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February 3, 2025

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on 2025 Proposed Amendments

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's proposed 2025 amendments, which are enclosed with this letter:

Proposal 1: Career offender

Proposal 2: Firearms offenses

Proposal 3: Circuit conflicts

Proposal 4: Simplification of three-step process

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Scott A.C. Meisler, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders Comment on Career Offender

(Proposal 1)

February 3, 2025

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For years, the Department of Justice and some judges have called for the Sentencing Commission to abandon the "categorical approach" for assessing prior convictions under USSG §4B1.2. Federal Public and Community Defenders and other judges have defended this approach. And we have argued against any amendment that would expand the reach of the career-offender guideline—which has included every past proposal to eliminate the categorical approach.[1]

The Commission this year has proposed a set of amendments that addresses concerns raised by both sides of this debate. Defenders appreciate the proposal, which seems to reflect a recognition that the Commission cannot liberalize §4B1.2's methodology without also narrowing its reach. Advocates for eliminating the categorical approach often complain about anomalous cases in which violently committed crimes are deemed not-violent. But the data tell a different story: §4B1.2 captures too many individuals, not too few. Judges vary downward from career-offender sentencing ranges in most cases[2]—and in "crime of violence" cases as well as drug cases.[3]

The Commission's proposed "crime of violence" definition has serious drafting flaws that would dramatically expand the career-offender guideline. But we don't think these are intentional. Defenders offer this comment in the spirit of collaboration. We begin by briefly reiterating what we've said before: the categorical approach, for all its flaws, is a solution to problems that arise with other methodologies for assessing prior convictions. But we do not linger there. The bulk of this comment presupposes that the Commission intends to move away from the categorical approach. Our primary focus, then, is helping the Commission accomplish this goal without creating the worst sorts of problems the categorical approach was designed to solve.

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[1] As we have said time and again, the career-offender guideline is arguably the most problematic in the book: it calls for overly harsh sentences and exacerbates pernicious racial disparities. Even the DOJ has acknowledged that there are "legitimate concerns about severity levels" associated with the career-offender guideline, and that "[d]ecades of research show that the career offender guideline produces a clear racial disparity in application." DOJ Comments on the U.S. Sent'g Comm's 2022–23 Proposed Amendments, at 27 & n.42 (Feb. 27, 2023) ("DOJ 2023 Comment"); *see also id.* at 35.

[2] USSC, Individuals Sentenced under §4B1.1:Proposed Amendment Data Background, at 7–8 (2025) ("USSC Data Background").

[3] USSC, Report to the Congress: Career Offender Sentencing Enhancements, at 34 (2016) ("USSC 2016 Career Offender Report").

I. Eliminating the categorical approach while at the same time narrowing the substantive definitions of "controlled substance offense" and "crime of violence" is a promising path forward for §4B1.2, but great caution is needed.

The categorical approach, as Defenders remarked in 2023, is "like democracy in the famous Churchill quote–the worst form of government, except for all the others."[4] No question, the categorical approach can seem hyper-technical and counter-intuitive. But it was not devised to annoy judges and practitioners; it is the Supreme Court's *solution* to problems that arise when applying recidivist-based sentence enhancements that look to convictions arising out of 50+ distinct criminal jurisdictions.

As the Commission ponders whether, and how, to eliminate the categorical approach, it is essential to keep the categorical approach's benefits top of mind, to avoid creating more problems than you solve.

1. Statutory text. The Supreme Court for 35 years has held that, as a matter of plain text, where a statute refers to a prior *conviction*, "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[5] The career-offender directive, like the Armed Career Criminal Act, refers to convictions, in calling for sentences at or near the statutory maximum where a defendant "has been *convicted* of" certain categories of felonies and also "has previously been *convicted* of" two or more offenses falling within the same categories.[6]

2. Avoiding mini-trials and misuse of court documents. The Supreme Court has long warned that fact-finding about how prior offenses were committed could lead to mini-trials at sentencing, which present both

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[4] Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments—Career Offender, at 11 (PDF p. 175) (March 14, 2023) ("Defender Comments on 2023 Career Offender Proposal").

[5] *Descamps v. United States*, 570 U.S. 254, 267 (2013) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Both of these cases address the categorical approach as applied to the Armed Career Criminal Act (ACCA), 18 U.S.C § 924(e).

[6] 28 U.S.C. § 994(h) (emphasis added).

administrative and substantive problems.[7] The DOJ in 2019 told the Commission it would "welcome" wide-ranging evidentiary hearings,[8] but others do not share that attitude—and we aren't just talking about defense attorneys.[9] To some extent, limiting courts considering prior-conviction-related conduct to certain court documents ("*Shepard* documents") reduces the risk of mini-trials; but that comes with its own problems: the Supreme Court has repeatedly warned that such documents are "prone to error" as to facts that were "unnecessary" to the prior proceeding—that is, non-elemental facts.[10]

3. Respecting plea bargains. The categorical approach avoids undermining negotiated pleas, through which constitutional rights are waived. The Supreme Court in *Taylor* balked at the idea that the government could attempt to prove in federal court that a person committed burglary when he had previously pled guilty (pursuant to a plea agreement) "to a lesser, nonburglary offense."[11] "Even if the Government were able to prove those facts," said the Court, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary."[12] For better or worse, our nation's criminal justice system is a system of pleas, not trials; and under this system, "a later sentencing court" should not be able to "rewrite the parties' bargain."[13] Moreover, where we are examining state

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[7] *See Taylor*, 495 U.S. at 601.

[8] DOJ Comments on the U.S. Sent'g Comm's 2019 Proposed Amendment—Career Offender, at 4 (Feb. 19, 2019) ("DOJ 2019 Comment") (explaining that the DOJ "welcomes the opportunity to put on evidence not limited to a judicial record—subject to objection and challenge by the defense—to prove that the conduct giving rise to the prior conviction was, in fact, violent").

[9] *See, e.g.,* VAG Comments on the U.S. Sent'g Comm's 2019 Proposed Amendment—Career Offender, at 2 (Feb. 19, 2019) (supporting the Commission's proposal to limit assessments under a proposed conduct-based methodology to *Shepard* documents, in part because it "avoids the need for 'mini-trials' within a sentencing which can re-traumatize a victim of a prior offense").

[10] *Erlinger v. United States*, 602 U.S. 821, 841 (2024) (citing *Mathis, v. United States*, 579 U.S. 500, 512 (2016)).

[11] 495 U.S. at 601–02.

[12] *Id.*

[13] *Descamps*, 570 U.S. at 271.

offenses, reopening old plea bargains would contravene federalism principles, which counsel respect for state charging, plea, and adjudicative practices.

4. The Constitution. The Sixth Amendment mandates the categorical approach when a judge would find that a prior conviction elevates a mandatory sentencing range.[14] Post-*Booker*, of course, guideline ranges are not mandatory.[15] But this does not mean the Constitution gives judges carte blanche to find facts in the guideline context. Criminal defendants possess a due process right to be sentenced on accurate information.[16] And the Sixth Amendment still has relevance: some Supreme Court justices have noted that because a substantively unreasonable sentence is illegal and must be set aside, "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."[17]

5. Underinclusive by design. Finally, in recent years, the Supreme Court has explained that the categorical approach is "under-inclusive by design."[18] In the context of sentence enhancements that dramatically increase an individual's exposure to prison time, the categorical approach "*expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences."[19] Although potentially frustrating, the Supreme Court understands that this is better than the alternative—a methodology that is potentially *over*inclusive. In the career-offender context, the categorical approach has undoubtedly kept career-

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[14] *Mathis*, 579 U.S. at 511–12 ("[A sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

[15] *See United States v. Booker*, 543 U.S. 220 (2005).

[16] *See United States v. Tucker*, 404 U.S. 443, 447–49 (1972); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (same).

[17] *Jones v. United States*, 135 S. Ct. 8, 8 (Mem) (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

[18] *Borden v. United States*, 593 U.S. 420, 442 (2021).

[19] *Id.*

offender numbers lower than they would be otherwise.[20] Yet even now, data shows that the career-offender guideline is arguably over-, not under-inclusive: judges vary downward from the guideline in a great majority of cases.[21]

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This amendment cycle, the Commission has not proposed simply jettisoning the categorical approach, as it did in 2018 and 2022. Instead, it has paired eliminating the categorical approach with concrete steps to narrow §4B1.2's definitions: (1) excluding state drug priors from the definition of "controlled substance offense" and (2) including a prior-sentence-length limitation in the definitions. These changes have at least the potential to resolve the fifth concern above—over-inclusiveness—and thus could present a viable path forward.

However, the other problems the categorical approach was designed to solve loom large. And we speak only of a "potential" to resolve concerns about overinclusiveness because, as discussed below, two aspects of the "crime of violence" proposal would profoundly increase the number of individuals sentenced under the career-offender guideline. Also, the prior-sentence-length limitation is presented only as an "option." This is to say: the devil is in the details. If the Commission makes big changes that not only present new application challenges for prior cases that are assessed but also increase the number of cases getting assessed in the first place, and increase the number of career offenders, there will be immediate calls for further amendments. We genuinely hope the Commission can make smart reforms to §4B1.2 this year but we urge caution in crafting the details.

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[20] The Commission's recent data report illustrates this: since the Supreme Court first began tightening application of the categorical approach, with *Descamps* in 2013, the numbers have trended downward. USSC Data Background, *supra* note 2, at 4.

[21] *Id.* at 7. In FY2022, only 17.2% of sentences were within-range; 1% of sentences were above-range; and the overwhelming majority—82.2%—were below the applicable career-offender range.

II. The devil is in the details: comments on the Commission's proposed amendments section-by-section.

The career-offender proposal has four parts: (1) new "controlled substance offense" definition, which eliminates the need for the categorical approach; (2) new "crime of violence" definition, which eliminates the categorical approach by creating a novel conduct-based methodology;[22] (3) options for sentence-length-based limitations on these definitions; and (4) retention of the current, categorical definitions of CSO and COV[23] in non-career-offender guidelines where cross-references to §4B1.2 now appear. This comment addresses each part in turn. To summarize:

- The Commission's proposal to define "controlled substance offense" with reference only to federal offenses is an elegant solution to multiple problems. Indeed, if the Commission is unable to come to agreement this year on a "crime of violence" definition, which is a far more complex matter, it should enact this proposal on its own. We would expect to see immediate positive benefits.

- The proposed definition of "crime of violence" contains significant flaws, particularly regarding relevant conduct and the so-called elements clause. We view these flaws as potentially fatal to the proposal: they would undermine fairness, complicate administrability, and unduly inflate career-offender numbers. Fortunately, all our concerns can be resolved this amendment cycle.

- Adopting a sentence-length-based limitation for these definitions is essential to the Commission's package of amendments. We urge the Commission to adopt a limitation of at least 3 years' sentence-served, or even longer sentence-imposed.

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[22] This comment uses "conduct-based methodology" to refer to a methodology for analyzing prior convictions that takes into account non-elemental individual conduct—not to be confused with the conduct-based categorical approach described in *Shular v. United States*, 589 U.S. 154 (2020).

[23] For the most part, this comment spells out "controlled substance offense" and "crime of violence." But where the same phrase is used in close proximity or we think it otherwise reads better in shorthand, we use "CSO" or "COV."

- As for guidelines outside the career-offender context, we worry that creating multiple distinct definitions of "controlled substance offense" and "crime of violence" could derail the whole proposal. But we see no obstacle preventing the Commission from amending §4B1.2 (with Defenders' suggested revisions), while maintaining the current cross-references to §4B1.2.

After our discussion of these points, appended to this comment is a revised §4B1.2, based on that discussion, for the Commission's consideration.

A. "Controlled substance offense" definition: Eliminating state drug offenses is the right call.

The proposed definition of "controlled substance offense" is exactly the right kind of reform. It dramatically simplifies application of the career-offender guideline: by excluding state drug priors, it entirely eliminates the categorical approach as applied to "controlled substance offense," without creating new processes that would implicate the concerns discussed above. And it resolves an intractable circuit split.[24]

At the same time, it significantly narrows the definition of "controlled substance offense"—a category that the Commission has long understood is a problem. In a report published in 2004, the Commission raised doubts about the appropriateness of applying the career-offender guideline in drug cases, highlighting that:

- there was evidence that lengthy incapacitation of drug-traffickers "prevents little, if any, drug selling; the crime is simply committed by someone else";
- recidivism rates for these cases "are much lower than [for] other [individuals] who are assigned to criminal history category VI"; and
- application of the career-offender guideline in drug cases adversely impacts Black individuals, which is likely the result not of propensity but of "the relative ease of detecting and prosecuting

[24] *See Guerrant v. United States*, 142 S. Ct. 640 (2022) (statement of Sotomayor, J., along with Barrett, J., respecting the denial of certiorari).

> offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods. . . ."[25]

The Commission made similar findings in its *Report to Congress* in 2016.[26] While the career-offender directive does not permit the Commission to exclude drug offenses entirely,[27] it does permit the Commission to eliminate state drug offenses.[28] The proposed amendment makes the right call in contracting the CSO definition almost as much as possible.

There is no good policy justification for including *any* of the proposal's extra statutory sections (that aren't listed in § 994(h)); indeed, the career-offender guideline would function better if it could exclude drug offenses altogether. Three of the extra sections aren't even necessarily trafficking offenses; and they are relatively low-level offenses that were added to §4B1.2 commentary in response to litigation, not based on a need for longer sentences in those cases.[29] Another section, 21 U.S.C. § 960, is not a criminal offense; it's a sentencing provision that attaches to convictions that would mostly already be predicates.[30] There are the inchoate offenses: §§ 846 and 963 (as limited to trafficking offenses). We do not see the need even for these. But since Commissioners just added these offenses to §4B1.2 in 2023, we

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[25] USSC, Fifteen Years of Guidelines Sentencing 134 (2004).

[26] USSC 2016 Career Offender Report, *supra* note 3, at 27 ("[T]he Commission concludes that drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.").

[27] *See* 28 U.S.C. § 994(h).

[28] Defender Comments on 2023 Career Offender Proposal, *supra* note 3, at 22–25 (PDF p. 186–89).

[29] USSG App. C, Amend. 568 (Nov. 1, 1997) (adding 21 U.S.C. §§ 843(a)(6) (possession of drug-manufacturing paraphernalia), 843(b) (use of a communication facility to commit any felony offense under the Controlled Substances Act, which includes non-trafficking offenses), and 856 (maintaining a premises for various purposes, including mere storage or use of a controlled substance)).

[30] *See* § 960 (sentencing ranges for offenses under the Import-Export Act; also cross-referenced in the MDLEA, 46 U.S.C. § 70506). Section 960 provides ranges for a few offenses that aren't career-offender predicates, but Congress expressly excluded those from § 994(h)—*e.g.,* § 952 subsections other than (a).

anticipate they'll want to maintain them; thus, the revised §4B1.2 in our appendix includes §§ 846 and 963. Finally, there's 21 U.S.C. § 860, which is an aggravated federal trafficking offense; we anticipate the Commission will want to maintain this as well, so we include it in our appendix.

Even with the extra federal offenses, the "controlled substance offense" proposal is a huge improvement. It is elegant, easy to apply, and positively impactful. Indeed, this part of the proposal is what allows Defenders to seriously engage with the part creating a new conduct-based methodology for "crime of violence," although we know the categorical approach remains the best way to assess prior convictions. If the CSO definition were to retain state drug priors, also relying on a conduct-based methodology, "the practical difficulties and potential unfairness of a factual approach" would be even more "daunting,"[31] and we'd have to simply oppose the proposal altogether, as we've done in previous years.

B. "Crime of violence" definition: There are serious flaws in this part of the proposal but an administrable conduct-based COV definition is possible this amendment cycle.

The Commission's "crime of violence" proposal, in contrast with the "controlled substance offense" proposal, has significant problems.

These problems extend far beyond the anticipated increase in violence-pathway career offenders. After all, we fully recognize that the impact of any new conduct-based methodology on our clients would be negative: many individuals whose prior offenses would not come within the current §4B1.2 would be captured by the new approach. Even so, Defenders are not categorically opposing the adoption of *any* conduct-based methodology this year. If the Commission eliminates state drug priors from the CSO definition and adds a meaningful prior-sentence-length limitation to the definitions, Defenders could be open to the possibility of a conduct-based COV methodology—if it were carefully crafted to be fair and administrable.

Unfortunately, the current proposal's conduct-based methodology is neither, primarily because of two features: (1) it uses a federal-guidelines-style concept of "relevant conduct"—which encompasses uncharged,

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[31] *Taylor*, 495 U.S. at 601.

dismissed, and even acquitted conduct—to assess "convictions," and (2) it relies on language from the so-called elements clause that does not work in the non-elemental context.[32] As to the first feature, if "crime of violence" is defined in part with reference to uncharged, dismissed, and acquitted conduct, then *any* conviction could be a COV: theft, shoplifting, trespass, unlawful possession of a firearm, drug possession—depending on what allegations are found in old court documents, which would vary from case to case. Second, if the elements clause is used in a non-elemental way, without definitional changes, the COV definition would capture misdemeanor-type offenses like common-law battery—the very offense the Supreme Court interpreted the elements clause to exclude. These two features implicate the Supreme Court's warnings about a conduct-based approach in the most extreme way possible.[33]

Concerns about the categorical approach have centered on anomalous cases in which apparently violent offenses (*e.g.* robbery, murder) are deemed nonviolent.[34] What the DOJ has advocated for is, effectively, the methodology that most judges used pre-*Descamps*, when they reviewed *Shepard* documents to determine not only the elements of prior offenses but also the

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[32] We also have other, less significant concerns and suggestions that are discussed in Section II.B.3 *infra*.

[33] Far from being underinclusive by design, both features will be *over*-inclusive. Moreover, determining whether a "conviction" was violent based on relevant conduct disregards entirely the text of § 994(h) and §4B1.1; it guarantees mini-trials; it blows open plea agreements; and it calls for fact-finding that is constitutionally suspect and will draw immediate challenges.

[34] DOJ 2019 Comment, *supra* note 8, at 2 & n.9 (complaining about the "problem" of the categorical approach, with citation to *United States v. Edling*, 895 F.3d 1153, 1156–58 (9th Cir. 2018) (holding that Nevada robbery is not a crime of violence); *United States v. McCollum*, 885 F.3d 300, 307–09 (4th Cir. 2018) (same, but with federal conspiracy to commit murder in aid of racketeering); *United States v. Schneider*, 905 F.3d 1088 (8th Cir. 2018) (same, but with North Dakota aggravated assault); *United States v. Mayo*, 901 F.3d 218, 224–31 (3d Cir. 2018) (finding that a Pennsylvania aggravated assault conviction was not an ACCA "violent felony"); *see also McCollum*, 885 F.3d at 309–14 (Wilkinson, J., dissenting) (bemoaning that use of the categorical approach led to the outcome that it did in that case).

means by which individuals committed them.[35] No one is clamoring for courts to examine the records of nonviolent offenses for allegations of violence. And no one is asking the Commission to expand the substantive definition of what is violent. Indeed, the last time the Commission released data about sentences imposed relative to the career-offender guideline that distinguished between the different career-offender pathways, it reported that sentences were generally below-guidelines not only for drug- pathway cases but also for mixed- and violence-pathway cases.[36] So the "crime of violence" definition, considered as a whole, is, if anything, already overbroad.

The Commission's recent data report indicates that the career-offender proposal, if promulgated, would significantly decrease drug-pathway career offenders and increase mixed- and violence-pathway career offenders. It can be read to suggest that, on the whole, the number of career offenders will stay in the same ballpark (a little more or a little less, depending on the prior-sentence-length limitation).[37] But under the proposal as written, this data report wildly undercounts COVs: it predicts impact based on counting prior convictions for fundamentally violent offenses (*e.g.*, robbery, aggravated

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[35] DOJ 2023 Comment, *supra* note 1, at 29 ("The Department has long maintained that the best approach to identifying qualifying state predicate offenses under the Guidelines is to retain the current 'crime of violence' and 'controlled substance offense' definitions . . . but to allow courts to consider actual conduct if necessary to understand the specific basis of the conviction."). As for how courts used to conduct this assessment*, see, e.g., United States v. Fish*, 368 F.3d 1200, 1202–03 (9th Cir. 2004) ("In those cases where a state statute criminalizes both conduct that does and does not qualify as a crime of violence, we review the conviction using a modified categorical approach. Under this . . . approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute was facially over inclusive." (cleaned up)).

[36] USSC 2016 Career Offender Report, *supra* note 3, at 34. Indeed, courts varied below the guideline in mixed-pathway cases almost as dramatically as in the drug-only-pathway cases. *Id.* at 34 (29.6% versus 32.7%). Sentences in violence-only-pathway cases deviated from the guideline range less dramatically (at 9.9%), but still averaged *below* the guideline range.

[37] USSC 2025 Data Background, *supra* note 2, at 21–22. It is worth noting that the mixed-pathway cases in this impact analysis would be comprised almost entirely of instant federal drug cases where there are two prior crimes of violence (since we'd expect to see a very small number of federal drug priors (*see id.* at 15)).

assault, forcible sex offenses).[38] The two features enumerated above (relevant conduct, non-elemental elements clause) will reach convictions for offenses far beyond this list. Under the proposal as written, Defenders would expect to see the number of career offenders *explode*.

We take heart from the Commission's introductory language to its proposal, which explains that the proposed COV definition is merely "intended to correct some of the 'odd' and 'arbitrary' results that the categorical approach has produced relating to the 'crime of violence' definition."[39] And also from the Commission's recent data report: The fact that it looked to prior convictions for serious, fundamentally violent offenses tells us that these are the crimes the Commission intends to reach. So, the fact that the current proposal will reach a large but unpredictable number of convictions for minor, nonviolent offenses appears to be a "bug," not a feature. What follows is Defenders' critique of the "crime of violence" proposal as written, along with suggestions for debugging the proposal.

1. **The proposal's reliance on conduct untethered to the offense of conviction, based on the Guidelines' concept of "relevant conduct," would conflict with §4B1.1 and § 994(h) and it would be administratively unworkable.**

The Federal Sentencing Guidelines' concept of "relevant conduct"—which includes uncharged, dismissed, and acquitted conduct[40]—is, by now, second nature to federal practitioners and judges. That is not to say it's popular; to the contrary, it has been the subject of vociferous criticism since the earliest days of guideline sentencing.[41]

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[38] *See id.* at 18 (audio accompanying the report), 25. Defenders confirmed with Commission staff that the report was based on labels attached to prior convictions.

[39] USSC, Proposed Amendments to the Sentencing Guidelines 1 (Dec. 19, 2024) (citations omitted) ("USSC 2024–2025 Proposed Amendments").

[40] Acquitted conduct, of course, now gets an exception in USSG §1B1.3.

[41] *See* Fed. Defender Comments on the U.S. Sent'g Comm's Proposed 2024–2025 Priorities, at 9–14 (July 15, 2024) (describing this criticism and collecting sources); *see also, e.g.,* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rep. 355, 356 (1992) ("The single feature of the federal sentencing guidelines that state judges . . . and judicial administrators outside the United States find most astonishing is the Commission's policy decision to base

But even among federal practitioners and judges, there is nothing remotely familiar about assessing *prior convictions* with reference to uncharged, dismissed, or acquitted conduct. Chapter Four measures past criminal conduct solely with reference to *convictions*, for which sentences were imposed.[42] The career-offender guideline, §4B1.1, has always looked only to offenses of "conviction," and so has §4B1.2.[43] As far as Defenders know, no one has ever suggested doing otherwise—until now.

The proposed COV definition does not use the term "relevant conduct," but the broad language in the definition's introductory phrase ("offense . . . in which the defendant engaged in any of the following conduct") and the proposed subsection (b)(3) would have courts assess prior convictions based, in part, on conduct for which a person was never convicted.[44] This is unworkable for two reasons—the first legal, the second practical.

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guideline application on the defendant's 'relevant conduct,' including conduct alleged in charges that were dismissed or that resulted in acquittals or that were never filed. More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating.").

