COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 2346
Chicago, IL 60604

Honorable Roy K. Altman
Honorable Kenneth D. Bell
Honorable Mark Jeremy Bennett
Honorable Terrence G. Berg
Honorable Nathanael Cousins
Honorable Katherine Polk Failla
Honorable Charles B. Goodwin
Honorable Beryl Howell
Honorable Joseph Laplante
Honorable Karen Spencer Marston
Honorable Diana Saldaña
Honorable Charles J. Williams

TELEPHONE
(312) 435-5795

Honorable Edmond E. Chang, Chair

February 3, 2025

Honorable Carlton W. Reeves
United States District Court
Thad Cochran Federal Courthouse
501 East Court Street, Room 5.550
Jackson, MS 39201-5002

Dear Chairman Reeves and Members of the Sentencing Commission:

On behalf of the Committee on Criminal Law of the Judicial Conference of the United States, we appreciate the opportunity to offer comment on the proposed Guideline amendments for the 2024-2025 amendment cycle.

The Committee's jurisdiction within the Judicial Conference includes overseeing the federal probation and pretrial services system and reviewing issues related to the administration of criminal law. The Committee provides comments about amendments proposed by the Sentencing Commission as part of its monitoring role over the workload and operation of probation offices and as part of its ongoing role in examining the fair administration of criminal law. The Judicial Conference has authorized the Committee to "act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing

guidelines, including proposals that would increase the flexibility of the Guidelines."[1] The Judicial Conference has resolved that "the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible."[2] In the past, the Committee has presented testimony and submitted comments supporting Commission efforts to resolve ambiguity, simplify legal approaches, reduce uncertainty, and avoid unnecessary litigation and unwarranted disparity.

These comments address each of the four categories of amendments proposed by the Commission: Career Offender, Firearms Offenses, Circuit Conflicts, and Simplification of the Three-Step Process.

Discussion

I. Career Offender

The proposed Career Offender amendment seeks to resolve the extensive challenges caused by the current "categorical approach" used to determine whether a prior conviction is a crime of violence or controlled substance offense under §4B1.1.

The Committee supports the Commission's efforts to clarify this guideline. Although any change to the established system would introduce some measure of uncertainty and the potential for new litigation, the proposed amendment appears to provide a workable alternative to the current categorical approach. On crimes of violence, the amendment is consistent with the Committee's previously expressed position to "allow judges to have greater flexibility to most effectively determine, based on the underlying facts, whether a prior state offense is a crime of violence."[3] By asking whether the defendant "engaged in" the use of physical force (among other things) under proposed §4B1.1(b)(1)(A), courts will assess facts rather than parse statutes into often arcane categories.

For controlled substance offenses, the Committee recognizes that the categorical approach has presented many of the same interpretive difficulties in the drug-offense context, too. *See, e.g.*, *United States v. Townsend*, 897 F.3d 66, 72-74 (2d Cir. 2018) (assessing state drug law for divisibility and comparing list of drugs in state law to federal Controlled Substances Act); *see also United States v. Ruth*, 966 F.3d 642, 653-654 (7th Cir. 2020) (describing circuit split on whether to apply categorical approach to controlled substance offenses). There also is inherent difficulty in trying to define controlled substance offenses in a way that uniformly and readily covers

---

[1] JCUS-SEP 1990, p.69. In addition, the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work." *See* 28 U.S.C. § 994(o).

[2] JCUS-MAR 2005, p. 15.

[3] Letter from Comm. on Crim. Law of the Jud. Conf. of the U.S. to U.S. Sent'g Comm'n (March 13, 2023), available here.

similar conduct across various state statutes. Also, the Commission's multi-year study of career-offender sentencing showed that defendants who qualified as career offenders based only on drug-trafficking offenses recidivated at a similar rate of *non*-career-offender defendants.[4] The Committee thus does not oppose the proposal to limit the provision to certain federal drug offenses. Judges can continue to account for repeat state drug convictions as part of the evaluation of criminal history category and under the 18 U.S.C. § 3553(a) factors, where appropriate.

Sources of Information. The proposed amendment lists "Sources of Information" (§4B1.2(b)(4)) on which the government may rely for its prima facie showing that an offense is a crime of violence. The Committee understands that the list was drawn from language in *Shepard v. United States*, 544 U.S. 13 (2005), and its progeny. However, two of the proposed sources of information appear to overlap, rendering the narrower one unnecessary. Section 4B1.2(b)(4)(F) says that one source would be "[a]ny explicit factual finding by the trial judge to which the defendant assented." Proposed Section 4B1.2(b)(4)(D) would cover the "judge's formal rulings of law or findings of fact." Generally, any finding of fact that might be covered by subsection (F) would be covered by subsection (D) and should not in any event require a showing of a defendant's assent. For those reasons, the Committee suggests eliminating subsection (F). The Committee also suggests striking the word "formal" from subsection (D). Adding the term "formal" within the context of rulings of law or findings of fact may lead to unnecessary litigation over whether a particular factual finding is "formal" enough to qualify as a source of information.

