" between offenses involving PMFs and those involving firearms with an altered or obliterated serial number, then it should add a knowledge or willful blindness requirement to the rest of §2K2.1(b)(4).

The Sentencing Reform Act instructed the Commission to craft sentencing policy to avoid unwarranted disparities, reflect distinctions in offense severity, and provide certainty and fairness in sentencing.[83] A mens rea requirement would ensure that the Enhancement applies only to people who act knowingly or with willful blindness to the fact that the serial number was altered or obliterated, which avoids unwarranted similar treatment of those who are dissimilar in an important way. It would also promote

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[80] *Handy*, 570 F. Supp. 2d at 440.

[81] *See* USSC App. C, Amend. 819, Reason for Amendment (Nov. 1, 2023) (adding additional enhancement to §2K2.1 for PMFs without data to support "concerns raised by the Department of Justice regarding the proliferation of ghost guns, the increased frequency with which ghost guns are used in connection with criminal activity, and the difficulty in tracing these firearms").

[82] *Id*. There is, however, a significant *legal* distinction between a non-prohibited possessor making and possessing a privately made firearm, which is not federally illegal, and an individual possessing a firearm with an altered or obliterated serial number, which is federally illegal. *See* 2023 Defender Firearm Comments, *supra* note 18, at 27–34 (PDF 30–37).

[83] *See* 28 U.S.C. § 991(b)(1)(A), (B).

punishment proportionate to an individual's culpability, and better "provide certainty and fairness in meeting the purposes of sentencing."[84]

III. Conclusion

For all the reasons above, Option 1 is better than Option 2. Option 1 will better further the statutory purposes of sentencing. The Commission should select Option 1, instead of broadening the application of the empirically deficient strict liability Enhancement, which continues to compound racial disparities in firearm sentencing outcomes.

Further, Defenders continue to encourage the Commission to add a mens rea requirement to §2K2.1(b)(4)(A) and (b)(4)(B)(i). Given the crucial importance, reaffirmed by the Supreme Court in recent years, of mens rea to criminal liability, the Commission should update the rest of (b)(4)(B) to remedy the lack of scienter requirement in those enhancements. We are encouraged by this Commission's stated dedication to "operate in a deliberative, empirically based, and inclusive manner."[85] Defenders therefore urge the Commission to revisit and revise §2K2.1 in the near future, so that it can better calibrate the guideline to the data and § 3553(a)'s mandate.

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[84] *Id.*

[85] Transcript of Public Hearing before the U.S. Sent'g Comm, Washington, D.C., at 4 (Oct. 28, 2022) (Remarks of J. Carlton W. Reeves, Chair, U.S. Sent'g Comm), https://tinyurl.com/567hfjsm.

B. Circuit Split Part B: Interaction between §2K2.4 and §3D1.2(c).

Defenders support the proposed amendment.

The Guideline Manual sets forth rules for when a person is being sentenced on multiple counts. These rules ensure incremental punishment is based only on additional acts and avoid increased punishment based on the same conduct.[1] These rules also further Congress's and the Commission's intent to reduce unwarranted sentencing disparities.[2] In keeping with these objectives, USSG §3D1.2(c) provides that multiple counts shall group "[w]hen one count embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guidelines applicable to another of the counts."[3]

The Seventh Circuit's holding that a drug-trafficking offense and felon-in possession offense do not group pursuant to §3D1.2(c) if a person also has an 18 U.S.C. § 924(c) conviction underlying the drug trafficking offense,[4] overcomplicates what should be a straightforward analysis. The Seventh Circuit's holding in *Sinclair* was based on Application Note 4 to USSG §2K2.4, which directs courts not to apply any offense-characteristic enhancement for firearm possession to the underlying count.[5] As explained by the Eighth Circuit in *United States v. Bell*, though, §3D1.2(c) does not require that a specific offense characteristic *apply* in the instant case for

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[1] *See* USSG Ch. 1, pt. A, subpt. (e) (Original Introduction to the Guidelines Manual, Multi-Count Convictions) ("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"); USSG Ch. 3, pt. D (Multiple Counts, Introductory Commentary) ("The rules in this part seek to provide incremental punishment for significant additional criminal conduct.").

[2] *See generally* USSG Ch. 1, pt. A, subpt. (3) (The Basic Approach (Policy Statement)).

[3] §3D1.2(c).

[4] *See United States v. Sinclair*, 770 F.3d 1148, 1156–59 (7th Cir. 2014).

[5] *Id.* at 1158–59.

counts to group, only that the conduct be *treated* as a specific offense characteristic, which it is here.[6]

The proposed amendment to Application Note 4 appropriately clarifies that grouping of an 18 U.S.C. § 922(g) felon-in-possession count with a drug trafficking count is permitted, and may be required under §3D1.2, even in cases where there is also a conviction under § 924(c).[7] This amendment is supported by both text and policy. Courts have generally concluded that the drug-trafficking count underlying a conviction under § 924(c) groups with a firearms count under §922(g), notwithstanding §2K2.4 Application Note 4.[8] Their reasoning is simple. Like the grouping rules, Application Note 4 aims to "avoid unwarranted disparity and duplicative punishment."[9] Application Note 4 does not serve to discourage grouping, but rather instructs that "if a sentence under [§2K2.4] 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."[10] This direction avoids further increasing a person's punishment based on harm that has already been fully accounted for elsewhere in the guidelines.

Section 3D1.2(c) and Application Note 4 in the Commentary to §2K2.4 work in tandem to further the same goal—avoid "'double counting of offense behavior'" that is otherwise accounted for within the guideline calculation.[11] This fundamental goal is best articulated in the Introductory Commentary to Chapter 3, Part D (Multiple Counts). As stated, the rules governing grouping

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[6] *See United States v. Bell*, 477 F.3d 607, 615 (8th Cir. 2007).

[7] *See* 88 Fed. Reg. 89142, 89154, 2023 WL 8874598 (2023) ("2024 Proposed Amendments").

[8] *See Bell*, 477 F.3d at 615–16 (grouping of a felon-in-possession offense and the underlying drug trafficking offense is proper when the separate offenses arise out of the same conduct); *see also United States* v. *Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010); *United States* v. *King*, 201 F. App'x 715, 718 (11th Cir. 2006).

[9] *See* USSG App. C, Amend. 599, Reason for Amendment (Nov. 1, 2000).

[10] §2K2.4, comment. (n.4).

[11] §3D1.2, comment. (n.5).

intend "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct."[12]

The text of §3D1.2 dictates that "[*a*]*ll* counts involving substantially the same harm shall be grouped."[13] Because a § 922(g) count and the drug trafficking count underlying a conviction under 18 U.S.C. § 924(c), involve substantially the same harm—in that one count embodies conduct that is treated as a specific offense characteristic in the guideline applicable to the other count—they should group. To achieve the reasonable sentencing uniformity sought by Congress and the Commission since the inception of the guidelines, this unique combination of counts presents a clear example of when grouping under the guidelines narrows rather than widens "disparity in sentences imposed for similar criminal conduct committed by similar offenders."[14]

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[12] *Supra* note 2, Introductory Commentary.

[13] §3D1.2 (emphasis added).

[14] *Supra* note 2, The Basic Approach (Policy Statement).