[42] *See* USSG §§4A1.1, 4A1.2. Courts can, of course, consider additional conduct that has been sufficiently proven in their wide-ranging § 3553(a) analysis, 18 U.S.C. § 3661, but they don't attempt to determine sentencing ranges based on prior-offense conduct beyond the offense of conviction.

[43] The original §4B1.2 called for a conduct-based methodology, but only as to the offense of conviction: the guideline enumerated several offenses (murder, manslaughter, kidnapping, aggravated assault, extortion, forcible sex offenses, arson, and robbery) and noted that other offenses were "covered only if the *conduct for which the defendant was specifically convicted* meets the above definition." USSG §4B1.2, comment. (n. 1) (1987) (emphasis added). After the Supreme Court adopted the categorical approach in *Taylor*, the Commission swapped-in the language that still appears in §4B1.2's commentary: "in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the *offense of conviction* (i.e., the conduct *of which the defendant was convicted*) is the focus of inquiry." §4B1.2, comment. (n. 2) (2024) (emphasis added).

[44] Subsection (b)(3) mirrors the language of USSG §1B1.3(a)(1)(A) except, oddly, in one respect. Section 1B1.3(a)(1)(A) covers "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of *the offense of conviction*, in preparation for that offense . . . ." (emphasis added). In the proposed §4B1.2(b)(3), the words "of conviction" are removed. Defenders can think of no reason why the

a. Reliance on "relevant conduct" would make the career-offender guideline legally incoherent.

The career-offender guideline is found at §4B1.1; the role of §4B1.2 is just to define §4B1.1's terms. And §4B1.1 is a sentence enhancement that's based entirely on offenses of conviction:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant *offense of conviction*; (2) the instant *offense of conviction* is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony *convictions* of either a crime of violence or a controlled substance offense.[45]

So, the question is not whether the individual engaged in conduct that can be categorized as a COV or CSO; it is solely whether he was *convicted of* a COV or CSO. This is consistent with everything else in Chapter Four. And it's also consistent with the career-offender directive, which is about *convictions*—indeed, given the directive, it is doubtful whether the Commission has the authority to base the career-offender guideline on free-floating conduct, rather than conduct for which the person was convicted.[46]

The Supreme Court has repeatedly emphasized that a person is only convicted of legal elements.[47] So, to some extent, *any* deviation from elements conflicts with the word "conviction." But there are two instances in federal law where the Supreme Court has found that a determination of what a person was convicted of calls for a conduct-based methodology, based on specific statutory context. In both instances, the only conduct relevant to the inquiry is that underlying the offense of conviction:

Commission would want the "crime of violence" analysis to be *even broader* than the already problematic §1B1.3(a)(1)(A).

[45] Emphasis added.

[46] *See* 28 U.S.C. § 994(h).

[47] *See, e.g., Mathis,* 579 U.S. at 511–12.

- **Misdemeanor crime of domestic violence.** In *United States v. Hayes*,[48] the Supreme Court held that for the offense of possessing a firearm or ammunition after having been convicted of a misdemeanor crime of domestic violence (MCDV),[49] the definition of MCDV has an actual-conduct-based component: whether the offense involved individuals with a specified domestic relationship. While *Hayes* requires this conduct-related question to be put to a jury, the key point here is that this inquiry pertains only to the offense of conviction.[50] This approach aligns with the language of § 922(g)(9), which requires that a person have been "convicted" of a MCDV. Section 4B1.1, of course, similarly requires that a person have been "convicted" of a "crime of violence."

- **Fraud in which the loss exceeded $10,000.** In *Nijhawan v. Holder*, the Supreme Court held in the immigration context—where the categorical approach is generally used—that the definition of "aggravated felony" involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000" calls for an actual-conduct-based assessment.[51] The purpose of this endeavor is to determine whether the individual was "convicted" of an aggravated felony.[52] So, the Court clarified that "the loss must be tied to the specific counts covered by the conviction," with citation to a circuit opinion expressly rejecting the idea of using a Guidelines-style "relevant conduct" assessment in this context.[53] The Supreme Court further

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[48] 555 U.S. 415 (2009).

[49] 18 U.S.C. § 922(g)(9).

[50] 555 U.S. at 426 ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim *of the predicate offense* was the defendant's current or former spouse or was related to the defendant in another specified way" (emphasis added)).

[51] 557 U.S. 29, 38 (2009).

[52] *Id.* at 32. This same determination can be relevant in the criminal context: the illegal-reentry statute has a sentence enhancement for persons whose removal was subsequent to a conviction for an "aggravated felony." *See* 8 U.S.C. § 1326(b)(2).

[53] *Id.* at 42 (cleaned up). The citation here was to a Seventh Circuit case in which the government had tried to prove loss exceeding $10,000 with reference to "total loss from the offense of conviction *and relevant conduct*." *Knutsen v. Gonzales*,

> clarified this proposition by quoting the government: the "sole purpose of the aggravated felony inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself."[54] The same is true of the career-offender inquiry.

It would be incoherent for §4B1.2 to define an "offense of conviction" with reference to conduct for which a person was not convicted. This would be akin to a puzzle instructing users to find all the triangles in a picture, then defining "triangle" to mean anything "related to" a triangle. This puzzle would make no sense. And in the context of a sentence enhancement that results in some of the most severe penalties imposed under the guidelines, such internal inconsistency and incoherence would inevitably lead to significant litigation over its legality.

b. Reliance on "relevant conduct" in this context would be an administrative nightmare.

If the determination of whether a prior conviction was for a "crime of violence" accounted for conduct beyond the offense of conviction, then every single conviction could be a career-offender predicate. And whether a judge might determine that any given conviction is a predicate would be unpredictable—making it impossible to assess the potential impact of this amendment and, if the proposal were adopted, making it impossible to advise our clients. Indeed, because of the many unknowns, the data the Commission recently released is not useful in assessing the impact of the proposal as written.[55]

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429 F.3d 733, 740 (7th Cir. 2005) (emphasis in original). The Seventh Circuit explained that although it was true that the individual had stipulated to loss exceeding $20,000 (apparently for purposes of restitution), this stipulation was "in a separate paragraph from the one in which Knutsen identified the conduct and losses to which he was pleading guilty." *Id.* Thus, the court rejected the government's argument, on the ground that "[t]o adopt the government's approach would divorce the $10,000 loss requirement from the conviction requirement." *Id.*

[54] *Id.*

[55] Defenders do not think there *could* be any way to assess how the current proposal would impact the reach of the career-offender guideline, given that it is essentially arbitrary whether a *Shepard* document related to a conviction for a nonviolent offense might reference some sort of violent act.

Even figuring out whether an *instant* federal offense is a COV could prove challenging: In a fraud case, if there's an allegation in the discovery that our client at one point threatened a co-defendant over fraud proceeds, would *fraud* be a career-offender predicate? With state priors, where we're dealing with thousands of distinct offenses arising from 50+ justice systems, the endeavor becomes overwhelming. We would expect litigation in career-offender cases to increase exponentially. Few of our clients would accept the notion that their federal sentence could double or triple because of, say, a robbery that a state prosecutor charged but then dismissed years ago, as consideration for a plea to theft and a waiver of constitutional rights.[56] Fewer still would accept such a sentence enhancement based on alleged conduct that didn't even merit a charge, or that was the subject of an acquittal.

The fact that the current proposal limits the government (in making its prima facie case) to *Shepard* documents does not solve this problem. Rather, it creates a new one: in addition to case-to-case disparities based on application difficulties, we would also see jurisdiction-to-jurisdiction disparities based on differences in state practices. In some states, charging documents incorporate full police reports. In others, they simply state how an individual's conduct violated each offense element. Myriad jurisdictions fall somewhere in the middle. And it is no answer to say (as the government might) that courts should be able to rely on other documents, like police reports. That might equalize jurisdictions, but by making the entire system fundamentally unfair and guaranteeing mini-trials.

Finally, to answer a question in the Commission's second issue for comment, it would not solve any of these problems if the Commission limited the relevant-conduct assessment to "acts and omissions that occurred 'during the commission of the offense of conviction.'" The concern here is not with timing. If an individual was originally charged with robbery but pled to theft, an attempt to reopen and prove the old robbery allegation is not any less offensive to the career-offender scheme because the government would be

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[56] This evokes *Taylor*'s reference to a person who was charged with burglary but pled guilty to a "lesser, nonburglary offense [as] the result of a plea bargain." 495 U.S. at 601–02. The Supreme Court said "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* This would seem *especially* unfair to the person who was a party to that agreement.

seeking to prove a robbery that was theoretically contemporaneous with the crime of conviction. Regardless of timing, assessing an "offense of conviction" with reference to conduct that the offense of conviction was not based on is legally incoherent, and it would make the career-offender guideline far less predictable and far more burdensome.

c. Relevant conduct is easy to excise from the Commission's proposal.

There is no reason for the Commission to adopt this novel method for assessing prior convictions. First, no one has asked for it. Again, the DOJ and various judges have essentially asked for the system that was used pre-*Descamps*, when judges determined whether an offense was a "crime of violence" based not only on legal elements but also on the specific means of committing an element, as described in court documents.[57] Pre-*Descamps*, judges would have called this the "modified categorical approach"; now we understand it was a conduct-based methodology.

Second, assessing prior convictions with reference to "relevant conduct" would not help federal judges get any closer to some fundamental truth about what *really happened*. Whether old records memorialize a factual allegation that never ripened into a charge is arbitrary. What we do know about such an allegation is that prosecutors deemed it unworthy of pursuing. With charges that were dismissed, all we know for certain is that the individual waived constitutional rights and the prosecutor decided the agreed-upon outcome was appropriate. With an acquittal, the idea of reopening the matter is downright offensive. Perhaps we could have mini-trials in every case. But even then, witnesses will be unavailable, memories will be stale, and evidence—at least, defense evidence, that wouldn't show up in police reports—will be lost. And ultimately, the differences among cases and jurisdictions regarding record retention and available evidence would result in unjust and unwarranted disparities.

The only rational conduct-based methodology for assessing prior convictions is the one adopted in *Hayes* and *Nijhawan*, which looks only to

[57] *See supra* note 36.

conduct underlying the offense of conviction. As it turns out, this is easily done, using language the Commission already has at its fingertips.

- In commentary to this year's proposal, the Commission explains that its new conduct-based methodology "allows a court to consider the conduct of the defendant underlying the offense *of conviction*."[58]
- And the Commission's career-offender proposal from 2018 explained: "In determining whether an offense is a 'crime of violence,' the focus of inquiry is on the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.[59]

The revised §4B1.2 in our appendix uses language pulled from these sources, which have been subject to public comment. Together, they clearly describe a non-categorical, conduct-based methodology, but one that, like §4B1.1 and the directive it's based on, looks exclusively to the offense of conviction.

2. Use of the elements clause in a non-elemental way would sweep in huge numbers of minor, misdemeanor-type offenses.

The so-called elements clause, which refers to an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," is central to many sentence enhancements and has been in the career-offender guideline from the start.[60] The Commission's proposal to use this clause but delete its reference to elements, and to define "physical force" as "force capable of causing physical pain or injury to another person," would expand §4B1.2's reach to an indefinite degree. This problem is distinct from the relevant-conduct problem and would not be resolved by tying the COV inquiry to the offense of conviction.

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[58] USSC 2024–2025 Proposed Amendments, *supra* note 39, at 12. We were surprised to see this in the commentary, since it seems to conflict with the proposed guideline text. But it works well when moved into the text.

[59] USSC, Proposed Amendments to the Sentencing Guidelines 26 (Dec. 20, 2018). The Commission lost a quorum before it could vote on this proposal.

[60] *See* §4B1.2(1) (1987) (simply cross-referencing 18 U.S.C. § 16's definition of "crime of violence," which contains an elements clause).

In *Curtis Johnson v. United States*, the Supreme Court examined the elements clause in the ACCA "violent felony" context; it explained that "physical force" "means *violent force*—that is, force capable of causing physical pain or injury to another person."[61] The Court referred to this as a "substantial degree of force," and reinforced its interpretation with dictionary definitions for both "violent" ("extreme," "furious," "severe," "vehement," and "strong") and "force" ("strength," "energy," "active power," and "vigor").[62] The Court quoted with approval Black's definition of "violent felony" as "'a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.'"[63]

Johnson's specific holding was that the elements clause does not encompass "common-law battery," an offense that may be committed by "even the slightest offensive touching."[64] Common-law battery can be committed by "[t]he most nominal contact, such as a tap on the shoulder without consent."[65] Historically, and usually even now, it is classified as a misdemeanor, but in many states it can be charged as a felony—as *Johnson*'s facts illustrate.[66] The Court said it would be a "comical misfit" for a misdemeanor-type offense like common-law battery to be deemed a "violent felony."[67]

Nine years later, the Supreme Court addressed the elements clause in the context of a robbery statute that did not have as an element a minimum level of force—any force sufficient to compel a person to part with their

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[61] 559 U.S. 133, 140 (2010).

[62] *Id.* at 139–40.

[63] *Id.* at 140–41. The Court also cited with approval a Seventh Circuit discussion of § 16's elements clause: "Section 16(a) refers to the 'use of physical force.' Every battery entails a touch, and it is impossible to touch someone without applying *some* force, if only a smidgeon. Does it follow that every battery comes within § 16(a)? No, it does not. . . . [Courts must] insist that the force be violent in nature—the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003).

[64] 559 U.S. at 139, 145.

[65] *Id.* at 138 (cleaned up).

[66] *Id.* at 136, 141.

[67] *Id.* at 145.

property would suffice.[68] The Court in *Stokeling* took pains not to "exclud[e] the quintessential ACCA-predicate crime of robbery."[69] It reaffirmed *Johnson* and its holding that common-law battery is not a "violent felony" but found that robbery-level force (regardless how minimal) is qualitatively more violent than common-law-battery-level force and thus the robbery offense at issue was a "violent felony."[70] The upshot is that *Johnson* still provides the general standard, although with a *Stokeling*-based asterisk for robberies.[71]

The Commission has proposed maintaining the elements clause, but without any reference to elements. And having done so, it makes sense that the Commission has proposed using *Johnson*'s definition of physical force: "force capable of causing physical pain or injury to another person." At first glance, Defenders assumed this would be unobjectionable, although we were prepared to ask the Commission not to delete the first word of this line from *Johnson*: "*violent*." After all, the career-offender guideline, like ACCA, is focused on "felon[ies]" involving "violence."[72] When Senator Kennedy first introduced the concept that would ultimately become the career-offender

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[68] *Stokeling v. United States*, 586 U.S. 73 (2019).

[69] *Id.* at 79–82.

[70] *Id.* at 82–83.

[71] *See id.* at 82 (discussing how the "conduct that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim"); *see also Borden*, 593 U.S. at 438 (2021) (reaffirming that *Johnson* required "a substantial degree of force").

[72] §4B1.1; *see also* 28 U.S.C. § 994(h) (same). It is noteworthy that although the career-offender guideline defines as a felony any conviction for an offense punishable by "imprisonment for a term exceeding one year," evidence indicates that when Congress used the word "felony" in § 994(h), it meant an offense designated as a "felony" by the convicting jurisdiction. When Congress enacted § 994(h) in 1984, the term "felony" was defined as follows: "The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." *See* 21 U.S.C. §§ 802(13), 951(b). That definition was enacted as part of the Drug Abuse Prevention and Control Act of 1970 and remains today. Incidentally, the criminal firearms code defines "crime punishable by imprisonment for a term exceeding one year" to *not* include "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B) (emphasis added). This is all to say that §4B1.2 takes a maximalist view of what is a felony, and thus lacks guardrails that could help mitigate problems created by definitional errors that capture misdemeanor-type offenses.

guideline, he talked about the "relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets"—that is, those "who stab, shoot, mug, and rob."[73]

But upon further reflection, the elements clause as defined in *Johnson* does not work as intended when its reference to elements is deleted. Here is the problem: If we are looking only at elements, then "capable of causing physical pain or injury" is a meaningful limitation. The only offenses that would have *as an element* physical force that's capable of causing physical pain or injury to another would be aggravated assaults and offenses more serious than that (*e.g.,* murder, rape). But if we are looking at conduct, this is no limitation at all: *any* contact with another person is *capable of* causing pain or injury—including *Johnson*'s reference to a "tap on the shoulder."[74] The word "capable" does not require any particular degree of force or likelihood of injury.

The potential impact of this is difficult to predict. Might some judges rule that state drug-trafficking offenses are "capable of causing physical pain or injury to another person"? What about misdemeanor-type offenses like pickpocketing, prostitution, resisting arrest, or illegal tattooing? Under a conduct-based definition using *Johnson*'s "capable of" language, essentially any crime involving human contact could be deemed a crime of violence.[75] One thing appears certain: this definition would sweep in essentially all misdemeanor-level assaults and batteries when they are subject to sentences of more than a year—which happens frequently but arbitrarily, based on the state of conviction.[76] That is, if the Commission adopts *Johnson*'s definition of

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[73] 128 Cong. Rec. 26512, 26517–18 (Sept. 30, 1982).

[74] 559 U.S. at 138.

[75] After all, "it is impossible to touch someone without applying *some* force, if only a smidgeon." *Flores*, 350 F.3d at 672.

[76] At least six states have "misdemeanors" that are *generally* subject to more than a year in prison. Nat'l Conf. of State Legislatures (NCSL), *Misdemeanor Justice: Statutory Guidance for Sentencing* (July 16, 2019). In Pennsylvania, for example, misdemeanors can carry maximum sentences of two or five years, 18 Pa. C.S. § 1104, including simple assault, 18 Pa. C.S. § 2701. Many other states have recidivism provisions that make misdemeanors subject to felony-level sentences. NCSL, *supra*. In Wisconsin, for instance, any misdemeanor comes with a two-year maximum penalty if the person was convicted of any three misdemeanors, or one

"physical force," but related to conduct rather than elements, it would capture precisely the offense that *Johnson* held would be a "comical misfit" for a sentence enhancement meant to cover violent felonies.[77]

This is no minor concern: Commission data from the most recent five-year period reveals that "simple assault" is one of the most common prior-conviction events; it appears nearly twice as frequently as aggravated assault, which is the most common of sort of violent offenses that the Commission appears to actually *intend* to trigger a career-offender sentence (aggravated assault, robbery, etc.):[78]

Offense type	Total prior convictions
Traffic	346,949
Drug possession	214,029
Larceny/motor vehicle theft	202,691
Public order	194,356
Drug trafficking	125,548
DUI	99,182
Simple assault	***90,105***
Immigration	88,843
Fraud	84,047
Other property	84,047
Weapons	80,298
Burglary	71,386
Court violations	55,272
Aggravated assault	47,286
All other offenses	43,389
Robbery	36,567
Forcible sex offense	15,006
Other violent offense	14,243

felony, within a five-year period. Wis. Stat. § 939.62. This provision applies even if all three previous misdemeanor convictions were from the same proceeding. *State v. Wittrock*, 350 N.W.2d 647 (Wis. 1984); *see also generally* Bruce T. Cunningham, Jr., *Misdemeanors 'Kicked Up' to Felonies*, 22 Fed. Sent. R. 111 (2009).

[77] 559 U.S. at 145.

[78] The data used for this analysis were extracted from the Commission's publicly available "Criminal History of Sentenced Individuals" datafiles spanning fiscal years 2019 to 2023. U.S. Sent'g Comm, Commission Datafiles.

This is consistent with the Commission's recidivism reports, which often find that assault is among the most common rearrest events.[79] Thus, even if the Commission were to fix the relevant-conduct problem, Defenders would expect this elements-clause problem, alone, to spark a massive increase in career-offender sentences.

Defenders have thought hard about how to fix this problem while also addressing the Commission's concerns about violently committed crimes being deemed not-violent. The solution that makes the most sense is to keep the elements clause as the *elements* clause—as it currently reads; and to set up a new conduct-based methodology for enumerated offenses only, where it's less likely to cause unintended mischief.[80] This is the option we illustrate in our appendix. We expect other stakeholders to like it: judges could rely on years of elements-clause caselaw, which will cover many prior offenses without needing to examine conduct at all. But where the elements clause does not capture an offense the Commission has deemed violent—that is, an

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[79] *See, e.g.*, USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, at 10 (2017) ("Regardless of whether offenders had only one-point sentences or more serious two-point, or three-point sentences in their criminal history, assault was the most common offense of rearrest."); USSC, *Recidivism and Federal Bureau of Prisons Programs*, at 20 (2022) ("The most common post-release recidivism event for all three groups was assault."); *id.* at 38 (same, with a study of individuals as related to a different set of BOP programming). Recidivism reports that separate out simple assault indicate that it's this misdemeanor-level offense that is driving the data. *See* USSC, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, at 7 (2018) (simple assault was the third most common recidivism event for the study group, after (1) court/supervision violation and (2) drug-trafficking); USSC, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, at 36 (Table C-1 (2020) (simple assault was the fourth most common recidivism event, after (1) court/supervision violation, (2) drug-trafficking, and (3) drug-possession).

[80] Defenders would prefer that the Commission eliminate the elements clause altogether; the career-offender guideline would be far simpler and more predictable without any conceptual definitions. It is our understanding, though, that the Commission is focused only on methodology here, such that it would not consider eliminating substantive categories—at least, not this year.

enumerated offense—the judge could turn to conduct in order to avoid what the Commission has called "odd and arbitrary results."[81]

Another solution would be to craft a new definition of "physical force" that would function well under a conduct-based methodology—perhaps, "violent force that is intended to cause physical pain or injury to another." This would allow the Commission to eliminate the categorical approach entirely, but it would mean defining identical words differently than the Supreme Court. And we don't see this option as plausible this amendment cycle: if the Commission intends to devise a new definition of "physical force," it would be essential for all stakeholders to get the opportunity to comment on specific language, to tease out unintended consequences.

3. Other matters: The Commission should revisit its definition of arson and retain §4B1.2's existing structure as much as possible.

The proposal's reliance on relevant conduct and its use of the elements clause in a non-elemental way are, by far, Defenders' most serious concerns with the Commission's proposed "crime of violence" definition. Each of these features would make the career-offender guideline less predictable and less administrable; increase disparities based largely, but not exclusively, on differences in state practices; and dramatically increase the number of career offenders, even with state drug priors excluded from the CSO definition.

But we do have two additional concerns. Defenders' first concern is substantive: the proposed definition of arson is too broad. Our second concern is stylistic: the proposed structure for §4B1.2(b) is hard to follow; we suggest retaining the current structure (including labels) as much as possible.

Arson. The Commission's proposal retains arson as an enumerated offense, but with a new definition: "The willful or malicious setting of fire to or the burning of property." The problem is that under a conduct-based methodology—and without even an "arson" label—this definition will be interpreted to cover numerous convictions that surely the Commission would not have intended, like unlicensed trash-burning, disorderly-conduct offenses

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[81] USSC Proposed 2024–2025 Amendments, *supra* note 39, at 2 (quotation marks omitted).

involving burning small personal items, and drug-possession offenses involving drugs that are smoked.

Even if the Commission were defining "generic" arson for the categorical approach, we would have concerns. The Commission's definition is broader than even the low-level arson statutes we're familiar with, which relate to specified types of property, or only to property belonging to another, or require risk-creation or at least damage.[82] The Commission's definition certainly doesn't look like the Model Penal Code, which defines arson as "causing a fire or explosion with 'the purpose of,' *e.g.,* 'destroying a building . . . of another' or 'damaging any property . . . to collect insurance.'"[83]

But we aren't talking about the categorical approach, where a court might look for a "generic" definition broad enough to capture the legal elements of most state statutes proscribing arson.[84] The Commission isn't describing elements; it's describing *conduct* that will be labeled a "crime of violence." And in this context, Defenders suggest: "the willful or malicious setting of fire to or burning of any building or inhabited structure."[85] This

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[82] *See, e.g., United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015) (Ohio arson statute requiring "a substantial risk of physical harm to property without the victim's consent"); *United States v. Misleveck*, 735 F.3d 983, 983 (7th Cir. 2013) (Wisconsin statute requiring "damage[] [to] any property of another without the person's consent"); *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (Texas statute requiring an intent to destroy or damage" certain specified property if at least one of several aggravators is present); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) (Missouri statute that covers starting a fire that damages property "of another"); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005) (Washington statute that covers maliciously causing a fire that "damages" property); *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (Vermont statute (Vt. Stat. Ann. tit. 13, § 504) that encompasses burning property, but only if it belongs to "another person" and has a minimum value); *see also* 18 U.S.C. § 844(i) (lowest level federal arson statute, requiring intent to "damage or destroy" property (along with interstate-commerce element)).