Minimum Sentence Lengths of Prior Offenses. The proposed amendment presents three options (each containing sub-options) that would limit predicate offenses based on sentence length (either indirectly, by referencing the number of criminal history points under §4A1.1, or directly, by specifying minimum qualifying terms of imprisonment). Given §4B1.1's goal of punishing the most serious recidivists, it is sensible to exclude convictions for which the sentencing judge imposed a relatively light sentence (or no prison sentence at all). Absent additional data on recidivism, the Committee believes that Option 1 best supports the goals of clarity and fairness, because it is straightforward and maintains consistency with the rest of Chapter Four. By tying the qualifying offenses to criminal history categories, Option 1 incorporates the preexisting value of criminal history categories in reflecting both risk of recidivism and level of culpability.

As for whether only §4A1.1(a) sentences should qualify, or instead §4A1.1(b) sentences should also qualify, the Committee encourages the Commission to analyze, if feasible, whether career offenders who had predicate sentences of 13-plus months recidivated at higher rates than offenders who qualified with an under-13-month sentence. Indeed, with regard to Option 2, the Committee suggests that the Commission consider studying whether sentence length for career-offender predicate offenses is predictive of risk of recidivism. If a future study shows that a particular sentence length (whether it is one year, three years, five years, or something else) provides a sound dividing line between little or no increased risk of recidivism and a substantial increased risk, then some form of Option 2 would be advisable.[5] Though not quite on point,

[4] Report to the Congress: Career Offender Sentencing Enhancements at 40–41 (Aug. 2016).
[5] The Commission's 2022 study, *Length of Incarceration and Recidivism*, suggests that sentences for

because the issue examined was the impact on recidivism of federal, rather than state, sentence length, the Commission's 2022 study, *Length of Incarceration and Recidivism*, suggests that a longer sentence results in a lower risk of recidivism.[6]

Option 3, which is based on the "time served" rather than the sentence imposed, poses serious workability concerns. Probation officers often have difficulty obtaining the records necessary to assess how much time was served on a particular sentence. Even when the records are available, calculating the precise time served can be complex where the defendant is serving sentences for multiple offenses or where revocation sentences are involved. Additionally, Option 3 could lead to litigation over what forms of custody count toward the time served. For example, would time at a pre-release center or halfway house count toward time served? Would federal courts need to look to state law to determine custody status?[7] Introducing a new concept of "time served" into the criminal history chapter would likely lead to substantial litigation over factual and legal questions, and there does not seem to be a significant countervailing policy benefit.

II. Firearms Offenses

The Committee appreciates the Commission's efforts in Part A of the proposed amendment to address the proliferation of machinegun conversion devices, which convert semi-automatic firearms into fully automatic machineguns. Given the seriousness of the dangers posed by machinegun converters, expanding specific offense characteristics to cover those devices (Option 2 of the proposed amendment) is consistent with imposing a sentence based on the seriousness of the offense.

Part B of the proposed amendment marks a reversal of the policy reflected in the guidelines since their adoption. Specifically, Part B would add a *mens rea* requirement to §2K2.1(b)(4), in contrast to the long-standing policy of applying enhancements for guns that are stolen or have obliterated serial numbers on a strict liability basis. The Commission, in explaining the enhancement for stolen guns when the guidelines were originally adopted, took note of "independent studies" showing that "stolen firearms are used disproportionately in the commission of crimes," 1987 Guidelines Manual §2K2.1 commentary, and then later increased the enhancement "to better reflect the seriousness of this conduct," *see, e.g.,* USSG App. C, Amd. 189 (Nov. 1, 1989). Although that background commentary has since been removed from the guidelines, a recent multi-year study from California shows that stolen guns are still much more likely to be used in crimes than legally acquired ones. *Sonia L. Robinson et al.*, Purchaser, firearm, and retailer characteristics associated with crime gun recovery: a longitudinal analysis of firearms sold in California from 1996 to 2021, 11 Injury Epidemiology, art. no. 8 at 6-7, 12 (2024) (finding that stolen guns are 8.93 times more likely to be used in a crime than if not stolen). For a sense of the overall scope of the stolen firearm issue, we note the ATF reports that over 1,000,000 firearms were reported stolen from 2017 to 2021. National Firearms Commerce

---

defendant-cohorts who received sentences of 60 months or longer generally resulted in a lower risk of recidivism. U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* at 19-20 (June 2022). The study is not directly on point, however, because it examines the *federal* sentence's impact on recidivism rather than that of prior state sentences, and the study was not limited to career offenders.

[6] U.S. Sent'g Comm'n, *Length of Incarceration and Recidivism* (June 2022).