[83] Model Penal Code § 220.1(1) (1985), as quoted in *Begay v. United States*, 553 U.S. 137, 145 (2008), which was abrogated by *Johnson v. United States*, 576 U.S. 591 (2015).

[84] *See Quarles v. United States*, 587 U.S. 645, 653–54 (2019) (discussing "generic burglary").

[85] This is the description we include in our appendix. As noted above, in footnote 80, we understand the Commission to be focused on creating a workable non-

might be narrower than "generic" arson but it's a common enough means of committing arson and it's appropriate for a conduct-based methodology focused on violence; it won't sweep in trash-burning and other plainly nonviolent conduct. Arson of a building or inhabited structure is the sort of case that's most likely to involve a risk of injury or death.[86] And having a concrete definition, rather than one in which a federal judge assesses risk, would keep things simple and predictable.

Structure. Defenders strongly recommend keeping the basic structure for "crime of violence"—indeed, for §4B1.2 generally—as much as possible, for clarity and to make the transition away from the categorical approach easier for judges, probation officers, and practitioners. We will not use space here to explain what precisely we mean, since Commissioners can review our appendix to see for yourselves.

Defenders have been using §4B1.2 for decades and we review it frequently, as we assess new cases and potential arguments. We presume that judges and prosecutors do the same; probation officers no doubt review the guideline even more frequently than the rest of us. Despite this familiarity—or perhaps because of it—as the Commission's proposal is structured, it took us significant time to parse through the amendments. It was hard to distinguish between what would change and what would stay the same, and how each change might affect the entire scheme.

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categorical methodology, not revisiting substantive categories of offenses. But if the Commission were willing to entertain the idea, Defenders' topline recommendation would be to delete §4B1.2's reference to arson altogether. In 2016, the Commission deleted §4B1.2's reference to burglary upon finding that burglary is rarely committed violently. USSG App. C, Amend. 798 (Aug. 1, 2016). As far as Defenders know, the Commission has never asked how often arson is committed violently. If the Commission were to ask this question, we feel confident it would remove "arson" from the COV definition. For that matter, if the Commission were to inquire about mere unlawful possession of a "firearm described in 26 U.S.C. § 5845(a)" or "explosive material," we suspect it would delete those too.

[86] *See Misleveck*, 735 F.3d at 984 (ultimately defining generic arson broadly, to capture most arson statutes, but also musing that "[i]ntentionally setting fire to a building is likely to do extensive damage, and, if the building is occupied, to endanger life," while setting fire to personal property is usually far less serious).

Also, we found the lack of labels on what have always been the definitions of forcible sex offense, robbery, and extortion, along with the new definition of arson, extremely confusing. Indeed, in the absence of labels, we spent no small amount of time trying to discern if the Commission was trying to repurpose these definitions for some other use before going back to the proposal's introduction, which refers to "conduct that would constitute certain specific offenses that currently qualify as a 'crime of violence,' such as forcible sex offenses, robbery, arson, and extortion."[87] But we still can't be sure how unlabeled descriptions of conduct would be interpreted by each of the many hundreds of district judges in courts around the country.

The Commission is considering big changes here, and in preparing to apply whatever ultimately gets promulgated, it would be helpful to all stakeholders if §4B1.2 mostly stays the same—except where it's changing.

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Defenders are confident the Commission can promulgate a reasonable, debugged "crime of violence" definition this amendment cycle. If, however, Commissioners decide to take additional time to work on the COV definition, we ask that the Commission not delay promulgating a new CSO definition that removes state drug priors. This would have immediate benefits: in addition to simplifying §4B1.2, resolving a circuit split, and eliminating drug-pathway cases from the career offender guideline (which would result in sentences closer to the guideline range both for the §4B1.1 range and the §2D1.1 range), it would also give the Commission real-world data to consider as it assesses potential COV definitions.

[87] USSC Proposed 2024–2025 Amendments, *supra* note 39, at 3.

C. Sentence-length-based limitations: The career-offender definitions should include a limitation of at least three years, sentence served.

The Commission's proposal to create a conduct-based methodology for the "crime of violence" definition is a huge change. Adding a meaningful sentence-length-based limitation to at least the COV definition—ideally, to both definitions—will ensure that this huge change makes for a guideline that is administrable, won't inadvertently capture minor offenses that shouldn't trigger near-maximum federal prison sentences, and won't create new disparities. Defenders advocate for Option 3A: at least three years' sentence served. If Commissioners decide to go with Option 2 (time *imposed*), the minimum prior sentence length should go up, to five years. If Commissioners decide not to adopt a prior-sentence-length based limitation for both definitions, it should at a minimum promulgate our requested limitation for the new, untested COV definition.

Administrability. Even the best possible conduct-based methodology for assessing whether an offense is a "crime of violence" will pose new challenges in application. All we know right now is that there will be legal fights and evidentiary hearings; we don't actually know how frequently these will arise or how difficult they will be to resolve.[88] What is clear, though, is that a significant prior-sentence-length requirement in at least the COV definition would quiet concerns about administrability by reducing at the front end the number of prior convictions we need to assess.[89] And in a non-

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[88] In thinking through the career-offender proposal, Former Secretary of Defense Donald Rumsfeld's famous quote related to Iraq comes to mind: "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." Michiko Kakutani, *Rumsfeld's Defense of Known Decisions*, N.Y. Times, Feb. 3, 2011 (referring to this 2002 quote).

[89] Defenders saw this sort of benefit after the Commission amended USSG §2L1.2 in 2016, changing a sentence enhancement based on prior conviction category to one based on prior sentence. USSG App. C, Amend. 802 (Nov. 1, 2016). Defenders would prefer that §2L1.2 not base offense levels on prior convictions at all, as those are most appropriately addressed through Chapter Four. But this single change made the guideline far more predictable and simple, as the Commission reported in

arbitrary, definitional way: the sentence someone received in a prior case is our best indication of how serious—that is, how *violent*—the offense was.

Minor offenses. Defenders' are extremely concerned about the "crime of violence" definition inadvertently capturing minor, misdemeanor-type offenses. The career-offender guideline is supposed to capture a "relatively small number of repeat offenders [who] are responsible for the bulk of the violent crime on our streets."[90] It is not meant to capture someone with a couple of disorderly-conduct convictions that would be misdemeanors in most jurisdictions. Nor is it meant to capture someone with a prior that looks bad on paper (*e.g.*, robbery) but resulted in only a short jail sentence because once it became clear the state couldn't prove guilt—maybe because of unreliable witnesses—the prosecutor made an offer for "time served."

This comment has alerted the Commission to the parts of the definition that seem certain to inadvertently capture minor offenses, to varying degrees (relevant conduct, elements clause, arson). But we don't know what we haven't noticed yet.[91] And in any event, with *any* system for assessing prior convictions, there will be anomalies. Under the categorical approach, anomalies have mostly favored our clients; under a conduct-based approach, they will almost certainly favor imprisonment. A meaningful prior-sentence-based limitation is the best way to avoid capturing minor, fundamentally nonviolent offenses.[92]

Unwarranted disparities. Eliminating state drug priors from the CSO definition while extending the reach of the COV definition does not resolve the career-offender guideline's pernicious racial-disparity problem; it does change it. The recent data report shows that if the Commission eliminates state drug priors from the CSO definition and alters the COV definition so it captures the offenses that the Commission deems fundamentally violent, the percentage of career offenders who are Black

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2022. USSC, Federal Sentencing of Illegal Reentry: The Impact of the 2016 Guideline Amendment, at 19 tbl. 1 & 22 (2022).

[90] 128 Cong. Rec. 26512, 26518 (daily ed. Sept. 30, 1982) (statement of Sen. Kennedy).

[91] Again Donald Rumsfeld's quote comes to mind. *See supra*, note 88.

[92] Weeding out minor offenses should also help get career-offender sentences closer to applicable guideline ranges.

finally goes down somewhat, to just below 50%, but the percentage of career offenders identified as Hispanic or "other" goes up.[93]

This does not surprise us: Hispanics are more likely to have *federal* drug priors because of how frequently they are charged near the Mexican border; and the Commission's "other" category includes Native Americans who, on reservations, are under the federal government's general felony jurisdiction. For Native Americans in particular, there will be many convictions for both drug offenses and seemingly violent offenses that, if they had been prosecuted by the state, might have been misdemeanors. But they can't be charged by the state. What's more, federal sentences tend to be longer than state sentences, so a prior-sentence-length limitation of around one year would not weed out relatively minor offenses that might have been misdemeanors if the individual involved had not been Native American.

Another source of disparities arises between individuals with prior convictions in a jurisdiction without parole and individuals with priors in states that have parole. This is why our topline request is for a requirement of three years' sentence *served*. In a state with parole, a three-year sentence might translate as a determination that the offense warrants only 18 months of incarceration. In a jurisdiction without parole, a three-year sentence is a three-year sentence. These are very different assessments of seriousness and they shouldn't be treated the same. By adopting a sentence-served-based limitation, the Commission would eliminate unwarranted disparities that would arise from a time-imposed (or solely points-based) limitation.

One more source of disparities underlying Defenders' request for a threshold requirement of three years' sentence served is related to "time served" sentences. Criminal defense attorneys know that many clients stuck in pretrial detention—who tend to be indigent—will plead guilty to nearly *any* offense if it comes with a "time served" sentence; the ability to be free and among loved ones is often more important than proving one's innocence or exercising constitutional rights.[94] Thus, the Commission should choose a

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[93] USSC 2025 Data Background, *supra* note 2, at 23.

[94] *See also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 (2004) ("If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after

sentence-based limitation that is long enough to weed out most "time served" sentences—to reduce the likelihood that such sentences will distort application of the career-offender guideline. Defenders regularly see "time served" sentences of about a year.[95] It is far rarer to see a "time served" sentence that was imposed after three full years of pretrial detention.

D. Cross-references to §4B1.2: There is no reason to further proliferate definitions of "controlled substance offense" and "crime of violence."

The Commission's proposal would eliminate all the cross-references to §4B1.2 other than from the career-offender guideline (§4B1.1), and maintain the current, categorical definitions of "controlled substance offense" and "crime of violence" everywhere else, through lengthy commentary. Defenders have long argued in favor of the categorical approach, and we will not advocate against it here, but we have to acknowledge that this part of the proposal could derail the whole package. So, while Defenders are essentially neutral, we want to convey that if §4B1.2 is amended along the lines of our revisions, we do not see why the Commission shouldn't simply maintain all the current cross-references to §4B1.2.[96]

There are two problems with eliminating the cross-references: First, having a single Guidelines Manual contain two distinct definitions of "controlled substance offense" and "crime of violence"—neither of which lines up with any of the other similar definitions that federal courts must examine day after day—would be confusing.[97] Second, we simply cannot imagine that

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trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court.").

[95] This is even more true when we take into account revocation sentences (perhaps only for rule violations) that are tacked onto jail sentences.

[96] Really, the best action would be for the Commission to eliminate offense-level enhancements in §2K2.1 and other guidelines that are based on criminal history that is better addressed via Chapter Four, thereby eliminating the need for cross-references and simplifying these guidelines.

[97] *See, e.g.*, 18 U.S.C. § 924(e) ("drug trafficking crime" and "violent felony"), 18 U.S.C. § 924(c) ("controlled substance offense" and "crime of violence"), 21 U.S.C. § 802 ("serious drug felony" and "serious violent felony"). The Commission in 2016 reported to Congress that "[a] single definition of the term "crime of violence" in the guidelines and other federal recidivist provisions is necessary to address increasing

those individuals and groups who have lobbied against the categorical approach for years would accept maintaining it outside the career-offender context, including in USSG §2K2.1, which is one of the most frequently applied guidelines in the book.

We do not know why the Commission's proposal retains the current system for most guidelines that currently cross-reference §4B1.2; surely Commissioners can see how this works against simplification. Perhaps the Commission is concerned that applying a significantly amended §4B1.2 to all the guidelines that currently cross-reference that section would be too much change all at once? We do not view this as a problem. To the contrary, it is only by very frequently assessing prior convictions under the new system that judges, probation officers, and practitioners will get the hang of it. And it is only through frequent application that courts will develop a body of interpretive caselaw to help with further applications.

Alternatively, perhaps the Commission does not want to decrease the number of drug priors that elevate sentences, as applied to anything other than the career-offender guideline. This should not be a concern. Public opinion on drug offenses has become less punitive over recent decades.[98] Defenders have significant experience with the guidelines that currently cross-reference §4B1.2—especially §2K2.1—and it is the elevated base offense levels associated with prior drug offenses that often cause judges the most concern about overly harsh sentencing ranges. Thus, eliminating state drug

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complexity and to avoid unnecessary confusion and inefficient use of court resources." USSC 2016 Career Offender Report, *supra* note 3, at 3.

[98] *See* The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems* (Mar. 8, 2018) ("Across demographic groups and political parties, U.S. voters strongly support a range of major changes in how the states and federal government punish people who commit drug offenses. A nationwide telephone survey of 1,200 registered voters, conducted for Pew in 2016 by the Mellman Group and Public Opinion Strategies, found that nearly 80 percent favor ending mandatory minimum sentences for drug offenses. By wide margins, voters also backed other reforms that would reduce the federal prison population. More than 8 in 10 favored permitting federal prisoners to cut their time behind bars by up to 30 percent by participating in drug treatment and job training programs that are shown to decrease recidivism. Sixty-one percent believed prisons hold too many drug offenders and that more prison space should be dedicated to 'people who have committed acts of violence or terrorism.'" (footnotes omitted)).

priors from the CSO definition might not only help get career-offender sentences (and §2D1.1 sentences) closer to the guideline range; it might also help get sentences imposed under §2K2.1 and these other guidelines closer to the guideline range.[99]

Or, perhaps the Commission is concerned about a congressional directive that precludes retaining cross-references to §4B1.2. We don't share this concern. The only directive seeming potentially relevant is an uncodified 1994 directive related to §2K2.1 that instructed the Commission to "appropriately enhance penalties" for § 922(g) cases where there are one or two prior convictions for a "violent felony" or a "serious drug offense" as defined by ACCA.[100] But the Commission fully complied with that directive decades ago.[101] And this uncodified directive to link §2K2.1 penalties to ACCA, with which the Commission long ago complied, does not forever preclude the Commission from amending §2K2.1 as needed to ensure that guideline ranges permit courts to meet § 3553(a)'s sentencing objectives, to "provide certainty and fairness" and avoid "unwarranted disparities," and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[102] In any event, times have changed since 1989: §4B1.2 already deviates from ACCA in various ways.

Perhaps the Commission is not worried about the directive per se, but rather the notion that there will be too steep a cliff between ACCA sentences and other § 922(g) sentences that are sentenced under §2K2.1. After all, it appears the Commission amended §4B1.2 to mirror ACCA back in 1989, even

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[99] This assumes that the Commission takes to heart Defenders' suggestions regarding the "crime of violence" definition, and adopts a prior-sentence-length limitation for the definitions. If the Commission were to adopt a COV definition that captures myriad minor, fundamentally nonviolent convictions, Defenders would expect to see an *increase* in variances.

[100] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110513, 108 Stat. 1796, 2019 (1994).

[101] Indeed, the Commission had already amended §4B1.2 to mirror ACCA back in 1989. USSG App. C, Amend. 268 (Nov. 1, 1989).

[102] 28 U.S.C. § 991(b); *see also* Fed. Defender Comments on the U.S. Sent'g Comm's 2024 Proposed Amendments—Simplification, at 23–24 (Feb. 22, 2024) (discussing directives generally).

before Congress directed it to do so, largely related to this concern.[103] But while this may have been a serious concern in 1989, that's no longer the case. The number of ACCA cases is now very small, notwithstanding the high number of ACCA cases that get on the Supreme Court's docket. In FY2023, out of 8,040 convictions under 18 U.S.C. § 922(g), there were only 189 ACCA cases.[104] We expect that number to keep dropping—particularly now that ACCA is understood to be an element of an aggravated § 922(g) offense.[105] This is all to say that it does not make any sense to design a guideline around an incredibly rare mandatory minimum that's now understood to function as a legal element of a distinct offense.

III. Conclusion

The Commission's career-offender proposal is big and ambitious, and it impacts one of the harshest guidelines. The Commission's idea to move away from the categorical approach while narrowing §4B1.2's substantive reach is an exciting opportunity for smart reform. If the proposal works as intended—shrinking the CSO definition and crafting a conduct-based COV definition to capture all truly violent offenses (but not other offenses)—it could have enormous positive impacts. Indeed, if the amended §4B1.2 continues to apply to guidelines beyond §4B1.1, we'd likely see positive impacts there as well. If the proposal does not work as intended, it could become a cautionary tale.

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[103] USSG App. C, Amend. 268 (Nov. 1, 1989); *see also* USSC, Firearms and Explosive Materials Working Group Report 18–22 (1990).

[104] This was extracted from the Commission's publicly available "Individual Datafiles" for fiscal year 2023. U.S. Sent'g Comm, Commission Datafiles. A Commission report from 2021 showed ACCA cases declining over the years, very likely due to the Supreme Court tightening rules related to the categorical approach, from a high of 609 (in 2012—before *Descamps*) to 312 (in 2019). USSC, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 19 (2021). Again, in FY2023, that number was down to 189. Returning to the directive point, if the Commission were serious about making §2K2.1 strictly track ACCA, there would be far, far fewer sentence enhancements. That is, over the years, ACCA's definitions have been repeatedly narrowed, while §4B1.2's definitions have grown broader.

[105] *See Erlinger v. United States*, 602 U.S. 822 (2024) ("Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt"). Since the Supreme Court issued *Erlinger*, Defenders have seen prosecutors choose not to indict on ACCA and we have seen ACCA acquittals.

That is, it is important to get this right. And Defenders want to help the Commission get this right.

To be clear, the categorical approach is still the best system for assessing prior convictions—admittedly, among bad options. But the Commission, if it is careful, is capable of eliminating the categorical approach while at least mitigating the worst sorts of problems that the categorical approach was designed to solve. Defenders have identified some very serious problems with the currently proposed "crime of violence" definition; but these problems appear inadvertent, and they are fixable. And the Commission's proposal includes two features that will mitigate remaining concerns related to administrability, complexity, and over-inclusiveness: the CSO definition and the prior-sentence-length limitation.[106] We appreciate Commissioner's thoughtful consideration of our comment and its appendix and we look forward to the upcoming hearing on this proposal.

[106] In case we have not yet made this sufficiently clear, Defenders (categorically) oppose any conduct-based "crime of violence" definition that is not accompanied by these mitigating parts of the proposal.

APPENDIX

The following is a set of revisions to §4B1.2, working from the current guideline and generally using the current structure except where indicated. All language that is different from the current guideline (including language that is part of the Commission's proposal this year) is highlighted in red; language that is both different and not from the Commission's current proposal is additionally underlined. All language and structure that's different from the current guideline (and some that remains the same) is explained in footnotes.

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

(a) CRIME OF VIOLENCE.—[1]

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

a. has as an element the use, attempted use, or threatened use of physical force against the person of another;[2] or

b. is, as established by conduct of the defendant underlying the offense of conviction,[3] murder, voluntary manslaughter, kidnapping,

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[1] The placement of the "crime of violence" definition remains as in the current guideline, but the structure of this section is set up as in the Commission's proposal, with subsections for definitions, additional definitions, inchoate offenses, determination, and sources of information. Defenders' comment at pages 27–28 explains that the Commission should try to maintain §4B1.2's current structure and language as much as possible (that is, except where substantive change is intended).

[2] Section II.B.2. of Defenders' comment is devoted to the serious problems that would arise from importing the so-called elements clause to the non-elemental, conduct-based context (without definitional changes). On page 24–25, we explain the proposal to retain the elements clause as is, adopting a new conduct-based approach for the enumerated offenses only.

[3] Section II.B.1. of our comment addresses the current proposal's "relevant conduct" problem. This language is substituted for the currently proposed introductory language in order to establish a conduct-based methodology for the enumerated offenses that looks only to offenses of conviction, consistent with USSG §4B1.1. This text draws from language that is currently proposed for commentary, as discussed on page 19. *See* USSC, Proposed Amendments to the Sentencing Guidelines, at 12 (Dec. 19, 2024) (commentary explaining that the new conduct-based methodology "allows a court to consider the conduct of the defendant underlying the offense of conviction").

aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[4]

(2) ADDITIONAL DEFINITIONS.—[5]

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

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

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

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[4] The enumerated offenses here remain unchanged from the current guideline. Defenders' comment at pages 27–28 explains why it is important to retain this language and structure. Since we are proposing maintaining the elements clause as is, we do not delete any of the currently enumerated offenses. However, as suggested at page 26, footnote 85, if the Commission is willing to contemplate eliminating offenses from this list, arson and the possession offenses involving firearms and explosive material should be placed on the cutting table.

[5] The definitions here remain unchanged from the current guideline other than arson, which is addressed in the next footnote, and this uses the current label ("Additional Definitions"). *See* §4B1.2(e). As noted in footnote 1 of this appendix, although this section mostly remains unchanged, it has been nested under the "crime of violence" definition in line with the Commission's current proposal.

(D) Arson. ~~The willful or malicious setting of fire to or burning of property~~ The willful or malicious setting of fire to or burning of any building or inhabited structure.[6]

(3) COVERED INCHOATE OFFENSES. ~~The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.~~ An offense is a "crime of violence" if ~~the defendant engaged~~ the offense of conviction involved the defendant engaging in any of the conduct described in subsection ~~(b)~~(a)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense.[7]

(4) DETERMINATION OF WHETHER AN OFFENSE IS A "CRIME OF VIOLENCE."—In determining whether an offense is a "crime of violence," the focus of inquiry ~~is on the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. See subsection (a)(1)(A) of §1B1.3 (Relevant Conduct).~~ for sub. (a)(1)(A) is on the elements of the offense of conviction. The focus of inquiry for sub. (a)(1)(B) is on the defendant's conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.[8]

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[6] Currently, "arson" is undefined. The Commission has proposed a new arson definition, but Defenders explain at pages 25–27 of our comment how, although the Commission's proposed definition might work if we were relying on the categorical approach, it does not function appropriately under a conduct-based methodology. At pages 26–27, we explain why we chose this specific alternative definition.

[7] This is taken directly from the Commission's proposed language, with the exception of the underlined language. Defenders are generally comfortable with the Commission's inchoate-offense-related language (although of course, we'd prefer that inchoate offenses be excluded altogether), except that we altered the text where indicated so that it mirrors the new introductory phrasing for the conduct-based methodology, which is discussed at footnote 3 of this appendix. Then, we updated the cross-reference, which now looks only to the enumerated offenses (because the conduct-based approach attaches only to the enumerated offenses).

[8] The placement of and label for this section mirror the Commission's proposal but Defenders do not use the language of the proposal due to the grave relevant-conduct problem that is discussed at length in Section II.B.1. of our comment. Since the elements clause remains focused on elements in this revised §4B1.2, this section

(5) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence" under sub. (a)(1)(B), the government may only use the following sources of information from the record:

(A) The charging document.

(B) The jury instructions and accompanying verdict form.

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

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

(E) The judgment of conviction.

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

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).[9]

(b) CONTROLLED SUBSTANCE OFFENSE.—[10]

~~(1)~~ DEFINITION.—The term "controlled substance offense" means an offense under 21 U.S.C. § 841, § 860, § 952(a), § 955, or § 959; or § 846 or § 963, if the object of the conspiracy or attempt was to commit an offense covered by this provision); or 46 U.S.C. § 70503(a) or

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separates out the elements clause from the enumerated offenses. The text used to describe the new conduct-based methodology for the enumerated offenses is taken directly from the Commission's 2018 proposal, as discussed in our Comment at page 19. *See also* USSC, Proposed Amendments to the Sentencing Guidelines, at 26 (Dec. 20, 2018).

[9] This section is lifted directly from the Commission's proposal, with the added underlined language in the introductory clause cross-referencing sub. (a)(1)(B), since the new conduct-based inquiry would only be used for enumerated offenses.

[10] The "controlled substance offense" section is structured as it is in the Commission's proposal, but it's just moved back to the location within §4B1.2 where it currently appears for the same reason noted in footnote 1 of this appendix and elsewhere: to aid clarity and reduce transition-related problems.

§ 70506(b).[11] ~~[or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)]~~.[12] ~~federal or state law, punishable by imprisonment for a term exceeding one year, that—~~

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

~~(2) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).~~[13]

(2) ADDITIONAL CONSIDERATION.—A violation of 18 U.S.C. § 924(c) or § 929(a) is ~~a "crime of violence" or a~~ "controlled substance offense" if the offense of conviction established that the underlying offense was ~~a "crime of violence" or a~~ "controlled substance offense.~~":~~ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)[14]

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

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[11] This is the Commission's proposed new language, with three statutory sections that were presented as optional moved from the brackets to the main text (21 U.S.C. §§ 860, 846, and 963), in the location where they make the most sense grammatically. Defenders' comment at page 8–9 explains that we do not see the need for including any of the extra statutory sections in brackets; however, we anticipate that Commissioners will most likely want to include §§ 860, 846, and 963, so we include them here (to ensure our appendix is helpful).

[12] Again, our comment explains that we do not see the need for including any of the extra statutory sections in brackets but we have retained §§ 860, 846, and 963, by moving them into the unbracketed text discussed in the preceding footnote.

[13] These deletions are all from the Commission's proposal. As discussed in Defenders' comment at Section II.A., eliminating state drug priors from the "controlled substance offense" definition is exactly the right call.

[14] This subsection is presented exactly as it is in the Commission's proposal.

two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense)~~,~~; and (2) ~~the sentences for~~ each of at least two of the aforementioned felony convictions (A) is counted separately under §4A1.1(a), and (B) resulted in a sentence for which the defendant served three years or more in prison. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.[15]

(d) PRIOR FELONY CONVICTION.—"***Prior felony conviction***" means a prior adult ~~federal or state~~ conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).[16]

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[15] This is language from the current definition of "Two Prior Felony Convictions," as proposed to be modified by Option 3A of the Commission's proposal. Defenders' comment discusses this important part of the Commission's proposal at Section II.C., on pages 29–32.

[16] This is the current definition of "Prior Felony Conviction," as proposed to be modified by the Commission proposal.

Federal Public and Community Defenders
Comment on Firearms Offenses

(Proposal 2)

February 3, 2025

Table of Contents

PART A

PART B

PART A: Machinegun conversion devices. Part A of the "Firearms Offenses" proposed amendment lays out two options that would enhance sentencing ranges for certain individuals who possess machine gun conversion devices (MCDs). Both options function similarly to expand ranges in these cases. Option 1 does so via expanding §2K2.1's definition of "firearm" in a newly created subsection, whereas Option 2 does so by expanding application of several specific offense characteristics (SOCs) and the guideline's cross-reference subsection.[1] For the reasons below, Defenders urge the Commission to adopt neither option.

The Department of Justice (Department) asked the Commission to fix a supposed inconsistency, since §2K2.1 does not define MCDs as "firearms" for purposes of its SOCs or cross-reference. But as explained below, the different statutory definitions of what constitutes a "firearm" exist for a reason, and their "fix" will exacerbate disparity by treating offenses involving aftermarket parts (which cannot on their own inflict harm) more severely than offenses involving an actual weapon, which can. In addition, the strict liability base offense level (BOL) enhancements in §2K2.1(a) provide more than sufficient punishment for conduct involving MCDs, as evidenced by the below-guidelines average sentences meted out in those cases.

There is no need to increase penalties now. Defenders understand the alarm raised by the proliferation of small, easy-to-make, plastic pieces that convert semiautomatic weapons to automatic. But Defenders urge the Commission to heed public health experts who warn that gun violence requires systemic solutions beyond individual incarceration. For many of our clients, the everyday threat and untold toll of gun violence on their lives are the very reasons they become involved in the conduct this amendment seeks to root out. Many of our clients live in communities left behind, in a country deeply divided between the "haves" and the "have-nots." And when decades of policy failures at every level of government have not made these communities safer or more prosperous, who can fully blame people for taking their safety into their own hands?[2] If history is any guide, a reactive, punitive response

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[1] USSC, Proposed Amendment: Firearms Offenses 34 (Dec. 19, 2024).

[2] Johns Hopkins Center for Gun Violence Solutions, *In Depth: Community Gun Violence Solutions* ("Most community gun violence is highly concentrated within under-resourced neighborhoods impacted by a legacy of discriminatory public policies.").

to the possession of these small, easy-to-make "switches," will have an outsized impact on Black and Brown individuals and lead us down a well-traveled but dangerous, and ineffectual, road.[3]

Two years ago, sponsors of the Bipartisan Safer Communities Act (BSCA) urged the Commission to pursue "evidence-based, data-driven sentencing guidelines that consider the[] inequities" that impact communities of color in firearms sentencing.[4] Likewise, public health and firearms safety experts warned that protecting communities from gun violence demands systemic solutions beyond increased incapacitation of individual downstream actors.[5] As laid out below, both MCD options here defy this sage advice.

This Comment proceeds in three parts. Section I lays out proposed amendment's lack of empirical basis. Section II explains why neither option will further the statutory purposes of sentencing and will result in unwarranted disparity. Section III explores an alternative suggestion: if the Commission feels it must act now despite the lack of empirical support for this amendment, at most it should create a single, targeted specific offense characteristic (SOC) in §2K2.1(b) that applies only to MCDs.

I. The Commission should not expand application of an already empirically deficient guideline based on an empirically deficient request.

As explained below, this Commission may have inherited a defective guideline, but it does not have to compound §2K2.1's flaws by adding another unstudied increase. Commission data do not support the Department's request to increase penalties in MCD cases. And this guideline's history tells

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[3] *See* Section II.D., *infra* (discussing racial disparities).

[4] Letter from Sens. Cory Booker & Christopher Murphy to the U.S. Sent'g Comm, at 3 (Dec. 5, 2022) ("Booker & Murphy Letter").

[5] *See* Letter from Peter L. Zimroth Ctr. on the Admin. of Crim. L. to the U.S. Sent'g Comm Re: Proposed Priorities for the 2022-23 Amendment Cycle, at 5 (Oct. 17, 2022) ("Zimroth Letter") ("Data also suggests that focusing solely on illegal possession of firearms will not effectively address gun violence."); Everytown for Gun Safety, *Damming the Iron River* (May 21, 2024) ("It is primarily the U.S. firearms industry—our gun manufacturers and sellers, and the groups that enable them, here in the United States—fueling Mexico's gun violence crisis.").

a story of kneejerk increases in severity that have failed to further the purposes of punishment; the Commission should not exacerbate its flaws.

A. The Department's request to raise guideline ranges for MCD cases lacks an empirical basis.

We understand that the Department's repeated requests for increased penalties in cases involving MCDs and the corresponding proposal reflect a fear of a proliferation of illegal MCDs. But this Commission should create policy based on empirics, not headlines.[6] And the Commission's data show judges are, on average, sentencing individuals *below* the guideline minimum in §2K2.1 cases, *including* those cases involving an MCD.[7] In other words, sentencers—those most familiar with the facts of their cases—find the current guidelines greater than necessary when sentencing §2K2.1 offenses involving MCDs. This indicates that the Commission should not raise penalties at this time.

Further, cases involving MCDs remain rare, comprising less than 5% of all cases sentenced under §2K2.1 in fiscal year 2023.[8] The Commission should not create national policy with long-lasting impacts based on a handful of cases that do not indicate any increase is warranted, especially when doing so will compound disparity.[9] By forcing a small, plastic part—harmless on its own and resembling a Lego piece—into SOC enhancements designed for actual firearms, the proposed amendment attempts to fit the proverbial "round peg into a square hole." As Defenders warned in the past,[10]

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[6] *See* Written Statement of Kyle Welch on behalf of Fed. Defenders to U.S. Sent'g Comm, at 1 (Mar. 17, 2011) (noting problem of increasing individual punishment in response to high profile events).

[7] USSC, Public Data Briefing: Machinegun Conversion Devices 8 (Jan. 2025) ("MCD Data Briefing").

[8] *Id.* at 5.

[9] *See* Sections II.A. & II.D., *infra* (discussing disparities).

[10] In 2023, Defenders, along with gun safety experts, warned that increasing penalties in individual cases would not curb the American public health problem of gun violence, but would instead compound racially disparate outcomes. Testimony of Michael Carter on behalf of Fed. Defenders to U.S. Sent'g Comm, at 26 (March 7, 2023) ("[W]e request that the Commission resist [further] actions that seem mathematically rational[] in their incremental application but have the overall impact of increasing (yet again) the overall sentencing range." (internal quotation

adding ungrounded enhancements to an already empirically flawed guideline will only exacerbate the many problems of §2K2.1.

B. The firearms guideline is broken.

Section 2K2.1 never had an empirical basis,[11] and has grown into a guideline haunted by factor creep,[12] unstudied increases,[13] and racial disparity.[14] The original manual had multiple firearms guidelines for separate firearms offenses. It included a guideline for offenses involving restricted weapons regulated by the National Firearms Act (NFA), separate from the guideline for prohibited possessor offenses under the Gun Control Act (GCA).[15] Separating these offenses made sense as the NFA largely focused on prohibited weapons, while the GCA largely focused on prohibited conduct and historically rejected control over most firearm *parts*.[16] This is

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omitted)). Zimroth Letter, *supra* note 5, at 6 (summarizing study findings noting that despite increase in imprisonment for gun possession, gun homicides rose) (citation omitted); Brady, Comments on Consideration of Possible Amendments to §2K2.1, at 3 (Oct. 17, 2022) ("Brady Comment") ("[I]ndividuals lower down in the supply chain are often fungible, whereas the larger players (organized distribution rings, dealers, etc.) are not.").

[11] *See* USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 18 (1987) (explaining Commission did not use data analyses as a starting point for firearms guidelines).

[12] *See* Fed. Defenders' Annual Letter to the U.S. Sent'g Comm 6 (July 15, 2024) (noting original §2K2.1 guideline had only one special offense characteristic) ("2024 Defender Annual Letter").

[13] Testimony of Michael Carter, *supra* note 10, at 16–18 (discussing history of amendments to §2K2.1 resulting in "repeat, non-evidence based" increases).

[14] Section II.17D., *infra*; *see also* Testimony of Michael Carter, *supra* note 10, at 6–11 (discussing racial disparities in §2K2.1 sentencing); Testimony of Deirdre D. von Dornum on behalf of Fed. Defenders to U.S. Sent'g Comm, at A-13–15 (Feb. 27, 2024) ("2024 von Dornum Testimony") (same).

[15] Section 2K2.1 addressed prohibited person offenses, §2K2.2 addressed prohibited weapon—NFA firearm—offenses, and §2K2.3 addressed prohibited firearm transactions. *See* USSG §§2K2.1, 2K2.2, 2K2.3 (1987). The §2K2.2 base offense level was 12, with no SOC for number of firearms involved in the offense.

[16] *See* 18 U.S.C. § 921(a)(3) (1982) (defining firearm to include a weapon, frame, or receiver). The GCA largely does not focus on firearm parts, but it does deem "any firearm muffler or firearm silencer" to be a firearm, *id.,* a feature it retained from its predecessor. The GCA's precursor, the Federal Firearms Act, had treated "any part or parts" as a firearm, but lawmakers had learned it was "impractical to have

why, for the most part, the GCA defines "firearm" largely in line with how most laypeople would interpret that word—weapons that "expel a projectile by the action of an explosive" and the core components of such a weapon.[17]

A 1990 Firearms and Explosive Materials Working Group Report ("1990 Report"), whose faults Defenders previously highlighted,[18] recommended an overhaul and consolidation of the firearms guidelines with many increases in base offense level severity.[19] In 1991, the Commission adopted much of the 1990 Report's proposal, consolidating the guidelines into §2K2.1 with new enhanced base offense levels far higher than the base offense levels in its predecessor guidelines.[20]

In addition to the empirical flaws built into §2K2.1's enhanced BOLs[21] (including the enhancements for NFA firearms such as MCDs[22]), the SOCs

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controls over each small part of a firearm. Thus, the [GCA's new] definition substitute[d] only the major parts of the firearm; that is, frame or receiver for the words 'any part or parts.'" S. Rep. No. 90-1097 (1968).

[17] 18 U.S.C. § 921(a)(3).

[18] *See* Testimony of Michael Carter, *supra* note 10, at 20–21 & n. 72 (describing flaws in Report's methodology).

[19] *See generally* USSC, Firearms and Explosive Materials Working Group Report (1990) ("1990 Report").

[20] *See* USSG App. C, Amend. 374 (Nov. 1, 1991) (replacing three prior firearm-related guidelines). *Compare* USSG §§2K2.1 *and* 2K2.2 (Nov. 1, 1990) (highest base offense level of 18) *with* USSG §2K2.1 (Nov. 1, 1991) (setting four highest base offenses between 20 and 26). The consolidated Guideline employed the GCA definition of firearm with respect to its specific offense characteristics and cross-reference. *Id.*, comment. (n. 1).

[21] In our witness statement on the Commission's 2023 Firearms Proposal, Defenders addressed at length §2K2.1's history, with its years of piecemeal increases in penalties prompted mostly by requests from DOJ, congressional directives, and statutory minimum and maximum penalty increases, rather than the deliberative, empirical process the Commission is known for. *See* Testimony of Michael Carter, *supra* note 10, at 16–24.

[22] The enhanced BOLs for offenses involving NFA firearms, including MCDs, have also increased over time, with little empirical grounding despite sweeping in a broad array of firearms, many of which are curios or relics at this point. *See* 2024 Defender Annual Letter, *supra* note 12, at 6 n.22 (noting that 1987, §2K2.2, covering NFA violations, had a BOL of 12.). The 1990 Report proposed a BOL increase at ATF's request due to a "relatively high" statutory maximum penalty of 10 years. 1990 Report, *supra* note 19, at 13. The Report found that "courts in these cases

this proposal seeks to expand reflect a history of piecemeal increases based on emotion, not empirics. For example, the 1990 Report acknowledged, "sentencing correlates only loosely with the number of weapons involved,"[23] yet proposed no change to the (b)(1) SOC for number of firearms, and the Commission later further expanded (b)(1) at ATF's request.[24] And as Defenders have explained before at length, the enhancements in §2K2.1(b)(4) never had an empirical basis and fail to further the purposes of punishment.[25]

The 1990 Report proposed the ancestor of the modern-day enhancement in (b)(6)(B), targeting offenses committed "in connection with another felony offense," tracking closely "18 U.S.C. §§ 924(b), (c), [and] (g)."[26] The report cited "[s]throng statutory support," along with mixed data from a small sample of cases sentenced under the then-new Guidelines. Specifically, the 1990 Report found that courts "sentenced at the upper end of, or above, the range, in 39%" of the 64 cases sentenced under §2K2.1 it examined from 1989 where "criminal use of a firearm occurred" or was reasonably foreseeable; and in 60% of the 26 §2K2.2 cases from 1987.[27] Notably the

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impose higher average sentences when N.F.A. firearms are involved (average 19 months compared with a norm in §2K2.1 cases of 15 months)." *Id.* The consolidated guideline produced ranges far above these averages.

[23] 1990 Report, *supra* note 19, at 47.

[24] USSG App C., Amend. 631, Reason for Amendment (Nov. 1, 2001).

[25] *See* 2024 von Dornum Testimony, *supra* note 14, at A-8 (explaining the stolen-firearm enhancement was not grounded in past practice as the Original Manual noted data were not sufficient to determine the effect a stolen firearm has on the average sentence, and was silent on the origin of the enhancement for possession of a firearm with an illegible serial number). The stolen firearm and illegible serial numbers have also failed to deter this conduct. *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments—Firearms Offenses, at 26 (March 14, 2023) ("While DOJ requested the serial-number increase to provide stronger deterrence and better reflect the harm of these offenses, since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value." (internal quotation omitted)) ("2023 Defender Firearms Comment"); *see also id.* at 33 (urging Commission to gather data on PMFs before expanding penalties).

[26] 1990 Report, *supra* note 19, at 55.

[27] *Id.* at 9 n.29, 56 (explaining methodology).

average sentence in those cases was 17 months.[28] The Commission added a disproportionately large 4-level enhancement with an override to level 18,[29] and sentences today for cases sentenced under §2K2.1 that receive an enhancement under (b)(6)(B) now receive sentences far exceeding that 17-month average.[30]

In 2011, the Commission added the progenitor of today's (b)(6)(A) enhancement, targeting offenses involving unauthorized export of firearms or ammunition.[31] Over a decade later, Congress once again attempted to address firearms trafficking and straw purchasing via increased criminal penalties. The BSCA directed the Commission to raise guideline penalties for certain offenses involving straw purchase and firearms trafficking,[32] and the Commission did so.[33] In 2023, Defenders and gun safety experts warned that empirically lacking increases in individual penalties would do little to staunch the flow of trafficked firearms unless we first address upstream

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[28] *Id.* at 56 ("courts sentencing under §2K2.1 (1989) imposed an average 17-month sentence, and sentenced at the upper end of, or above, the range, in 39% of the cases. . . . A similar pattern plays out for §2K2.2 (1987) cases (average 17-month sentence, 60% at or above the upper end of the guideline range)."

[29] USSG App C., Amend. 374 (Nov. 1, 1991); §2K2.1(b)(5) (1991). For an individual in Criminal History Category I with no other adjustments, their then-mandatory guideline range would have been 27 to 33 months under the new BOL.

[30] While changes in variables and other factors make an apples-to-apples comparison difficult, the difference in modern sentence lengths is stark. For cases sentenced in the past five fiscal years under primary guideline §2K2.1 that received the enhancement under (b)(6)(B), the average sentence length was 67 months. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[31] USSG App C., Amend. 753 (Nov. 1, 2011). In addition, the 2011 amendment increased base offense levels for many straw purchasers. *See id.* (adding further increases to §2K2.1 to address . . . concerns about straw purchasers").

[32] Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(a)(5), 136 Stat. 1313, 1328 (2022).

[33] USSG App C., Amend. 819 (Nov. 1, 2023) (adding enhancements in §2K2.1(b)(5) and (b)(8) with no reference to empirical study).

sources,[34] and they could exacerbate existing racial disparities.[35]

II. Both options fail to effectuate the purposes of sentencing.

Beyond the lack of empirical basis, neither option will effectuate the statutory purposes of sentencing, and both options will increase unwarranted disparity. Both assign similarly severe punishment to dissimilar conduct. And both options will produce ranges greater than necessary by expanding existing enhancements for an overbroad class of all NFA firearms. Further, neither option requires mens rea or a nexus to the offense of conviction. And both options will exacerbate unwarranted racial and ethnic disparity. Finally, considering the Guidelines' goals of deterrence and public protection, the Commission should heed experts who warn we cannot punish our way out of this public health crisis.[36]

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[34] Zimroth Letter, *supra* note 5, at 5 (Oct. 17, 2022) ("Data also suggests that focusing solely on illegal possession of firearms will not effectively address gun violence."); s*ee also Damming the Iron River*, *supra* note 5 (explaining U.S. firearms industry is "fueling Mexico's gun violence crisis.").

[35] Testimony of Michael Carter, *supra* note 10, at 2 (citing Booker & Murphy Letter, *supra* note 4 at 1) (urging caution against guideline increases at the expense of communities of color); *see also* Zimroth Letter, *supra* note 5, at 1 ("there is a risk that [new BSCA statutes] can be misapplied in a manner that will thwart Congressional intent to target rogue gun dealers and large-scale traffickers, increase the racial disparities that already exist in federal sentences for firearms offenses, and fail to measurably impact gun violence"); Brady Comment, *supra* note 10, at 7 ("An amendment to §2K2.1 should properly account for the racial disparities in enforcement that underlie straw purchases to more accurately target the source of gun violence in the United States."). Given the failure of individual criminal penalties to deter this conduct in the U.S., Mexico has taken matters into its own hands with lawsuits targeting upstream sources of firearms. *See, e.g., Smith & Wesson Brands, et al. v. Estados Unidos Mexicanos*, 603 U.S. — (Oct. 4, 2024) (granting cert.); *Estados Unidos Mexicanos v. Diamondback Shooting Sports Inc.*, No. CV-22-00472-TUC-RM, 2024 WL 1256038, at *1 (D. Ariz. Mar. 25, 2024) ("Plaintiff alleges that Defendants knowingly and systematically participate in trafficking military-style weapons and ammunition to drug cartels in Mexico through reckless and unlawful business practices including straw sales, bulk sales, and repeat sales." (internal quotation omitted)).

[36] *See, e.g.,* Caroline Nobo, Think Global Health, *The United States Can't Arrest Its Way Out of Gun Violence* (Nov. 20, 2024); *see also* Zimroth Letter, *supra* note 5, at 5.

A. Both options would increase unwarranted disparity.

Both options contravene § 3553(a)(6)'s mandate to avoid unwarranted disparity by treating possession of a mere part, which alone can inflict no harm, the same as possession of an actual functional firearm, which can. While Defenders urge the Commission not to adopt either option, if the Commission chooses to act, it should treat MCDs differently than functional firearms, and narrowly tailor the amendment language to avoid treating a single firearm affixed with an MCD the same as two firearms.[37]

Under either option, a firearm and affixed MCD would count as two firearms, while a real machinegun, purpose-built to fire automatically with no modification, would only count as one firearm. This defies common sense and negates the Commission's mandate to establish sentencing policies that provide certainty and fairness and avoid unwarranted sentencing disparities.

Additionally, the Department raised concerns that §2K2.1's enhanced BOLs fail to distinguish conduct by not providing an additional increase for an MCD attached to a semiautomatic weapon capable of accepting a large-capacity magazine (LCM),[38] which the commentary defines as one that had a "magazine or similar device that could accept more than 15 rounds of ammunition" attached or "in close proximity to the firearm."[39] But both this argument and the outdated LCM enhancement ignore the reality of the contemporary firearm market: the majority of modern firearms sold today are semiautomatic weapons capable of accepting LCMs.

The outdated and overbroad BOLs for LCMs should not be grounds for expanding punishment in MCD cases in the way DOJ requested. The

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[37] As written, both options would lead to dissimilarly situated individuals being treated similarly, a result contrary to the Commission's obligation to avoid unwarranted sentencing disparities. 28 U.S.C. § 991(b)(1)(B). For instance, offenses involving true automatic weapons would be treated as only one firearm, compared to an MCD affixed to a handgun, which would be treated as two weapons. CBS News, *Police illegally sell restricted weapons, supplying crime* (Dec. 4, 2024) (summarizing investigation of illegal transfers of restricted weapons).

[38] DOJ's Annual Letter to the U.S. Sent'g Comm 4 (July 15, 2024) ("Failing to distinguish between those scenarios [of person with a semiautomatic capable of accepting a LCM versus one with an affixed MCD] makes little sense.").