[7] The Committee has the same concerns over the bracketed time-served language in Sub-options 2A and 2B.

and Trafficking Assessment: Crime Guns—Volume Two, Part V at 2, 12, 19, 23.

Moreover, the Committee is concerned that the addition of a proposed *mens rea* requirement to §2K2.1(b)(4) will result in additional litigation for no particular policy benefit. In the Issue for Comment, the Commission asked whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. The Committee believes this requirement would add significant challenges, unduly complicating application of (b)(4). Determining whether a firearm is stolen is a relatively straightforward proof issue. Determining whether someone knew a gun was stolen or was willfully blind or consciously avoided that knowledge is obviously a more complex undertaking. In the Committee's overall experience, the government does not offer specific evidence showing that the defendant knew that the firearm was stolen (even though that would be a fact in aggravation under § 3553(a)). This suggests that there would be very, very few times when the enhancement would apply. Given the prevalence and seriousness of gun crimes, and the need to combat the availability of stolen firearms, adding the knowledge requirement would diminish the seriousness of the offense.

With regard to adding a knowledge requirement for the modified serial number enhancement, it is likely true that the evidentiary challenges are not as difficult as those in the stolen firearm context. It may be easier to draw inferences one way or the other, because a person possessing a firearm had the opportunity to observe the results of any actual or attempted defacement of the serial number; or if the serial number is in a difficult-to-see location on the firearm, then the opposite inference can be drawn. But again, unless there is a basis to change course, the added knowledge requirement would seem to diminish the seriousness of the offense. In sum, the Committee opposes the addition of a knowledge requirement for these two specific offense characteristics.

III. Circuit Conflicts

Part A of the proposed Circuit Conflicts amendment seeks to address a circuit split over whether using a firearm to restrain movement, without physical measures, constitutes "physical restraint" under §2B3.1(b)(4)(B). Broadly, the Committee supports any resolution of this split, as the current divide results in disparate application of the guidelines. The Committee supports Option 1, which would place gunpoint restraint on equal footing with other physical measures of restraint, as a matter of fairness. On that point, the Committee's view is that a reasonable victim may find being restrained at gunpoint just as distressing—or even more so—than other forms of physical restraint.

Part B of the proposed Circuit Conflicts amendment seeks to address a circuit split over whether a traffic stop constitutes an "intervening arrest" for purposes of §4A1.2(a)(2). The Commission states that it intends to resolve that circuit conflict by excluding traffic stops from the definition of "intervening arrest." The amendment would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest … requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." The Committee is generally supportive of removing traffic stops from the definition of intervening arrest. At the same time, however, the Committee is concerned that the definition proposed in the amendment language could be read to exclude more serious charges

from intervening arrests. Even serious charges where the defendant appears by summons or otherwise by agreement, without ever being formally arrested, could be excluded from the proposed definition of intervening arrest. For example, the proposed definition could be read to exclude "waive and file" cases in federal court and similar procedures in many state courts like direct indictments and summons arraignments. To avoid excluding serious crimes, the Committee suggests adding to the definition: "An intervening arrest also includes appearance on a court-issued summons requiring a person to appear on a felony criminal charge, even if the person is not formally placed into police custody."

IV. Simplification of the Three-Step Process

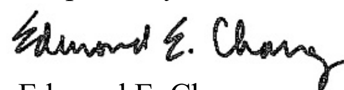
Overall, the Committee supports the proposed Simplification amendment, which would remove departures and policy statements relating to certain personal characteristics. It is true that some judges look to the departure step of the current framework to provide structure to the sentencing process. Formal departures require transparency due to the notice requirements and arguably enhance uniformity—at least at the departure stage—due to the detailed considerations in each departure provision. But this additional step no longer aligns with the sentencing practices of many courts. More importantly, the Section 3553(a) goals and factors control the ultimate sentence, so whatever happens at the departure stage can be negated by a sentencing judge's modification of (or disagreement with) the departure-based policy.

The current proposal addresses many of the concerns the Committee raised regarding the previous simplification proposal during the 2023-2024 cycle. [8] It is a much cleaner excision of departures from the guidelines. It also appropriately retains revised provisions for substantial assistance to authorities and early disposition programs, which are based on statutes and must be preserved in some form.[9]

Conclusion

The Committee appreciates the work of the Commission and the opportunity to comment on this set of proposed amendments for the 2024-25 amendment cycle. The Committee members look forward to working with the Commission to improve the overall effectiveness of the sentencing guidelines and the fair administration of justice. We remain available to assist in any way we can.

Respectfully submitted,



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

---

[8] Letter from Comm. on Crim. Law of the Jud. Conf. of the U.S. to U.S. Sent'g Comm'n (Feb. 22, 2024), available here.

[9] The Committee notes that proposed §5B1.1, comment (n. 3(B)), might have an extra clause at the end of the sentence. It appears that the clause "may be appropriate" should be stricken from the end of the sentence.