[39] USSG §2K2.1, comment. (n. 2) (2024).

majority—over 70%—of firearms manufactured in this country in the modern era are pistols and rifles, the vast majority of which are semiautomatic firearms, which accept detachable magazines.[40] And it is "indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms."[41] Thus many pistols and rifles come straight from the manufacturer with magazines that the guideline considers LCMs.[42]

The outdated LCM definition comes from a law of questionable efficacy that expired two decades ago.[43] As far back as 2006—two years after that law's sunset (after which it was legal to buy, sell, and trade LCMs and previously-banned semiautomatic firearms)—when the Commission cemented the LCM enhancement into §2K2.1—Defenders *and DOJ* objected

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[40] Over 70% of firearms manufactured in the United States in 2023 were pistols or rifles. ATF, *National Firearms Commerce and Trafficking Assessment Part I: Firearm Commerce Updates and New Analysis* 28 Table FC-03 (2024). Most modern pistols and rifles are semiautomatic weapons, and "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc), *abrogated by N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)). A semiautomatic pistol or rifle is nearly synonymous with one capable of accepting a "large capacity magazine." *See Duncan v. Bonta*, 19 F.4th 1087, 1097 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), and *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022) ("Most, but not all, firearms use magazines. For those firearms that accept magazines, manufacturers often include large-capacity magazines as a standard part of a purchase of a firearm."). And the Commission determined decades ago that "offenses involving a semiautomatic firearm represent the typical or 'heartland' case under the guidelines." USSG App C., Amend. 531, Reason for Amendment (Nov. 1, 1995).

[41] David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 852–64 (2015) (discussing development and history of contemporary firearms design and technological innovations leading to larger magazine capacities).

[42] *Kolbe*, 849 F.3d. at 129. For example, the popular Glock 17 comes with a magazine that holds 17 rounds. Glock, G17 (last visited Jan. 18, 2025); *see also Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020), *vacated and remanded sub nom Duncan v. Bonta,* 142 S. Ct. 2895 (2022) ("[S]everal variants of the Glock pistol—dubbed 'America's gun' due to its popularity—come standard with a seventeen-round magazine.").

[43] *See* Testimony of Michael Carter, *supra* note 10, at 22–23 (describing passage and sunset of statutory ban and summarizing questionable efficacy of ban).

to maintaining the enhancement since this conduct was no longer illegal.[44]

Moreover, the Department's request ignores how MCDs work. MCDs have existed for decades,[45] thanks to the design of most modern semiautomatic firearms. This design allows users to convert them to fire in automatic fashion with a simple aftermarket part.[46] Functionally, an MCD can *only* attach to a semiautomatic firearm, so cases involving an affixed MCD should also involve a semiautomatic firearm. And as discussed above, millions of popular semiautomatic firearms come standard with LCMs, given that most states do not have magazine size restrictions.[47] The Department's requested additional increase would only compound the problems in the LCM enhancement.

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[44] Letter from Jon M. Sands on behalf of Fed. Defenders to the U.S. Sent'g Comm, at 3–10 (Mar. 9, 2006) *and* Letter from Michael Elston on behalf of DOJ to the U.S. Sent'g Comm, at 8–9 (Mar. 28, 2006) ("The Department favors this upward-departure approach over the offense-level approach in light of the fact that possession of such firearms is no longer illegal *per se*.").

[45] Prior to the 1986 addition of § 922(o) to the GCA, the NFA already heavily restricted machinegun ownership, including MCD kits, which the ATF deemed to be machineguns over four decades ago. ATF Ruling 81-4 (1981). *See also* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 668 (1987) (discussing history of § 922(o), which was introduced amidst concern about commercial MCDs).

[46] Glenn Thrush, *Minnesota and New Jersey Sue Glock Over Lethal Add-On for Guns*, N.Y. Times, Dec. 12, 2024 ("Glock is a dominant player in the American handgun market, accounting for an estimated two-thirds of all pistol sales in the United States in any given year."). Recent lawsuits by Minnesota and New Jersey against Glock allege that the "ability to easily function as either a semi-automatic weapon or a machine gun is built into Glock's design." Press Release, N.J. Att'y Gen., *Attorney General Platkin Sues Glock for Design and Sale of Guns Switchable to Machine Gun Configuration* (Dec. 12, 2024). *See also* MN Att'y Gen., Press Release, Office of the Mn. Att'y Gen., *Attorney General Ellison sues Glock for making and selling handguns that can easily be turned into machine guns* (Dec. 12, 2024) ("Glock, however, has known since at least 1988 that its semi-automatic handguns can be easily converted into fully automatic machine guns by a small device that allows a Glock handgun to fire continuously with a single trigger pull.").

[47] The enhanced BOLs for LCMs also likely creates geographic disparity, as only a minority of states have magazine size restrictions. In most states, this often means an individual would have to actively seek out smaller magazines that might not be common. *See* Congressional Sportsmen's Foundation, *Standard Capacity Magazines* (last visited Jan. 30, 2025) (listing 10 states with magazine size restrictions).

Defenders agree the enhanced BOLs for LCMs create disparity, especially geographic disparity, but only because they are overbroad and outdated.[48] If the Commission wants to distinguish dissimilar conduct, it can remove the meaningless and statutorily baseless LCM enhancements instead of raising penalties in cases involving MCDs.

B. Treating MCDs like GCA firearms under §2K2.1's SOCs is unnecessary and will produce absurd results.

The Department claims that "§2K2.1 contains inconsistent definitions of the term 'firearm.'"[49] But using the GCA definition of "firearm" makes sense for most §2K2.1 SOCs considering their origins and purposes. Grafting on the broad NFA definition of "firearm" to these SOCs will lead to absurd results (*i.e.*, conduct involving a small plastic device would be treated as proportional to, or more severely than, conduct involving a functional machinegun) and to ranges greater than necessary, especially given that MCDs already trigger several strict liability enhanced BOLs.

1. SOC (b)(1)

Both options will produce unwarranted disparity in (b)(1) by potentially treating an MCD the same as an actual gun, and an MCD affixed to a gun as *two* firearms, while counting a true automatic weapon as *one*. Both options potentially also treat a person with 10 MCDs and no actual GCA firearm much more severely than a person with two sniper rifles. This makes no sense. An MCD affixed to a firearm should only count as one firearm, and an MCD alone should not be treated the same as an actual gun.

In addition to this logical flaw, the (b)(1) enhancement lacks a mens

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[48] Without the underlying data, it is difficult to determine the precise overlap between offenses involving affixed MCDs and offenses involving LCMs, but the data hint at a possible overlap between these offense characteristics. Out of the 2023 MCD cases examined for the MCD Data Briefing, 64% of MCD cases involved an affixed MCD, and 66% of MCD cases also involved a "large capacity magazine." MCD Data Briefing, *supra* note 7, at 9–10.

[49] DOJ Comments on the U.S. Sent'g Comm's 2023 Proposed Amendments, at 10–11 (Feb. 27, 2023) ("2023 DOJ Comments").

rea requirement.[50] Many MCD devices are low-profile and small, making it easy for those unfamiliar with handguns to miss the fact that one is affixed.[51]

Pistol (left) and pistol with affixed MCD (right)

Under both options, an individual could easily possess two "firearms" under (b)(1) for having a firearm with an MCD affixed and not even know it.

2. SOC (b)(4)

Likewise, there is no need to include MCDs in the definition of "firearm" for the (b)(4) enhancements, because it will result in double counting and conflict with the SOC's purposes. As the Department pointed out, MCDs are "readily made using a 3D printer,"[52] and the vast majority of such MCDs will not be legally owned or serialized.

The (b)(4)(A) enhancement for a stolen firearm tracks the statutory prohibition on stealing a GCA firearm.[53] If that enhancement's goal is to punish stealing an otherwise legally owned firearm, it makes no sense to apply it to offenses involving MCDs, the vast majority of which cannot be

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[50] Defenders have long urged the importance of scienter requirements in punishment. *See* Federal Public and Community Defenders Comment on Mens Rea (Proposal 2, Part B) (Feb. 3, 2025) (summarizing previous comments).

[51] *See* Erin Wise, , *ATF sees rise in quarter-sized switch that turns handguns into machine guns*, WBMA May 4, 2022 (describing police officer not recognizing Glock switch on seized weapon before submitting as evidence).

[52] 2023 DOJ Comments at 11.

[53] *Compare* §2K2.1(b)(4)(A) *with* 18 U.S.C. §§ 922(i), (k).

legally owned.[54] And like the (b)(1) enhancement discussed above, presently the (b)(4)(A) enhancement lacks a mens rea requirement, although we are pleased the Commission is considering fixing that problem.[55]

Regarding the (b)(4)(B) enhancements for firearms with illegible serial numbers and unserialized privately made firearms (PMFs), the Commission previously stated that they reflect the difficulty in tracing these firearms.[56] But homemade or illegally imported MCDs will not be serialized in the way a commercially manufactured GCA firearm is, and they cannot be traced.[57] And they have no serial number to deface. As such, the illegible serial number enhancement is irrelevant to modern MCDs, and the unserialized PMF enhancement would apply in virtually every MCD case. The latter is particularly problematic given SOCs are meant to distinguish atypical or aggravated conduct from otherwise run-of-the-mill offenses.[58]

3. SOC (b)(5)

The SOC enhancements in (b)(5) came from the BSCA directive on straw purchasing and trafficking—offenses regulated by the GCA. Regarding (b)(5)(A), one cannot be convicted under § 933(a)(2) or (a)(3) for transfer of an MCD alone. And the Commission explained that the (b)(5)(B) enhancement

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[54] As written, the proposed amendment would lead to absurd results by increasing punishment for possession of a stolen item that the original possessor *also* possessed illegally.

[55] However, unless the Commission adopts Part B of the proposal, under both options here, a person who unwittingly possessed a stolen MCD could be punished as if he stole the MCD himself.

[56] Defenders continue to maintain that a firearm's traceability has little to do with the statutory purposes of punishment, and we encourage the Commission to revisit these empirically lacking enhancements. *See* 2024 von Dornum Testimony, *supra* note 14, at A-8–A-9 (outlining lack of empirical basis underlying enhancement for stolen firearm and enhancement for illegible serial number); 2023 Defender Comment, *supra* note 25, at 26—34 (discussing the lack of relationship between traceability, offense seriousness, and punishment for most §2K2.1 offenses and urging the Commission to gather data and study cases involving PMF cases instead of adding enhancement without study).

[57] *See* 18 U.S.C. § 923(i).

[58] *See* USSG, Ch. 1, Pt. A (Basic Approach) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

"incorporates the elements of the [other GCA] straw purchasing and firearms trafficking statutes . . . to provide an increase for defendants who attempted, conspired, or engaged in conduct involving the illicit transfer of a firearm or ammunition."[59] The (b)(5)(C) enhancement "ensure[s] straw purchasers and firearms traffickers meeting [certain] criteria receive increased penalties as required by the [BSCA's] directive."[60] That directive to the Commission explicitly focused on "persons convicted of an offense under section 932 or 933 . . . and other offenses applicable to the straw purchases and trafficking of firearms."[61] A person cannot straw purchase a homemade MCD.

Because the BSCA specifically dealt with GCA offenses, Defenders urge the Commission not to go beyond its narrow statutory mandate, especially given that the law's proponents wrote the Commission to clarify that their focus was upstream supply, not fungible individuals.[62] Grafting the NFA definition onto SOC (b)(5) will result in excessive or unnecessary sanctions for individuals not responsible for upstream GCA firearm trafficking.

4. SOC (b)(6)

Likewise, adding in the NFA definition of "firearm" into the (b)(6) enhancements would not further this SOC's purposes and would create unwarranted similarity. The (b)(6)(A) enhancement for possessing a firearm while leaving or attempting to leave the United States aimed to address the "illegal flow of firearms across the southwestern border," and it tracked GCA straw purchase and trafficking offenses,[63] which cannot be committed with an MCD alone. This makes sense as the demand in Mexico is for functional

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[59] USSG App. C, Amend. 819, Reason for Amendment (Nov. 1, 2023).

[60] *Id.*

[61] Pub. L. 117-159, § 12004(a)(5), 136 Stat. 1313, 1328 (2022).

[62] Specifically, the BSCA aimed "to punish suppliers of the large numbers of firearms diverted from lawful commerce, while avoiding unnecessarily long sentences for people with less culpability or without significant criminal histories." Booker & Murphy Letter, *supra* note 4, at 2. The Commission chose to enhance the guideline pursuant to the BSCA directive without further study.

[63] USSG App C., Amend. 753, Reason for Amendment (Nov. 1, 2011).

firearms unavailable there, not aftermarket parts easily made at home or purchased online from overseas.[64]

The (b)(6)(B) enhancement aimed to mirror the offenses in §§ 924(b), (c), and (g),[65] which involve GCA firearms. The first clause of (b)(6)(B) applies if a person uses or possesses a firearm in connection with another felony offense. That enhancement often applies in cases involving drug trafficking and guns, with commentary explaining that the enhancement applies where a firearm is found near drugs because "the presence of the firearm has the potential of facilitating [the drug trafficking offense]."[66] The second clause applies if a person possessed or transferred any firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. People are unlikely to carry an unaffixed MCD to facilitate a drug deal or other felony offense, and a firearm with an affixed MCD will already be covered by the (b)(6)(B) enhancement. By adding the NFA definition of "firearm" to this enhancement, (b)(6)'s second clause could potentially apply in unaffixed MCD cases where, for instance, someone is illegally selling MCDs. It makes no sense to treat a person who sells unaffixed MCDs the same as someone whose offense involves trafficking true machineguns given that the former, on its own, is harmless, whereas the latter has the potential to inflict harm. And someone who sells or trades MCDs is already subject to a strict liability heightened BOL of either 26, 22, 20, or 18. Thus, the proposed expansion of (b)(6)(B) is unnecessary. If the Commission feels such an enhancement is necessary to address the illegal exchange (as opposed to mere possession) of "switches," it should craft a standalone SOC less punitive than the 4-level (b)(6)(B) enhancement already applied to GCA firearms (with or without an MCD affixed).

C. There is no need to sweep in all NFA weapons.

Options 1 & 2 are overbroad, and both unnecessarily sweep in all NFA firearms even though they have not been raised as an issue of concern. If the Commission feels it should address MCDs, it should say what it means and narrowly target MCDs, instead of the broad category of NFA firearms. The

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[64] Data show that this enhancement applied in less than 1% of cases involving MCDs in fiscal year 2023. *See* MCD Data Briefing, *supra* note 7, at 13.

[65] *See* 1990 Report, *supra* note 19, at 55.

[66] USSG §2K2.1 comment. (n.14(B)).

Department's concerns are specific to MCDs, not, for example, flare launcher inserts.[67] Further, §2K2.1 already contains enhanced penalties for all NFA firearms via enhancements in several BOLs, without an explicit scienter requirement.[68] Finally, both proposed options conflict with the relevant statutory schemes in that they could result in penalty ranges exceeding the ten-year statutory maximum penalty applicable to § 922(o) or 26 U.S.C. § 5861(d).[69]

D. Both options will exacerbate severe racial and ethnic disparity in cases involving MCDs.

Defenders have repeatedly cautioned against empirically unsound expansions of §2K2.1, given the guideline's outsized impact on people of color.[70] The Department has put forth no reason to believe that this time will be different in terms of racial inequity. Both options will sharply exacerbate such disparities.

1. A tale of two Second Amendments.

As scholars and Defenders have pointed out, racial disparities permeate federal firearm enforcement and sentencing,[71] given "centuries of

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[67] NFA firearms include "[a]ny other weapon[s]," which includes flare launcher inserts, when possessed with a flare launcher gun. ATF, Firearms Guide - Identification of Firearms - Section 7. With the constant evolution of technology, in the someone may well invent additional firearms or devices that are regulated by the NFA but not the GCA, but we cannot predict those now.

[68] §§2k2.1(a)(1)(A)(ii), (a)(3)(A)(ii), and (a)(4)(B)(i)(II).

[69] Take a young man in Criminal History Category I convicted in a § 922(o) conspiracy, which involved no GCA firearms. And say his actions furthered the transfer of 8 MCDs. Under both options, he might receive a 4-level increase under (b)(1)(B), a 4-level increase under (b)(4) because the MCDs lacked serial numbers, and a potential 5-level increase under (b)(5)(C) if they were transferred to someone he had reason to believe intended to use them unlawfully. His offense level prior to any adjustments would be 31, with a range of 108–135 months. If he fell in CHC II or higher, his unadjusted range would exceed the statutory maximum even at the low end.

[70] *See* Testimony of Michael Carter, *supra* note 10, at 6–11.

[71] See *id*. at 6 n.24 (citing Emma Luttrel Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 164 (2018) ("[S]ince the first colonists set foot on the New World,

unequal and racially disproportionate crime control."[72] MCD cases are no different. The Commission's own data show, out of all §2K2.1 cases involving an MCD sentenced in fiscal year 2023, nearly 60% of individuals sentenced in such cases were Black, and 22% were Hispanic.[73] This tracks broader patterns in federal firearms offenses.

The fact that Black people make up over half of those sentenced under §2K2.1, and are subject to higher sentences than their white counterparts,[74] is no coincidence.[75] The vast majority of offenses sentenced under §2K2.1 involve convictions under § 922(g) for possessing a firearm after a felony conviction,[76] and they often trigger the guideline's enhanced BOLs,[77] which

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firearm and weapon control laws were enacted to suppress the enslaved and free Black populations.") (citations omitted)).

[72] *Id.* at 7.

[73] MCD Data Briefing, *supra* note 7, at 7.

[74] Of cases sentenced under primary guideline §2K2.1 from fiscal years 2019 to 2023, the average sentence for Black individuals was 53 months, compared to 43 months for white individuals. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[75] *See* Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2198 (2016) (analyzing racial disparities in firearm convictions in light of the War on Drugs and urging that "we *must* address the racial costs of the current regime and of further criminal regulation of gun possession"); *Benjamin Levin & Kate Levine*, *Redistributing Justice*, 124 Colum. L. Rev. 1531, 1574 (2024) ("Race-class subordinated populations tend to face heavier policing than whiter and wealthier populations, and studies have shown that minoritized defendants tend to face harsher charges and sentences.").

[76] USSC Federal Firearms Offenses, *supra* note 8, at 4.

[77] Many prior convictions trigger enhanced severe base offense levels, due to an empirically unfounded recommendation in the 1990 Report. The 1990 Report did not look at sentencing trends, instead citing the desire for "proportionality" with § 924(e)'s 15-year mandatory minimum. *See* 1990 Report, *supra* note 19, at 18–22, 32. A later directive to the Commission in the Violent Crime Control and Law Enforcement Act of 1994 instructed the Commission to "appropriately enhance penalties" for § 922(g) offenses in which an individual had a controlled substance offense or crime of violence "as defined in section 924(e)(2)(B)." Pub. L. 103–322, September 13, 1994, 108 Stat 1796. Decades later, the firearm guideline employs the "crime of violence" definition in §4B1.2, which looks very different now from the statutory definition. In fiscal year 2023, only 2% of individuals convicted of prohibited possession under 18 U.S.C. § 922(g) were subject to the enhanced ACCA penalty. USSC, QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses, FY 2023.

also serve to compound racial disparities.[78]

Dating back to the nation's founding, firearms laws have been used to disenfranchise and categorically disarm groups thought to be a threat to public safety, such as enslaved Black individuals and Native Americans.[79] Laws continued to prohibit Black individuals from lawfully owning or possessing firearms in the post-Reconstruction South.[80] These disparities have carried into the modern mass incarceration era.[81]

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[78] USSC, QuickFacts: 18 U.S.C. § 922(g) Firearms Offenses, FY 2023 (Fifty-nine percent of those convicted and sentenced under 18 U.S.C. § 922(g) were Black. And of all people convicted under § 922(g), almost 93% fell into a criminal history category of II or higher); *see also* USSC Firearms Offenses, *supra* note 76, at 33 ("The Commission's analysis revealed racial differences between the 27.5 percent of firearms offenders arrested following a routine police patrol compared to firearms offenders who were arrested for other reasons."); Testimony of Michael Carter, *supra* note 10 (firearm enforcement disproportionately targets and harms people of color and their communities); 2024 Defender Annual Letter, *supra* note 12, at 8 & 8 n.2 (explaining how enhancements based on prior convictions compound racial disparity).

[79] *See Kanter v. Barr*, 919 F.3d 437, 451, 457–58 (7th Cir. 2019) (Barrett, J., dissenting).

[80] *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. Law Rev. 537 (2022); Dave Davies, *Historian Uncovers the Racist Roots of the 2nd Amendment*, NPR (Jun. 2, 2021), ("the right to bear arms, presumably guaranteed to all citizens, has been repeatedly denied to Black people."). Even Dr. Martin Luther King Jr. was denied his concealed carry permit, after being the victim of a violent crime, despite the facially neutral gun laws in effect at the time. *See* Donald T. Ferron, *Notes on MIA Executive Board Meeting*, Martin Luther King, Jr. Research and Education Institute (Feb. 2, 1956); *see also* Patrick J. Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, Duke Center for Firearms Laws (April 8, 2020) (discussing the 1967 Mulford Act designed to restrict Black gun ownership); Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. C.R.L.J. 67 (1991) (discussing how gun control measures have been used throughout American history to intentionally disarm and oppress people of color); Brief for Amicus Curiae Nat'l African Am. Gun Ass'n, Inc. in Support of Petitioners, *N.Y. State Rifle & Pistol Ass'n., Inc. v. City of New York*, 140 S. Ct. 1525 (2020), 2019 WL 2103434, at *34.

[81] *See Guns and Drugs*, *supra* note 75, at 2197 ("to the extent that the War on Drugs has led to more people of color with felony convictions, a system of gun control that requires mandatory minimum prison terms for felons risks sending the same individuals to prison for extended sentences."); *see also* Brief for Amicus Curiae National African American Gun Association, Inc. in Support of Petitioners, *New*

Regardless of one's personal feelings on firearms, they are endemic to the United States,[82] but not everyone has equal access. When we imagine an American gun owner, we default to the "image of the gun owner as rural white male. This idealized gun owner has become a symbol of sorts,"[83] and stands in contrast to those we disarm. People who aren't prohibited possessors and can afford to do so can lawfully purchase machine guns pursuant to NFA requirements,[84] and those who cannot afford to do so can still lawfully shoot them at machinegun tourist attractions.[85] While we do not have statistics on those tourists, it seems unlikely the demographics track those convicted for federal machinegun offenses, given the unique historical context of federal firearm enforcement.

2. Puerto Rico and ethnic disparities.

The ethnic disparities are just as stark for convictions under § 922(o). Hispanic individuals comprised 50% of individuals sentenced from fiscal years 2019 to 2023 under §2K2.1 in cases with at least one count of conviction under § 922(o).[86] An additional 26% were Black.[87] And in that timeframe, the District of Puerto Rico alone has produced 38% of sentenced cases involving at least one count of conviction under § 922(o).[88] Understanding the racial impact of federal firearms convictions in Puerto Rico presents a unique

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York State Rifle & Pistol Ass'n, Inc. v. Bruen, No. 20-843 at 27–34 (July 16, 2021) (discussing Jim Crow era licensing restrictions aimed at disarming Black community); USSC Federal Firearms Offenses.

[82] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

[83] *Guns and Drugs*, *supra* note 75, at 2193.

[84] *See* Ruben Mendiola, *Dealer NFA Inc.: Machine Guns* (last accessed Jan. 31, 2025) (listing transferable fully automatic machine guns for sale ranging in price from $9,495 to $109,995 for transferable machine guns).

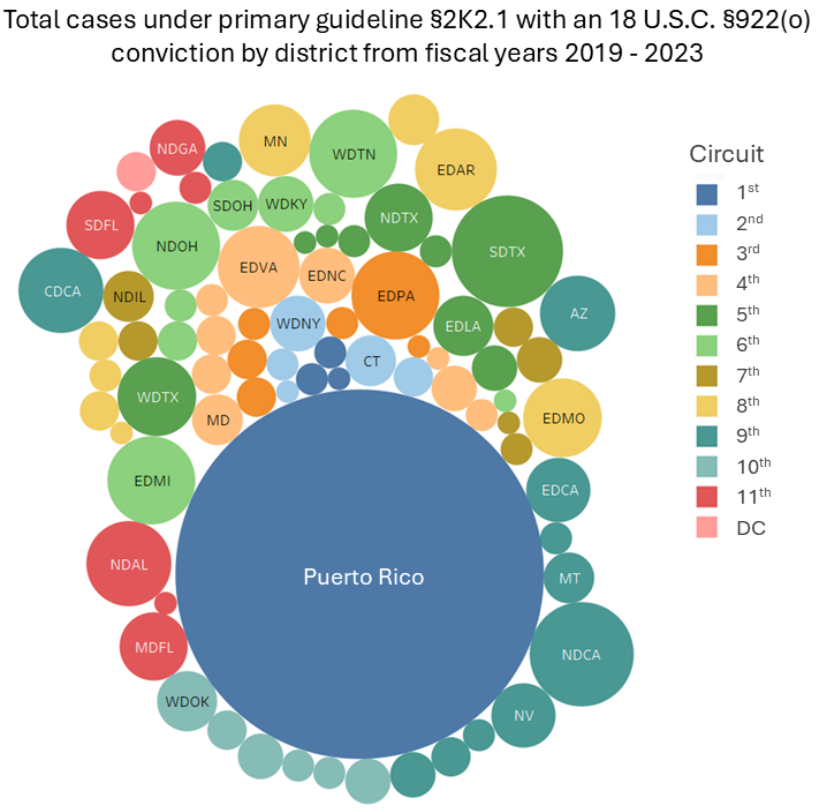
[85] In Pennsylvania, guests from around the world are invited "to experience classic machine guns from WW-II to state-of-the-art military and law enforcement firearms and explosives." *See* WCMG, *Machine Gun Rentals*, (last accessed Jan. 22, 2025). In Nevada, tourists are encouraged to "feel the thrill of firing" machine guns such as those used by the United States Armed Forces at Battlefield Vegas. *See* Shoot Machine Guns: Battlefield Vegas (last accessed Jan. 22, 2025).

[86] The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

[87] *Id.*

[88] *Id.*

challenge given that the complexities of post-colonial racial identity differ from conceptions of race on the mainland, but Part A will have an outsized impact in the district.[89] The heightened proportion of § 922(o) convictions from Puerto Rico cannot be considered outside of its legacy of colonialism, which continues to shape politics, identity, and law on the island.[90]



Puerto Rico is also unique in that it has long had the highest poverty

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[89] Research involving race in Puerto Rico presents unique challenges; "[m]ore than three-quarters of Puerto Ricans identified as white on the last census, even though much of the population on the island has roots in Africa." Natasha S. Alford, *Why Some Black Puerto Ricans Choose 'White' on the Census*, N.Y. Times (Published Feb. 9, 2020, Updated Aug. 7, 2020). Though fewer Puerto Ricans identified as white in 2020 than in 2010, "activists and demographers say [the numbers are] still inaccurate and they are working to get more Puerto Ricans of African descent to identify as black on the next census in an effort to draw attention to the island's racial disparities." *Id.*

[90] *See generally* Emmanuel Hiram Arnaud, *Colonizing by Contract*, 124 Colum. L. Rev. 2239 (2024) (discussing federal firearms prosecutions in Puerto Rico).

rate out of all U.S. states and territories,[91] with almost 40% of inhabitants living in poverty.[92]

And Puerto Rico's high proportion of MCD offenses is particularly unusual due to a unique Memorandum of Understanding between the Department and Puerto Rico's commonwealth government,[93] which for over a decade, has funneled firearms cases into the federal court system that would normally be handled in local courts.[94] The result: a dramatic rise in federal firearms offense prosecutions and convictions in the district of Puerto Rico,[95] including offenses involving MCDs.

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[91] *See* Carlos Vargas-Ramos, et. al, *Pervasive Poverty in Puerto Rico: A Closer Look*, CENTRO, (Sept. 2023); WIOA State Plan, *Puerto Rico PYs 2020–2023* ("Since 2007 until fiscal 2018 [PR's GNP] declined an average of -2.0%, while the US economy expanded at an average annual rate of 1.7%.")

[92] USCB, *QuickFacts Puerto Rico*, (last accessed Jan. 24, 2025); s*ee also* Willie Santana, *The New Insular Cases*, 29 Wm. & Mary J. Race Gender & Soc. Just. 435 (2023) (discussing the Insular Cases, a series of opinions issued by the Supreme Court of the United States discussing the status of the U.S. territories acquired during the Spanish-American War. The Insular Cases establish that while residing in "unincorporated" territories (such as Puerto Rico and the U.S. Virgin Islands) were not entitled to all of the rights granted under the Constitution, such as the right to vote for the President, to elect a voting member of the United States Congress, to receive certain Social Security benefits, etc.). Puerto Rico's economy has been crippled in recent years by mounting debt, the lasting effects of natural disasters, and a shrinking population. *See* Diana Roy and Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Relations: Backgrounder, (Updated Jan. 8, 2025).

[93] *See* Arnaud, *supra* note 90, at 2239 (discussing the 2010 confidential MOU, which subverted the constitutional protections established in Puerto Rico, such as the stringent speedy trial rights, and prohibitions on wiretaps and the death penalty). The MOU has "subject[ed] a growing number of Puerto Ricans to federal laws and procedures they had no say in creating." *Id.*

[94] *See id.* at 2251.

[95] *See id.* at 2270. In 2010, the Puerto Rico district courts applied §2K2.1 in just 33 cases; in 2013, following the implementation of the MOU, the number of cases increased (nearly 6 times) to 227. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2010 and 2013. Complicating matters, the Commonwealth firearm laws have historically diverged from those of the continental United States, taking a more strict, and at times inconsistent, approach to gun control. Puerto Rico Weapons Act of 2020, Act No. 168 (Dec. 23, 2019).

Mr. Alcantara's federal case offers a tragic example.[96] After being held at gunpoint at his wife's restaurant, Mr. Alcantara wanted to arm himself to protect his family's business as soon as possible. But the process to do so legally in Puerto Rico was too costly and prohibitively slow. In desperation, he purchased a firearm from an unlicensed vendor; the firearm came with an MCD already affixed. Mr. Alcantara was convicted under § 922(o) and was sentenced to 12 months and one day in custody. With strong family support, he completed supervised release early. But many do not have the support to successfully complete supervision,[97] and the over-incarceration of young men of color hurts their communities.[98] In light of the racial and ethnic disparities prevalent in MCD cases, we urge the Commission not to add another empirically unsupported enhancement, which will have an outsized impact on people of color.

E. Neither option will effectively deter conduct.

Finally, there is no evidence that increasing guideline ranges will deter MCD possession. Four decades of MCD prohibition has not curbed the proliferation of MCDs, given the unchanged design, and popularity of, semiautomatic pistols and rifles.[99] MCDs have become more common, not less. Nor has consistent harshening of the primary firearm guideline over the decades managed to deter gun violence or illegal gun possession. We have no reason to believe that adding SOC enhancements for MCDs throughout

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[96] We use a pseudonym here to protect the individual's privacy.

[97] USSC, Federal Offenders Sentenced to Supervised Release 4 (July 2010) (noting that "one-third had their terms revoked and were sent back to prison"). As the Department has acknowledged, prison may have a criminogenic effect and any crime prevention benefits of lengthening imprisonment "fall far short of the social and economic costs." *See* Nat'l Inst. of Just., *Five Things About Deterrence* (2016) (noting certainty of punishment is better deterrent than severity).

[98] *See generally*, Becky Pettit and Carmen Gutierrez, *Mass Incarceration and Racial Inequality*, 77 Am. J. Econ. Social. 1153–1182 (2018). And many convicted individuals are held in mainland prisons far from their families. Emmanuel Hiram Arnaud, *Llegaron los Federales: the Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53.3 Colum. Hum. Rts. L. Rev. 894 (2022) (discussing imprisonment of convicted individuals in Puerto Rico).

[99] *See The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. at 668–69 (discussing the 1986 passage of § 922(o) and early MCDs).

§2K2.1 will achieve what no other past punishment increase has done.[100] A systemic problem requires systemic solutions.[101] We urge the Commission to listen to the experts who warn that we cannot overcome the public health crisis of gun violence by magnifying individual punishment.[102]

III. If the Commission feels that it should act, it should create a narrowly tailored standalone SOC for certain MCD offenses.

We urge the Commission not to take any action at this time. But if the Commission feels it must act now to address MCDs, it should do so with precision. Instead of implementing an empirically deficient, disparity-creating, blanket increase across all SOCs for all NFA weapons, it could instead create a narrowly tailored standalone enhancement focusing explicitly on aggravated conduct involving MCDs. A standalone, narrowly tailored SOC could limit some of the disparity built into both Options 1 and 2, and would be less likely to result in punishment greater than necessary. The standalone SOC should ensure an MCD is not treated the same as an actual functional firearm. It should also require mens rea and a nexus to the offense of conviction. Additionally, it should focus on MCDs alone, instead of broadly sweeping in all NFA firearms.

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[100] *See* 2023 Defender Comment, *supra* note 25, at 26 ("While DOJ requested the serial number increase to 'provide stronger deterrence and better reflect the harm of these offenses,' since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value."). Nor were the 2011 enhancements for straw purchase and firearm trafficking effective in stopping the flow of firearms out of the country, as evidenced by Congressional attempts to address that problem over a decade later in the BSCA.

[101] *See Redistributing Justice*, supra note 75, at 1591–92 ("[T]he institutional design of the criminal system means that an assignment of criminal liability all too easily does the exact opposite--scapegoating an individual and suggesting that problems involve bad apples rather than rotten barrels or blighted orchards.").

[102] *See* Caroline Nobo, Think Global Health, *The United States Can't Arrest Its Way Out of Gun Violence* (Nov. 20, 2024) (citing U.S. Surgeon Gen., Firearm Violence: A Public Health Crisis in America (2024)) ("Public health advocates do know that—regardless of federal support—they can continue to have an impact on gun violence through community and state-based public health approaches."); Johns Hopkins Center for Gun Violence Solutions, The Public Health Approach to Prevent Gun Violence: Quick Facts About the Public Health Approach to Prevent Gun Violence (last visited Jan. 22, 2025) ("To reduce gun violence, we should apply this same time-tested public health approach. . . .").

Finally, the Commission should not move additional commentary definitions to the text nor take any additional action at this time beyond implementing a careful study of this broken guideline.

IV. Conclusion

For the reasons above, the Commission should not adopt Option 1 or Option 2. Both options increase unwarranted disparity, and neither effectively advances the statutory purposes of sentencing. The data show judges do not see MCDs as warranting sentences within—much less above—extant guideline ranges. Further, adding yet another empirically unsupported increase into the bloated firearms guideline goes against the Commission's broader goals of simplification and reducing the unnecessary costs of incarceration.[103] Defenders want our communities and families to be safe as much as anyone else. But decades of increases to §2K2.1 penalty ranges have not decreased the number of offenses sentenced under the guideline and have instead compounded disparity. If the Commission feels that it must act to address MCDs, it should do so in a more empirically sound manner.

The Commission has mighty tools at its disposal beyond increasing punishment to address the problem, such as exercising its empirical might to aid researchers seeking systemic solutions to gun violence, as well as making recommendations to Congress.[104] As researchers have explained,[105] exploring such a "public health approach to prevention and how it fits our current epidemic of gun violence" will require "measuring problems and identifying

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[103] USSC, Proposed 2024–2025 Priorities (May 31, 2024).

[104] *See* Joshua Horwitz, *How A Public Health Prescription Could Help Curb the Gun Violence Epidemic*, Health Affairs (Jan. 31, 2025) (citing Cedric Dark & Seema Yasmin, *Under the Gun: An ER Doctor's Cure for America's Gun Epidemic* (2024)) ("following the public health approach consistently requires us to challenge our assumptions"). Research can also shed light on racial disparities. *See* Testimony of Rob Wilcox, Everytown for Gun Safety before March 2023 USSC Firearms Offenses Hearing 11–12 (Mar. 7, 2023) (("urg[ing] the Commission to collect data on sentences imposed for these two new federal offenses to determine whether racial disparities arise. Studying this issue is consistent with the BSCA's mandate. . . .").

[105] *See* Johns Hopkins Center for Gun Violence Solutions, *The Public Health Approach to Prevent Gun Violence* (drawing comparison to successful public health campaign that reduced car fatalities).

risk and protective factors that are amenable to intervention."[106] But it also "means constantly challenging one's own assumptions, and at times politically popular ideas, to keep fidelity with the evidence."[107] We encourage the Commission to follow its characteristic empirical approach and resist the politically popular, but unfounded, idea that increases in individual punishment will adequately solve this problem, and to reject both options.[108]

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[106] *How A Public Health Prescription Could Help Curb the Gun Violence Epidemic*, *supra* note 104.

[107] *Id.*

[108] 28 U.S.C. § 991(b)(1)(C) (purpose of the Commission include establishing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

PART B: Mens Rea. Part B of the "Firearms Offenses" proposed amendment would apply the mens rea currently applied only to §2K2.1(b)(4)(B)(ii) (unserialized—or privately manufactured—firearms) to the other two enhancements contained within §2K2.1(b)(4): offenses involving stolen firearms or those with an illegible serial number ("the Enhancements"). Defenders support Part B and thank the Commission for proposing this improvement.[1] We continue to urge the Commission to take on comprehensive mens rea reform in §2K2.1 and more broadly in the Manual.[2]

I. The Commission must act now to add a mens rea requirement into the empirically deficient Enhancements.

As Defenders have explained at length before, the Commission should enact mens rea reform across the Manual.[3] This amendment cycle it should start by adding a scienter requirement to the Enhancements—for a number of reasons. First, doing so will ameliorate disparity, by "helping to separate those who understand the wrongful nature of their act from those who do not."[4] Second, a mens rea requirement would cabin the application of the Enhancements, which compound racial disparities in sentencing outcomes.[5]

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[1] Defenders have asked the Commission for years to better these broken enhancements by adding a mens rea requirement. *See, e.g.,* 2024 Fed. Defenders' Annual Letter to U.S. Sent'g Comm, at 17 (July 15, 2024); Testimony of Deirdre D. von Dornum on behalf of Fed. Defenders to U.S. Sent'g Comm, at A-15–A-19 (Feb. 27, 2024); 2023 Defender Comment on Firearms Offenses to U.S. Sent'g Comm, at 21–27 (March 14, 2023); 2022 Fed. Defenders' Annual Letter to U.S. Sent'g Comm, at 9–11 (Sept. 14, 2022).

[2] *See* 2024 Defender Annual Letter, *supra* note 1, at 16–17 (urging return to default mens rea requirement in §1B1.3); 2022 Defender Annual Letter, *supra* note 1, at 9–11 (discussing §2K2.1's strict liability enhanced base offense levels and other areas in the Manual in need of mens rea reform).

[3] 2024 Defender Annual Letter, *supra* note 1, at 16–17.

[4] *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (cleaned up). As things stand, the Enhancements treat a person who unknowingly possesses a stolen firearm the same as one who actually stole it, and treats a person who does not know that one of three serial numbers on a pistol is illegible the same as the one who intentionally obliterates them all.

[5] *See* von Dornum Testimony, *supra* note 1, at A-14 ("Black individuals made up 50% of those receiving the Enhancement in the past five fiscal years. And when they

Third, the Enhancement's strict-liability nature has never had an empirical basis, and does not further the purposes of sentencing.[6] Strict liability punishment cannot deter conduct, "since a person cannot be deterred from doing what he or she does not know is being done."[7] And in the typical §2K2.1 case involving a prohibited possessor,[8] the Enhancements arguably impose double punishment on the same conduct—illegal possession of a firearm.[9] Finally, the sentences in cases where the Enhancements apply suggests that sentencing judges think the ranges in these cases are too high.[10] A mens rea

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received the Enhancement, Black individuals received longer sentences than their white counterparts.").

[6] *See* 2023 Defender Firearms Comment, *supra* note 1, at 25; von Dornum Testimony, *supra* note 1, at A-7–A-8 (discussing empirically lacking history of the Enhancements); *see also United States v. Jordan*, 740 F. Supp. 2d 1013, 1016 (E.D. Wis. 2010) (noting the Commission "never satisfactorily explained why an increase of this extent should apply on a strict liability basis").

[7] *United States v. Handy*, 570 F. Supp. 2d 437, 480 (E.D.N.Y. 2008) (*disapproved of on other grounds by United States v. Thomas*, 628 F.3d 64 (2d Cir. 2010)). The data suggest that the increase in severity to the illegible serial number enhancement has not deterred this conduct. 2023 Defender Firearms Comment, *supra* note 1, at 26 ("While DOJ requested the serial-number increase to provide stronger deterrence and better reflect the harm of these offenses, since 2006, the rate at which the enhancement has applied has not decreased, meaning the increase has provided little deterrent value." (cleaned up))

[8] USSC, What Do Federal Firearms Offenses Really Look Like? 8 (July 2022) ("The vast majority of [people] (88.8%) sentenced under §2K2.1 were prohibited from possessing a firearm.") ("USSC Federal Firearms Offenses").

[9] *United States v. Faison*, No. GJH-19-27, 2020 WL 815699, at *7 (D. Md. Feb. 18, 2020) (explaining that for individuals convicted of being a felon in possession of a firearm, "there is no legal avenue by which that person could have purchased a firearm . . . . Thus, every felon in possession of a firearm has engaged in the illegal marketplace to acquire a gun").

[10] Forty-three percent of §2K2.1 cases receiving the (b)(4)(A) enhancement were sentenced below guideline range, while 53% of §2K2.1 cases receiving the (b)(4)(B) (now the (b)(4)(B)(i)) enhancement were sentenced below guideline range. Note that "below guideline range" includes cases with §5K1.1 and §5K3.1 departures. Cases where the enhancement levels were coded as negative numbers were not included, which removed less than 1% of cases. The data used for these analyses were extracted from the Commission's "Individual Datafiles" spanning fiscal years 2019 to 2023.

requirement will ameliorate some of these flaws by making punishment more proportionate to the offense.

II. Requiring the government to meet its evidentiary burden to establish mens rea is not a reason to forego the amendment.

The Commission now seeks comment on whether there would be "evidentiary challenges in firearms cases to proving a [person's] mental state."[11] Any mens rea requirement places evidentiary burdens on the government, but the requirement to prove mental intent is a familiar and key feature of the American criminal legal system. And the mens rea requirements in the proposed amendment are "well established in criminal law" and already present elsewhere in §2K2.1.[12]

1. Mens rea is fundamental to the criminal system.

The Supreme Court has reaffirmed the importance of mens rea in recent years.[13] It explained that the presumption of mens rea should be excused only where statutory provisions at issue are part of a "regulatory" or "public welfare" program and "carry only minor penalties."[14] The Enhancements are not part of a regulatory or public welfare program. Nor are they minor; even a two-level enhancement can lead to a guideline range increase of a year or more. Moreover, firearms cases are not unique; they are the third-most-sentenced offense in the federal system.[15] Guideline ranges

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[11] USSC, Proposed Amendments to the Sentencing Guidelines 46 (Dec. 19, 2024).

[12] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023) ("[T]he Commission determined that the doctrines of 'willful blindness' and 'conscious avoidance' are 'well established in criminal law.'" (quoting *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011))).

[13] *See, e.g., Ruan v. United States*, --- U.S. ---, 142 S. Ct. 2370, 2376 (2022) (explaining that "'wrongdoing must be conscious to be criminal'") (quoting *Elonis v. United States*, 575 U.S. 723, 734 (2015)); *Rehaif*, 588 U.S. at 233–37; *see also* Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 Vill. L. Rev. 51, 56 (2023) ("Within specific categories of crime, where the act can be seen as a constant, the defendant's mens rea is a key factor in how we "rank" the particular act and assign appropriate punishment").

[14] *Rehaif*, 588 U.S. at 232.

[15] USSC, 2023 Sourcebook Fig. 2.

and enhancements should suggest punishment proportionate to an individual's culpability.[16] If the government cannot meet its burden of proof at sentencing as to mental state—which is lower than the burden of proof required to obtain a conviction—then the Enhancements should not apply.

Further, the statutes that the Enhancements track carry a mens rea requirement, indicating Congress understood the importance of mens rea here.[17] Section § 922(k), covering offenses involving a firearm with a removed, altered, or obliterated serial number, requires the offense be committed "knowingly."[18] And violations of §§ 922(i) and (j), covering offenses involving stolen firearms, also require knowledge or "reasonable cause to believe" the firearm was stolen.[19] In §2K2.1 cases involving convictions under these statutes, there will be no evidentiary issue as the burden of proof will be met already. And in cases where the issue arises based on relevant conduct, and not convictions, the government will have to meet a less stringent mens rea standard, under a much weaker proof standard, for one of the Enhancements to apply. The current scheme is far more problematic: enabling the government to use relevant conduct and a lower evidentiary standard as an end-run around the burden of proof required to obtain a conviction.[20]

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[16] 28 U.S.C. § 991(b)(1)(A), (B) (instructing the Commission to craft sentencing policy to avoid unwarranted disparities, reflect distinctions in offense severity, and provide certainty and fairness in sentencing); *see also* 18 U.S.C. § 3553(a)(2)(A) (sentencing objectives).

[17] *Handy*, 570 F. Supp. 2d at 478 (noting in rejecting the strict liability nature of the stolen firearm enhancement that "there is a closely related specific and unambiguous statute" that requires mens rea, and the Commission "cannot ignore this congressional policy and the constitutional implications attached to it").

[18] 18 U.S.C. § 922(k).

[19] 18 U.S.C. §§ 922(i) and (j) ("knowing or having reasonable cause to believe"). The original prohibited firearm transactions guideline included a mens rea requirement tracking the statute for the Enhancements. *See* §2K2.3(b)(2)(C) (1987) ("If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.").

[20] *See* von Dornum Testimony, *supra* note 1, at A-16–A-17 ("Commission data show that while there were only 258 cases involving at least one count of conviction under § 922(k) and sentenced under §2K2.1 from fiscal years 2018 through 2022, there were 2,328 cases where the altered or obliterated serial number enhancement

2. Section 2K2.1 requires the same scienter elsewhere.

Section 2K2.1 already carries the same scienter requirement proposed here in two other places: the (b)(4)(B)(ii) enhancement for unserialized firearms and the (b)(8) gang enhancement.[21] In 2023, the Commission noted that "the doctrines of 'willful blindness' and 'conscious avoidance' are 'well established in criminal law.'"[22] The existence of these same scienter requirements elsewhere in §2K2.1 supports a parallel mens rea requirement for the Enhancements as well.

In particular, the Commission added the (b)(4)(B)(ii) enhancement for unserialized firearms because it felt "there is no meaningful distinction between a firearm with an obliterated serial number . . . and a firearm that is not marked with a serial number."[23] With "no meaningful distinction" between the bases for the (b)(4)(B) enhancements, there is also no reason not to add the scienter requirement to the illegible-serial-number enhancement. This is particularly true as commercially serialized firearms often have several serial numbers in different places, meaning it is easy to miss whether one of these numbers has been made illegible.[24]

Finally, the scienter requirement is even more crucial for the stolen firearm enhancement.[25] By and large, the "fact that the gun was stolen is not visually detectable, nor is the [person] in possession capable of tracing the

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applied.").

[21] *Compare* USSC, Dec. 2024 Proposed Amendments to the Sentencing Guidelines, at 46 ("knew, was willfully blind to the fact, or consciously avoided knowing that") *with* §§2K2.1(b)(4)(B)(ii) ("knew . . . or was willfully blind to or consciously avoided knowledge of such fact") *and* (b)(8)(B) ("knowing or acting with willful blindness or conscious avoidance of knowledge").

[22] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023) (quoting *Glob.-Tech Appliances*, 563 U.S. at 766, 769)).

[23] USSG App C., Amend. 819 Reason for Amendment (Nov. 1, 2023).

[24] *See* von Dornum Testimony, *supra* note 1, at A-18 (explaining that "an individual might not inspect or notice defacement on every single iteration of the serial number, especially one on the underside of the firearm"). Defenders urge the Commission to consider clarifying in the future that the enhancement should only apply if *all* serial numbers are illegible.

[25] *Id. See also* Letter from Jonathan Wroblewski on behalf of DOJ to U.S. Sent'g Comm, at 3 (Feb. 27, 2023) ("it may not be as readily apparent that a gun is stolen").

gun to determine if it was stolen."[26]

3. There are more stringent mens rea requirements in the Manual.

Other enhancements in the Manual also carry a similar mens rea requirement,[27] or a knowledge requirement,[28] which is more stringent than the willful-blindness standard here.[29] So the government has experience proving scienter for these other enhancements. With respect to willful blindness, the Supreme Court explained, while iterations of the doctrine differ slightly across circuits, at its core it has a "limited scope that surpasses recklessness and negligence," such that a person engaging in willful blindness "can almost be said to have actually known the critical facts."[30] If the government cannot prove that an individual was at least willfully blind to the conduct at issue, the Enhancements should not apply.

In sum, Defenders urge the Commission to adopt Proposal B, as an important first step toward further mens rea reform in the Manual, in both §2K2.1 and beyond.

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[26] *Handy*, 570 F. Supp. 2d at 454. Even ATF has difficulty tracing commercial firearms and acknowledges that tracing is of limited utility beyond determining the "first retail seller." 2023 Defender Firearms Comment, *supra* note 1, at 31 (quoting an ATF publication for this proposition).

[27] *See* §2D1.1(b)(13)(B) ("willful blindness or conscious avoidance of knowledge").

[28] Many provisions require proof of knowledge or belief. *See e.g.* §§2A3.1(b)(6)(A); 2A3.2(b)(2)(A); 2A3.3(b)(1); 2A3.4(b)(4); 2D1.1(b)(5); 2D1.1(b)(12) & comment. (n. 17); 2D1.1(b)(13)(A); 2D1.1(b)(16)(B); 2G1.3(b)(2)(A); 2G2.1(b)(3); 2G2.1(b)(6)(A); 2G2.2(b)(3)(F); 2G3.1(b)(1)(F); 2K1.3(a)(4)(B); 2K1.4(a)(1). Others require knowledge or belief. *See e.g.* §§2D1.11(b)(2); 2D1.12(a)(1); 2D1.13(a)(1), (2); 2S1.1(b)(1); 2S1.3(b)(1). Others require knowledge or intent. *See e.g.* §§2B1.1(b)(14); 2G1.3(c)(3); 2K1.3(c)(1); 2K2.1(c)(1); 2K2.5(c)(1); 2N1.1(c)(1).

[29] The willful-blindness standard has been criticized by some for being too expansive. *See* Heritage Foundation, *The Supreme Court's Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions* (June 30, 2011) ("Punishing as criminals those whom prosecutors decide—after the fact—'should have known' that their conduct was unlawful is a misuse of criminal law.").

[30] *Glob.-Tech Appliances*, 563 U.S. at 769 (explaining that circuits all "agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact").

Federal Public and Community Defenders
Comment on Circuit Conflicts

(Proposal 3)

February 3, 2025

Table of Contents

The Commission's third set of proposed amendments addresses two circuit conflicts, regarding (1) the "physically restrained" enhancement in USSG §2B3.1; and (2) Chapter Four's definition of "intervening arrest." This document includes Federal Public and Community Defenders' comments on each of these proposals.

I. PART A: "Physically restrained"

Part A of the proposed amendments for circuit conflicts sets forth three options to address whether the robbery guideline's "physically restrained" enhancement ("Enhancement") in the robbery guideline requires actual physical restraint, or can be triggered by nonphysical means, such as holding victims at gunpoint.[1] Defenders urge the Commission to adopt Option 2. Under that approach, the Enhancement would apply only to cases involving physical confinement or contact, and not to cases involving psychological coercion or other nonphysical restraint (i.e, pointing a gun at a victim).

As discussed below, Option 2 better aligns with the Enhancement's purpose by targeting distinctive conduct beyond what occurs in a typical robbery. It also avoids unwarranted sentencing disparities and problematic double counting of conduct already captured by the robbery guideline's base offense level and other enhancements. And it best tracks current sentencing patterns showing that judges often find guideline ranges excessive in robbery cases, particularly those involving firearms. While Defenders generally support Option 2, we offer modest refinements to ensure the amendment best serves the purposes of sentencing.

Options 1 and 3, in contrast, would effectively transform what should be a specific offense characteristic ("SOC") targeting distinctive conduct into a de facto guideline-range increase that would apply in virtually every robbery case, undermining the Enhancement's purpose and exacerbating existing sentencing disparities.[2] Defenders urge the Commission to reject those options.

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[1] *See* USSC, Proposed Amendments to the Sentencing Guidelines 48–53 (Dec. 19, 2024) ("USSC 2024–2025 Proposed Amendments"). The 2-level enhancement applies "if any person was physically restrained to facilitate commission of the offense or to facilitate escape[.]" USSG §2B3.1(b)(4)(B).

[2] Option 1 expands the 2-level "physically restrained" enhancement to apply when a person's movement is restrained by either physical or nonphysical means.

A. Option 2 is superior to Options 1 and 3.

1. Option 2 better aligns with the Enhancement's core purpose.

Option 2 best furthers the Enhancement's purpose to identify and increase punishment for distinctive, aggravating conduct. Use or threat of force is definitional to robbery.[3] And in federal robbery cases, firearms are commonplace.[4] Options 1 and 3 would make the Enhancement apply in a great many cases based on, essentially, this conduct.[5] As the Second Circuit explained when rejecting the expansive reading Options 1 and 3 countenance, if the Enhancement is interpreted so broadly, "virtually every robbery would be subject to the to the 2-level [E]nhancement for physical restraint unless it

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Option 3 creates a tiered enhancement with a 2-level increase for physical restraints and a 1-level increase for nonphysical restraints.

[3] *See, e.g.*, Ninth Circuit Model Crim. Jury Instr. 9.8 (Hobbs Act Robbery, 18 U.S.C. § 1951) (defining "Robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence…"); *see also* Eleventh Circuit Pattern Jury Instr. O70.3 (Hobbs Act Robbery, 18 U.S.C. § 1951(a)) (requiring proof that an individual "took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future"); *cf. Stokeling v. United States*, 586 U.S. 73, 77 (2019) ("[T]he elements of the common-law crime of robbery [have] long required force or violence.").

[4] According to the Commission's 2022 Robbery Report, "more than three-quarters (77.6%) of robbery events involved a weapon, and firearms were the most common type of weapon. Of the robbery events involving a weapon, more than three-quarters (79.8%) involved a firearm." USSC, Federal Robbery: Prevalence, Trends, and Factors in Sentencing 30 (2022) ("USSC 2022 Robbery Report"). And the (b)(2) enhancements for using or brandishing a firearm or dangerous weapon or making a threat of death applied in 63.5% of cases sentenced under §2B3.1 in fiscal year 2023. *See* USSC, Quick Facts on Robbery Offenses (2024) ("Robbery Offenses Quick Facts, FY23").

[5] These options both encompass psychological restraint, in line with cases such as, *e.g.*, *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997) ("physical restraint occurs whenever a victim is specifically prevented at gunpoint from moving"); *United States v. Dimache*, 665 F.3d 603, 608–09 (4th Cir. 2011) (affirming the Enhancement's application where a person used a gun to force bank tellers to the floor because they "were prevented from both leaving the bank and thwarting the bank robbery…").

took place in unoccupied premises."[6] Such an interpretation would render the Enhancement "at risk of no longer operating as a sentencing enhancement but instead as a potentially automatic increase of the. . .base offense level."[7]

Option 2's narrow enhancement targeting actual physical restraint represents the most principled approach to applying a SOC by distinguishing conduct that truly warrants additional punishment from conduct inherent in virtually every robbery offense. It recognizes that actual physical restraint adds "another dimension" to a typical robbery that is qualitatively different from the psychological coercion of issuing an immobilization order.[8]

Option 1's expansive approach is "unnecessarily punitive" because individuals receive additional punishment "not only for conduct beyond the rule's scope but also for conduct, in effect, constituting the underlying crime of armed robbery."[9] It also violates 18 U.S.C. 3553(a)(6)'s requirement that

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[6] *United States v. Anglin*, 169 F.3d 154, 163 (2d Cir. 1999). The Fifth Circuit has similarly observed, where a person holds a firearm and instructs a victim to get on the ground, he has "simply ma[de] explicit what is implicit in all armed robberies: that the victims should not leave the premises. Such conduct does not differentiate this case in any meaningful way from a typical armed robbery." *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (cleaned up).

[7] Drew Curtis, *Criminal Law-the Federal Sentencing Guidelines: Examining the Physical Restraint Sentencing Enhancement*, 44 U. Ark. Little Rock L. Rev. 561, 591 (2022).

[8] *See United States v. Deleon*, 116 F.4th 1260, 1267 (11th Cir. 2024) (Rosenbaum, J., concurring). Additionally, Option 2 best aligns with the Enhancement's use of the modifier "physically," which reflects the Commission's deliberate policy decision to limit it to instances of actual physical restraint. *See id.* ("[I]f the framers of the guideline wanted it to apply whenever any person was restrained in either a physical or non-physical way, they wouldn't have included the qualifier 'physically'."). This interpretation is supported by the original robbery guideline's background commentary that the "guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up." USSG §2B3.1 (Background) (1987). Of course, the Commission is always free to revisit policy decisions, but the reasons discussed herein counsel against doing so.

[9] *See* Curtis, supra note 7, at 591; *see also* Heather Crabill, *Restraints of the Body or of the Mind: Conflicting Interpretations of the Physical Restraint Sentencing*

courts avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct by improperly equating the threats inherent in virtually every robbery with the distinct and more serious act of physical restraint.[10]

Option 3 fares no better. Although it attempts to lessen Option 1's overreach by reducing the offense-level increase for non-physical, psychological restraint to one level, its approach still results in an unwarranted guideline range increase in most robbery cases.[11] Adding even a one-level increase for conduct essentially inherent to robbery serves no legitimate sentencing purpose, particularly since the level added would be added to what's already typically a high guideline range.[12] This can translate into an additional 12 to 36 months of imprisonment, while still failing to meaningfully distinguish specific offense conduct.

Beyond overbroad application, both Options 1 and 3 introduce a problematic subjectivity that would undermine the Guidelines' fundamental goal of sentencing uniformity and this Commission's goal of simplification. These options could result in enhancement decisions turning on victims' subjective reactions to threats rather than objective offense characteristics—a framework that would likely lead to inconsistent application.[13]

Enhancement, 74 Okla. L. Rev. 795, 819–20 (2022) (expanding the Enhancement to "include psychological restraint would cause the two-level enhancement to apply to virtually all robberies.").

[10] *See* § 3553(a)(6) (providing that in sentencing, courts shall consider the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *Gall v. United States*, 552 U.S. 38, 54 (2007) (discussing § 3553(a)(6)).

[11] *See Gall*, 552 U.S. at 55 (affirming a sentence where "it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated" (emphasis in original)).

[12] *See* Robbery Offenses Quick Facts, FY23, *supra* note 4, at 2 (showing an average guideline minimum of 123 months).

[13] *See Herman*, 930 F.3d at 876 (providing that a person's "physical response to [an individual]'s attempt to coerce, however, is not something that logically belongs within the scope of the physical-restraint guideline"); *see also* Julia Knitter, *"Don't Move": Redefining "Physical Restraint" in Light of a United States Circuit Court*

2. Option 2 avoids applying separate enhancements for identical, weapon-related conduct.

Using a firearm to hold victims in place may be distinct at least from unarmed robbery; but this conduct is already captured and punished by §2B3.1's weapon-related specific offense characteristics.[14] Section 2B3.1(b)(2) provides a graduated enhancement framework imposing escalating penalties based on the severity of weapon use, ranging from 3 to 7 levels.[15] The robbery guideline also adds enhancements for otherwise using other dangerous weapons (§2B3.1(b)(2)(D)), making death threats (§2B3.1(b)(2)(F)), and causing bodily injury (§2B3.1(b)(3)).[16] Options 1 and 3 would make the Enhancement clearly duplicative of those.[17]

There is an 11-level cap on cumulative adjustments from applying these enhancements,[18] which reflects the Commission's intent to punish aggravating conduct while avoiding excessive enhancements for overlapping conduct.[19] Adding what would function as another weapons-based enhancement on top of the others, via Options 1 or 3, would undermine that

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Divide, 44 Seattle U. L. Rev. 205, 224 (2020) (explaining that "a victim's reaction to a[n individual]'s actions should not be the determination of whether the physical restraint enhancement is applied.").

[14] This conduct also may result in a conviction under 18 U.S.C. § 924(c) for using or carrying a firearm in furtherance of a crime of violence. *See* § 924(c); *see also* Joshua McCroskey, *Held at Gunpoint: Applying the Physical Restraint Sentencing Enhancement*, 73 Fla. L. Rev. 919, 946–47 (2021) (discussing how conduct like showing or pointing a firearm already faces large enhancements for brandishing or otherwise using a gun, including under § 924(c)).

[15] *See* USSG §2B3.1(b)(2)(a)–(c).

[16] *See id.* §§2B3.1(b)(2)(D), (F); §2B3.1(b)(3).

[17] To be sure, in the rare case involving extraordinary psychological restraint that might not be captured by the guideline's existing structure, courts have discretion under § 3553(a) to consider "conduct that appears to the judge to be the equivalent of a physical restraint." *See Herman*, 930 F.3d at 877.

[18] *See* USSG §2B3.1(b)(3).

[19] This cap works as an important check against using the guidelines as a "prosecutorial hammer." Conner J. Purcell, *This Is Your Captain Speaking, Please Remain Physically Restrained While the Robbery Is in Progress*, 38 Touro L. Rev. 453, 489 (2022).

structure. Option 2 respects this structure by targeting distinct conduct not already captured by these other enhancements.

Consider a common bank robbery scenario: a person points a gun at a teller and demands money, and the teller complies. This conduct very likely would trigger a 5-level enhancement for brandishing a firearm under §2B3.1(b)(2)(C), or enhancements when a firearm or dangerous weapon is "otherwise used."[20] But under Options 1 and 3, the same conduct would also warrant an enhancement under §2B3.1(b)(4)(B), effectively punishing identical behavior twice.[21] This double counting is significant, subjecting individuals to more months or even years of incarceration.[22]

3. Option 2 best tracks current sentencing patterns.

Existing data supports Option 2. Robbery guideline ranges, particularly in cases where firearms were involved, already call for lengthy punishment. And data show that below-guideline sentences in robbery cases have increased in recent years.[23] Even when the Enhancement applies, courts impose sentences, on average, that are nearly 17 months below the average guideline minimum.[24] It does not make sense to expand the

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[20] *See also United States v. Hano*, 922 F.3d 1272, 1297 (11th Cir. 2019) (pointing a toy gun, which qualified as a "dangerous weapon," at a person with the intent to instill fear in another amounted to "otherwise used").

[21] *See* Purcell, *supra* note 19, at 488–89.

[22] *See* Curtis, *supra* note 7, at 591–92 ("While the two-level upward adjustment sounds relatively mild, it has significant consequences for [an individual], who is subjected to additional months—often years—of incarceration because of its application.").

[23] *See* USSC 2022 Robbery Report, *supra* note 4, at 22. Between fiscal years 2012 and 2021, the proportion of within-range sentences decreased from 51.1% to 38.8%, while below-range sentences, excluding USSG §5K1.1 departures, increased from 27.6% to 45.0%. *Id.*

[24] The data used for this analysis was extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023, which is publicly available for download on its website. The data show in robbery cases where §2B3.1(b)(4)(B) was applied, courts imposed an average sentence of 121.2 months compared to an average guideline minimum of 138.0 months. Sentence length was calculated using SENSPCAP and guideline minimum was calculated using a modified GLMIN where life was recoded as 470 months.

Enhancement when data indicate judges find that the guideline ranges are already too severe in firearm cases.

Moreover, the expanded approach described in Options 1 and 3 would exacerbate racial disparities in the federal criminal justice system. According to the Commission's data, most individuals sentenced for robbery offenses in FY2023 were people of color: 60.3% were Black, 19.7% were Hispanic, 16.1% were white, and 3.9% were other races.[25] What's more, Black and Hispanic individuals received, on average, much higher sentences than their white counterparts.[26] Making the Enhancement nearly automatic in robbery cases—which would be the impact of Options 1 and 3—would disproportionately harm these already overrepresented, marginalized groups.

Further, on average, individuals sentenced for robbery offenses are young, with a large percentage involving people in their twenties.[27] It makes no sense to call for even lengthier sentences for young people, who, as the Commission recently recognized through last year's age-related amendment to §5H1.1, have greater capacity for rehabilitation and warrant more measured sentences to account for their potential for positive change.[28]

B. While Option 2 is superior, key refinements can ensure the Commission resolves the present conflict.

While Option 2 presents the most equitable path forward for resolving the current circuit conflict, minor refinements to its language would ensure more consistent application. A key issue contributing to the current circuit split is courts' interpretation of the phrase "such as" in §1B1.1's commentary.

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[25] *Id.*

[26] The data used for this analysis was extracted from the U.S. Sentencing Commission's "Individual Datafiles" for fiscal year 2023, which is publicly available for download on its website. The data show that the mean sentence for Black and Hispanic individuals was 120.0 months and 101.2 months, respectively, while the mean sentence for White individuals was 89.9 months. Average sentence length calculated using SENSPCAP. *Id.*

[27] *See* USSC 2022 Robbery Report, *supra* note 4, at 15 & Fig. 5. The proportion of those ages 21–29 for FY 2021 was 43.0% for robbery, 32.1% for other violent crimes, and 24.9% for non-violent offenses. *See id.*

[28] *See* USSG App. C, Amend. 829, Reason for Amendment (Nov. 1, 2024)

Courts on both sides of the split have read this language as providing illustrative examples of physical restraint rather than expressly limiting the Enhancement's application to those examples.[29]

So, while Option 2 provides the best approach, the Commission can strengthen its proposal by adding language to Option 2 that expressly excludes psychological coercion: "if any person's freedom of movement was restricted through physical conduct or confinement, such as by being tied up, bound, or locked up…*but not including restrictions achieved through threats with weapons or other forms of psychological coercion*."[30] This language is similar to a proposal that an academic commentator suggested.[31] Or, the Commission could simply state: "if any person's freedom of movement was restricted through physical contact or confinement (not including psychological coercion), such as being tied, bound, or locked up . . ." This would help ensure that Option 2 achieves its intended purpose of aligning with those circuits providing a more targeted Enhancement.

Finally, Part A seeks comment as to whether the Commission should amend other guidelines that reference the term "physically restrained" in Application Note 1(L) of §1B1.1's Commentary, or amend that Commentary itself.[32] The facts on the ground suggest such broader amendments are unnecessary: little evidence suggests that the circuit conflict over physical restraint extends significantly beyond §2B3.1. The D.C. Circuit's

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[29] *Compare Anglin*, 169 F.3d at 163 ("[T]he modifier 'such as' in the definition of 'physical restraint' found in § 1B1.1, Application Note 1(i), 'indicates that the illustrations of physical restraint are listed by the way of example rather than limitation[.]'" (quoting *United States v. Rosario*, 7 F.3d 319, 320-321 (2nd Cir. 1993))), *with United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("By use of the words 'such as,' it is apparent that 'being tied, bound, or locked up' are listed by way of example rather than limitation.").

[30] USSC 2024–2025 Proposed Amendments, *supra* note 1, at 51–52 (italicized language added).

[31] *See* Knitter, *supra* note 13, at 224 (proposing that the definition of physically restrained "means the forcible restraint of the victim by the direct physical actions of the defendant and does not include psychological coercion experienced by the victim. Examples of such acts include, but are not limited to, the defendant tying, binding, or locking up the victim").

[32] *See* USSC 2024–2025 Proposed Amendments, *supra* note 1, at 53.

interpretation of physical restraint under Chapter 3, for instance, aligns with Option 2's approach.[33] Moreover, Chapter 3 already includes important limitations on that enhancement's application, instructing courts not to apply it "where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself."[34] Given these existing safeguards and the nature of the circuit conflict manifesting in the robbery context, combined with the fact that §2B3.1 would no longer use that phrase, the Commission can effectively resolve the issue by modifying the language in §2B3.1 alone, without needing to revise the Chapter 1 commentary or other guidelines provisions. Focusing the amendment narrowly on §2B3.1 would also promote the Commission's goal of simplifying the guidelines, avoiding unnecessary changes that could complicate their application.

C. Conclusion

Defenders urge the Commission to adopt Option 2 with the minor adjustment suggested above. Option 2 provides the most effective path forward by adhering to the Enhancement's core purpose of punishing conduct distinct from a typical robbery, avoiding problematic double-counting, and reflecting current sentencing practices showing the robbery guidelines are already overly punitive, especially when firearms are involved.

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[33] In *United States v. Drew*, the court emphasized that "physical restraint" means exactly what its plain language connotes—actual physical restraint, not psychological coercion. 200 F.3d 871, 880 (D.C. Cir. 2000).

[34] USSG §3A1.3 comment. (n.2).

I. PART B: "Intervening arrest"

Defenders support the proposed clarifying amendment defining what constitutes an "intervening arrest" under §4A1.2(a)(2)'s single sentence rule.

Chapter 4 of the Guidelines Manual sets forth rules for when to treat multiple prior sentences as a single sentence when calculating a person's criminal history score.[35] Specifically, §4A1.2(a)(2) directs sentencing courts to count multiple prior sentences as separate sentences when the underlying offenses are separated by an intervening arrest.[36] If not separated by an intervening arrest, multiple prior sentences are counted separately "unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day."[37]

The Commission has previously amended §4A1.2 to clarify what constitutes a single sentence.[38] The Commission now proposes to add the following definition of "intervening arrest" to further clarify §4A1.2(a)(2)'s operation:

> [A] formal, custodial arrest [that] is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or

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[35] USSG §4A1.2.

[36] *Id.*

[37] *Id.*

[38] *See* USSG App. C, Amend. 382 (Nov. 1, 1991). The original 1987 manual directed sentencing courts to count "prior sentences imposed in *unrelated* cases" separately and "[p]rior sentences imposed in *related* cases…as one sentence" when computing a person's criminal history score. USSG §4A1.2(a)(2) (1987) (emphasis added). In 1991, the Commission amended §4A1.2's commentary, defining related cases, explaining that "cases separated by an intervening arrest…are not treated as related cases." USSG App. C, Amend. 382, Reason for Amendment (Nov. 1, 1991). Then, in 2007, to resolve a circuit split and reduce complexity, the Commission replaced the "related cases" terminology with an instruction within the Guideline's text that prior sentences are to be counted separately if they are separated by an intervening arrest. USSG App. C, Amend. 709, Reason for Amendment (Nov. 1, 2007).

> booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.[39]

This definition is consistent with the plain meaning of the word "arrest" and is supported by at least three salient policy goals.

A. The proposed clarifying amendment is consistent with the ordinary usage of the word "arrest."

Diverging from every other circuit to have considered the issue, the Seventh Circuit misinterprets "intervening arrest" to include noncustodial traffic stops.[40] In splitting from the Third, Sixth, Ninth, and Eleventh Circuits, all who have examined §4A1.2(a)(2) more recently,[41] not only does the Seventh Circuit's approach conflict with the purposes of the single sentence rule, it ignores the plain meaning of the term "arrest," which does not include a noncustodial police encounter and ticket, summons, or citation.[42] Ordinarily "arrest" refers to "the taking or detainment (of a person) in custody by authority of law" or "legal restraint of the person."[43] Expanding the definition of an intervening arrest to include noncustodial encounters with law enforcement, such as traffic stops, would conflict with the "ordinary, contemporary, common meaning" of the word "arrest."[44]

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[39] USSC 2024–2025 Proposed Amendments, *supra* note 1, at 55.

[40] *See United States v. Morgan*, 354 F.3d 621, 623–24. (7th Cir. 2003).

[41] *See United States v. Rogers*, 86 F.4th 259 (6th Cir. 2023); *United States v. Ley* 876 F.3d 103, 109 (3rd Cir. 2017); *United States v. Wright*, 862 F.3d 1265, 1281-83 (11th Cir. 2017); *United States v. Leal-Felix*, 665 F.3d 1037 (9th Cir. 2011).

[42] *See Leal-Felix*, 665 F.3d at 1044–1046 (McKeown, J., concurring, joined by Kozinski C.J., Graber, J., and Wardlaw, J.) (relying on the ordinary meaning canon and finding it compelling that the "common understanding of the term arrest does not include being pulled over and ticketed for a traffic violation"); *see also Knowles v. Iowa,* 525 U.S. 113, 117 (2014) (noting that in contrast to a formal custodial arrest, a traffic stop is a "a relatively brief encounter… more analogous to a *Terry* stop" (internal citations omitted)).

[43] *See Webster's Third New International Dictionary* 109-10 (unabridged ed. 1993).

[44] *See Leal-Felix*, 665 F.3d at 1046 (internal citations omitted).

B. The proposed clarifying amendment is supported by sound sentencing policy.

There are at least three policy reasons to define "intervening arrest" as a formal, custodial arrest.

First, the purposes of Chapter 4's criminal history rules support this definition. These rules, inherited from the parole system, aimed "to take into account *culpability* (i.e., harsher punishments for [people] with aggravated criminal backgrounds) and *recidivism* (i.e., the likelihood of re-offending)."[45] To account for both factors, the rules should be supported by empirical research and "should incorporate 'additional data insofar as they become available in the future.'"[46] As to the goal of recidivism prediction, we know of no data or other evidence to indicate that treating as a custodial arrest a mere citation or summons to appear in court will enhance Chapter 4's ability to adjudge dangerousness.[47]

As to the culpability function, there are legitimate reasons to treat as a single sentence prior sentences resulting from offenses in the same charging document or imposed the same day. The single sentence rule prevents overinflated criminal history scoring that would inevitably result from treating multiple, related prior sentences separately in every instance. The intervening arrest rule serves as a *limited* exception, isolating and removing unrelated criminal conduct from the single sentence rule's reach. Treating an intervening summons or citation as equivalent to an arrest—in other words, broadening the meaning of "arrest" beyond recognition, as the Seventh

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[45] USSC, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 1 (2004) ("It was reasoned that the Salient Factor Score's high predictive power would transfer, at least in part, to the nascent guidelines' criminal history measure.").

[46] *See id.* at 2 (citation omitted).

[47] Indeed, back in 1991, when the Commission first introduced the concept of using an "intervening arrest" to distinguish related cases from supposed unrelated cases for purposes of the single sentence rule, some federal defenders argued that even treating offenses separated by an intervening arrest as separate sentences would not improve the criminal history score's ability to predict likelihood of future criminality. *See* Fed. Defender Office (E.D. Mich.) Comment on the U.S. Sent'g Comm's 1991 Proposed Amendments, at 1–2 (PDF 36–37) (Mar. 26, 1991).

Circuit has done—frustrates the single sentence rule's salutary purpose to better reflect culpability in these cases.

In this way, the Seventh Circuit's approach risks substantially increasing guideline ranges based on minor, noncustodial encounters.[48] Generally, citation in lieu of arrest programs allow police to issue a citation or summons in lieu of an arrest for traffic, misdemeanor, and other petty offenses.[49] These programs provide an obvious benefit to everyday citizens by letting them avoid an arrest record—with all its deleterious collateral consequences—for minor violations.[50] Jurisdictions permitting officers to issue a citation or summons for more serious offenses, such as felonies, are the exception, not the rule.[51] Section 4A1.2(a)(2) instructs courts to use the longest sentence for concurrent sentences, or the aggregate sentence for consecutive sentences, when prior sentences are treated as a single sentence. This reduces the likelihood that a single sentence under this rule will underrepresent an individual's criminal history. And in the rare cases where it does—say in one of those infrequent instances where a police officer issues a citation for a serious offense—courts can vary (or depart) above the guideline range if appropriate.[52]

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[48] Not only would expanding the "intervening arrest" definition impact criminal history calculations under Chapter 4, Part A, but §4A1.2 also impacts certain offense level computations, including the Chapter 2 guidelines governing firearms and immigration. *See e.g.* USSG §2K2.1 comment. (n.10) and §2L1.2 comment. (n.3); *see also* Fed. Defender Comment on U.S. Sent'g Comm's 2024-2025 Proposed Priorities, at 8 (July 15, 2024) (encouraging the Commission to eliminate the double counting of criminal history in Chapter 2 and highlighting the disparate impact double counting has on people of color given most individuals sentenced under the gun and immigration guidelines are Black and Hispanic). It could also lead to career offender status for someone who otherwise would not qualify. *See* §§4B1.1 comment. (n.1) & 4B1.2(c).

[49] Nat'l Conference of State Legs, *Citation in Lieu of Arrest* (March 18, 2019).

[50] *See* Int'l Ass'n of Chiefs of Police (IACP), *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States Project*, at 3 (April 1, 2016).

[51] *Id.* at 11.

[52] *See* 18 U.S.C. § 3553(a); *see also* §§4A1.2, comment. (n. 3(B)) ("Upward Departure Provision") & 4A1.3 ("Departures Based on Inadequacy of Criminal History Category").

Simply put, there's no evidence that the "single sentence" ranges resulting from related criminal history separated by an intervening summons or citation are inadequate to serve Chapter 4's purposes.

Second, defining arrest to include citations or summonses following traffic stops or other noncustodial police encounters risks exacerbating unwarranted racial disparities.[53] Traffic stops are among the most common interaction between police and civilians.[54] Police have significant discretion to decide whether to initiate a traffic stop and "[r]esearch on police traffic stops has consistently found widespread racial disparities, with Black drivers more likely than white drivers to be pulled over[, searched, cited, and arrested] in cities across the country."[55] Indeed, racial profiling in traffic stops is so pervasive and well-documented that the attendant "violation" is commonly referred to as "Driving While Black."[56]

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[53] *See* 28 U.S.C. § 991(b)(1)(B) (among the Sentencing Commission's purposes are to establish policies that ensure fairness and guard against unwarranted disparities in sentencing).

[54] *See* Susannah N. Tapp and Elizabeth J. Davis, *Contacts Between Police and the Public, 2022*, DOJ, Office of Justice Programs, Bureau of Justice Statistics (November 2022).

[55] Libby Doyle and Susan Nembhard, *Police Traffic Stops Have Little to Do with Public Safety*, Urban Institute (2021); *see also* Wendy Regoeczi and Stephanie Kent, *Race, poverty, and the traffic ticket cycle: Exploring the situational context of the application of police discretion*, Sociology & Criminology Faculty Publications, Cleveland State University (2014) (discussing how Black drivers can become caught in a cycle of unpaid traffic tickets and license suspensions, further exacerbating disparities in the issuance of traffic citations); Emma Pierson et al, *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behavior 736 (2020); Tapp, *supra* note 54, at 7, Table 5; *see also* Meghan McGone, *Tickets for loud music nearly 3 times more likely for Black drivers under new Florida law*, The Gainesville Sun (May 2, 2023). The enforcement of Florida's Loud Music Law provides one striking example of disparities in issuing citations following traffic stops, where Black drivers are three times more likely than white drivers to be cited. *See id.*; Fla. Stat. § 316.3045 (2022) (making it a noncriminal traffic infraction to play music that is "plainly audible" from 25 feet away while occupying a motor vehicle).

[56] *See, e.g.*, *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) ("Henry L. Gates, Jr. has written, poignantly, '[n]or does [University of Chicago Professor] William Julius Wilson ... wonder why he was stopped near a small New England town by a policeman who wanted to know what he was doing in those parts. There's

In a DOJ Bureau of Justice Statistics report from 2020, Black drivers were less likely to receive a warning, but more likely to receive a ticket, be searched, or be arrested, than white drivers.[57] The Commission itself has acknowledged that

> [c]oncerns over racial disparities in sentencing practices have been well documented and were one of the factors Congress sought to address in passing the Sentencing Reform Act of 1984. Furthermore, the use of race as a key factor in deciding whether to make a traffic stop is an issue that has been litigated in courts and has received attention from the federal government for decades.[58]

Indeed, the disparate impact of Chapter 4's criminal history rules on Defenders' clients of color is one reason we have for years called on the Commission to find ways to deemphasize criminal history throughout the Guidelines.[59] So too have courts—often pointing to concerns with criminal

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a moving violation that many African–Americans know as D.W.B.: Driving While Black.'" (quoting Gates, Henry L. Jr., *Thirteen Ways of Looking at a Black Man,* New Yorker, Oct. 23, 1995 at 59)); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Kathryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. Rev. 717 (1999); *cf. Jamison v. McClendon*, 476 F.Supp.3d 386, 414–15 (S.D. Miss. 2020) ("Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'" (Citations omitted)).

[57] *See* Tapp, *supra* note 54 at 7, Tbl. 5.

[58] USSC, *What Do Federal Firearms Offenses Really Look Like?* 32 (2022).

[59] *See* Fed. Defender Comments on the U.S. Sent'g Comm's 2022-2023 Proposed Priorities, at 20 (Sept. 14, 2022) (pointing out that "[t]he criminal history rules are numerous, complex, and often lead to unjust, and unnecessarily long sentences that perpetuate racial disparities."); Fed. Defender Comments on the U.S. Sent'g Comm's 2023-2024 Proposed Priorities, at 23 (May 24, 2023) (encouraging the Commission "to deemphasize criminal history to make the guidelines adhere more closely to the parsimony principle."); Fed. Defender Comments on the U.S. Sent'g Comm's 2024-

history as reasons "for imposing non-government sponsored below range sentences."[60] Thankfully, the Commission heeded those calls in 2023 when it made data-driven changes to the criminal history rules through Amendment 821.[61]

Certainly, the Commission cannot singlehandedly eradicate the intractable plague of racial discrimination and disparity that persists at every stage of the criminal legal process. The problem is systemic, with actors at every level—from legislators to police and prosecutors to individual judges—bearing some responsibility. This amendment will do nothing to ameliorate the impact of the uneven number of traffic stops and *arrests* of Black and Brown drivers as compared with their white counterparts.[62] But it will mitigate the impact of racially-biased policing on individuals who are cited or served a summons, rather than arrested. It also aligns with the Commission's priority to reduce the costs of unnecessary incarceration.[63]

Finally, the proposed clarifying amendment will fix the unwarranted geographic disparity caused by the Seventh Circuit's misreading of the term "intervening arrest." Of course, one of the Commission's primary responsibilities is to establish policies that avoid unwarranted sentencing disparities.[64] A disparity based solely on the fortuity of where in the country one was cited or issued a summons is the quintessential "unwarranted" disparity.

2025 Proposed Priorities, at 12 (May 15, 2024) (encouraging the Commission to continue to revise the criminal history guidelines).

[60] USSG App. C, Amend. 742, Reason for Amendment (Nov. 1, 2010).

[61] *See id.* Amend. 821 (Nov. 1, 2023) (reducing or eliminating the impact of "status points" on the criminal history score, creating a two-level reduction for certain people with zero criminal history points, and adding criminal history points resulting from the simple possession of marijuana as an example of a basis for a downward departure under §4A1.3).

[62] Further, individuals who are cited rather than arrested will not benefit from this amendment unless their multiple sentences resulted from offenses in the same charging instrument or were imposed the same day. *See* §4A1.2(a)(2).

[63] *See* USSC, Notice of Final 2024-2025 Priorities (Aug. 2024). By providing a clear, commonsense definition of "intervening arrest," the amendment is also in line with the Commission's priority to simplify the Guidelines. *See id.*

[64] *See* 28 U.S.C. § 991(b)(1)(B).

C. Conclusion

Not only does the proposed definition of intervening arrest track the plain meaning of the word "arrest," it furthers important sentencing policy goals. We urge the Commission to adopt this proposed clarifying amendment.

Federal Public and Community Defenders
Comment on Simplification of Three-Step Process

(Proposal 4)

February 3, 2025

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Federal Public and Community Defenders explained last year that the Commission's previous proposal to eliminate departures and correctly reframe the Guideline's three-step process as a two-step process held "tremendous promise," although we raised "serious concerns" related to the proposal's execution.[1] With this year's rendition, Defenders are pleased to see that the execution has improved dramatically. In this comment we identify further improvements to better fulfill the proposal's goals. We believe the Commission can act on this proposal this amendment cycle and we encourage the Commission to do so.[2]

This year's simplification proposal consists of two broad changes to the Guidelines: (1) re-envisioned Chapter One, which recites the Commission's purpose and authority as well as the Guidelines' role vis-à-vis 18 U.S.C. § 3553(a); and (2) elimination of almost every departure, preserving only two, §§5K1.1 (substantial assistance) and 5K1.3 (fast track), which are converted from departures to bases for reduction in the Guideline range.

Defenders' comment proceeds in two parts. Section I discusses the proposed revisions to Chapter One of the Guidelines Manual, which Defenders fully support. Indeed, if the Commission is unable to fully eliminate departures this year, we suggest it at least implement the Chapter One revisions. Section II endorses removing departures from the Guidelines Manual, without adding last year's "Additional Specific Offense Characteristic (AOSC)" language. We reiterate our position that there are special considerations regarding §§2L1.2, 4A1.3, 5C1.1, and 5G1.3 and offer possible language for those. And we suggest other ways the Commission can ensure that courts understand the elimination of departures to be a post-*Booker* update, not an insistence on compliance with the Guidelines. This includes, among other suggestions, excising mandatory-sentencing language from the Guidelines Manual. An appendix lists each instance of mandatory language and suggests alternative phrasing.

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[1] Defenders' Comment on U.S. Sent'g Comm's 2024 Proposed Amendment–Simplification, at 1 (Feb. 22, 2024) ("Defenders' 2024 Simplification Comment"). Because of how often Defenders refer to our 2024 Simplification Comment, each additional citation to that document is hyperlinked.

[2] Given the significant overlap between last year's proposal and the substance of Defenders' responses, Defenders in this comment focus primarily on any new points, providing only brief summaries of points previously made, with links to our 2024 comment, which is attached as an appendix.

I. Proposed Chapter One faithfully adheres to the post-*Booker* sentencing scheme.

Defenders welcome the Commission's proposed rewrite of Chapter One and appreciate that the new language properly describes the present-day lay of the sentencing landscape.[3] To be sure, the proposed revisions draw their strength from faithfully reciting the law as it currently stands, but Defenders are optimistic that having this recitation in "the Manual" will ensure that judges faithfully follow established sentencing law.

Two aspects of the proposal are especially welcome. First, the revised Chapter One appropriately describes the importance of the Guidelines post-*Booker* without overstating their role. It continues to make clear that the post-*Booker* Guidelines are the "'lodestone' of sentencing."[4] Yet it also clarifies that calculating the applicable guideline range is the first step of a larger analysis, with § 3553(a) requiring courts to consider "additional factors" beyond the guideline range.[5]

Second, the revised Chapter One clarifies that the Commission and sentencing courts do not operate on identical statutory foundations. There's a meaningful difference between the factors the Commission was permitted to consider in crafting sentencing guidelines and the virtually unlimited array of considerations that a sentencing court may consider at sentencing.[6]

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[3] *See* Defenders' 2024 Simplification Comment, *supra* note 1, at 13–14 (noting that the current Chapter One's recitation of history and description of a "three step" sentencing process is outdated and incomplete). Defenders appreciate the Commission's decision to forego last year's "AOSCs" which led to this year's substantially improved Chapter One proposal. Including AOSCs in place of departures posed multiple problems, which Defenders and others detailed in last year's comments. By removing AOSCs—which were potentially in tension with, or duplicative of, § 3553(a)—the Commission has both avoided those concerns and simplified and streamlined the amendment.

[4] USSC, Proposed Amendments to the Sentencing Guidelines 23 (Dec. 19, 2024) (quoting *Peugh v. United States*, 569 U.S. 530 (2013)) ("USSC 2024–2025 Proposed Amendments").

[5] *See id.*

[6] *See, e.g., id.* at 18 ("The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court.").

If the Commission decides to again delay removing departures from the Manual this year, we encourage it to at least promulgate the revised Chapter One.[7] To be clear, Defenders are not encouraging the Commission to delay promulgating a Simplification amendment. Quite the opposite, Defenders encourage the Commission to make further refinements and promulgate the entire proposal this amendment cycle.

II. As paired with the revised Chapter One, Defenders continue to support deleting departures but encourage additional steps to ensure outcome-neutrality.

Defenders continue to support the Commission's proposal to remove departures from the Guidelines. We have long contended that departures "needlessly complicat[e]" sentencings by compelling judges "to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions."[8] For the reasons we explained last year, the time has come for the Commission to jettison departure language from the Guidelines Manual.[9]

As also explained last year, the Commission has the authority to eliminate departures notwithstanding that Congress has issued various directives over the years. Defenders refer the Commission to pages 18 through 24 of our 2024 comment for a detailed explanation of the Commission's authority to implement its proposal.[10] Therein Defenders offer that many directives do not require their corresponding departures in the first instance, and most others do not contain language requiring the

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[7] If the Commission were to promulgate only the Chapter One portion of its proposal, without entirely eliminating departures, it could still move away from the three-step process with just one change: replace the proposed new section §1B1.1(a)(9) with the text found in the current §1B1.1(b). That alteration would direct courts to consider departure provisions but would place that requirement as a subpart of the Step One guidelines calculation.

[8] Defenders' 2024 Simplification Comment, *supra* note 1, at 3 (quoting Statement of Alan Dubois & Nicole Kaplan on behalf of Fed. Defenders to the U.S. Sent'g Comm. on The Sentencing Reform Act of 1984: 25 years later, at 17 (Feb. 10, 2009)).

[9] *See id.* at 3–7. We also continue to support maintaining in modified form the provisions related to substantial assistance and fast track (§§5K1.1 and 5K3.1).

[10] *See id.* at 18–24.

corresponding Guidelines amendments remain in perpetuity. The Commission's organic statute makes clear beyond dispute that the Guidelines are to be an evolving and responsive concept, adjusting to changes in law (like *Booker* and its progeny), social science, and on-the-ground realities.[11] Defenders are unaware of any directive explicitly setting aside the organic statute's evolutionary default.

Also, as with last year, Defenders advocate for eliminating departures despite considerable discomfort and uncertainty about the real-world ramifications of this change. The Commission has been clear that it does not intend to alter sentencing outcomes, but rather to simplify the sentencing process and bring the Manual into conformity with what already happens in most courtrooms around the country and with what is required by *Booker* and its progeny.[12] However, there is no guarantee judges will read it this way.

While certainly relatively few judges in a handful of districts use departures as opposed to variances (outside of substantial-assistance and fast-track departures), for some judges departures represent the only way to achieve an at-all-individualized sentence. Defenders in districts with such judges expressed grave concerns that eliminating departures might increase sentences. Simply put, we do not want this theoretically outcome-neutral shift to inadvertently push sentences higher.

We hope the Chapter One revisions will help these judges understand that a variance under § 3553(a) could be appropriate in a case where they might have previously departed under the Guidelines Manual. But we lack any assurance this will be the case.[13] Last year, we identified four places in the Manual where eliminating departures seemed likely to substantively and systematically alter sentencing outcomes. We reiterate this concern below

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[11] *See, e.g.,* 28 U.S.C. § 994(o) (directing the Commission to "review and revise" the Guidelines considering input from various stakeholders).

[12] *See* USSC 2024–2025 Proposed Amendments, *supra* note 4, at 57–63 (describing the Proposal as addressing changes in practice and law and making no mention of an attempt to raise or lower sentences).

[13] Moreover, as we raised last year, issues with available data make it impossible to fully grasp how many judges rely almost exclusively on departures to achieve sentences "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). *See* Defenders' 2024 Simplification Comment, *supra* note 1, at 24; *see also id.* at 24–26 (explaining how ending departures may improve Commission data quality).

and offer suggestions. Additionally, we suggest additional changes to clearly send the message to courts that eliminating departures is intended to reflect existing federal law, not insist on compliance with guideline ranges.

A. To avoid impacting sentencing outcomes, the Commission should preserve underlying concepts related to departures at §§2L1.2, 4A1.3, 5C1.1, and 5G1.3.

For the same reasons Defenders provided last year, we still urge the Commission to preserve information in several additional provisions—§2L1.2,[14] §4A1.3,[15] §5C1.1,[16] and §5G1.3,[17] without using departure language. These provisions require special attention: §§2L1.2 and 4A1.3 are more heavily relied upon than other departures by judges to achieve fair sentences; §5C1.1 is mandated by § 994(j) for certain people with no criminal history points; and §5G1.3 provides needed guidance on the complex and often confusing question of how to account for related terms of imprisonment.[18]

For the provisions in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3 that Defenders proposed preserving last year, we refer the Commission again to our comment last year and explanation.[19] We aren't sure why the Commission chose not to take special action related to these provisions in this year's proposal. But it is possible that Commissioners agree with the substance of our concerns but did not feel comfortable with language specifically

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[14] *See* *id.* at 34–36.

[15] *See* *id.* at 37–39.

[16] *See* *id.* at 40–42.

[17] *See* *id.* at 42–44.

[18] There is one more departure provision Defenders wish to bring to the Commission's attention, albeit not for special treatment in this year's amendment cycle. Last year, while deferring on the prior simplification proposal, the Commission promulgated an amended age policy statement. *See* §5H1.1. That policy statement, unanimously promulgated following extensive comment and testimony, discusses important information regarding a person's youthfulness at both the time of prior convictions and the time of the federal conviction. Given the work and care put into that provision last year, now that it is set to be deleted along with other departures, Defenders encourage the Commission to turn its recent age-related work into a stand-alone report to which judges and advocates may turn.

[19] *See supra* notes 14–17.

recommending courts consider a sentence above or below the guideline range in these situations. Hoping this is true, we suggest the Commission simply maintain the information in the current departure provisions, without referring to departures *or* variances—as illustrated below.[20]

1. §2L1.2

Applying this suggestion to § 2L1.2, Application Note 6 would read:

> *6. ~~Departure Based on~~ Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. ~~In such a case, a departure may be warranted.~~*

And here is how Application Note 7 would read:

> *7. ~~Departure Based on~~ Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, and the time served is not covered by an adjustment under §5G1.3(b) ~~and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case~~, the court may decide to consider whether ~~a departure is appropriate~~ to ~~reflect~~ account for all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. ~~Any such~~ ~~departure~~ should be fashioned to*

[20] Should the Commission adopt the amendment without preserving in the Manual itself the concepts in these selected departure provisions—which would best ensure that judges, probation officers, and practitioners know this information—the Commission should at least make the information readily accessible, either online or in an appendix.

achieve a reasonable punishment for the instant offense.

2. §4A1.3

As a substitute for §4A1.3, rather than maintaining the departure section, we suggest adding a third paragraph to Chapter Four, Part A's Introductory Commentary, stating:

> The Commission notes that these Guidelines are employed in 94 judicial districts, each of which see differing patterns of criminal history practices due to the diversity of laws and practices in the nation's 50 states, territories, tribal jurisdictions, municipalities, and the federal courts. The criminal history scoring system represents the Commission's best attempt to create a single scoring scheme for this diverse array of criminal history sources. However, cases will arise in which a defendant's criminal history category substantially under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

3. §5C1.1 Application Note 10(B)

Application Note 10(B) of Section 5C1.1 is unique among departure provisions because it implements a directive contained within the Commission's organic statute. While Defenders are confident about the Commission's authority to eventually move on from one-off directive-induced provisions, directives in the organic statute plainly remain in effect indefinitely. While Defenders suggest new language for each of the identified provisions this year without referring to a sentence outside the guidelines range, Defenders do not believe such an option exists to preserve the value of Application Note 10(B), consistent with § 994(j). As such, Defenders continue to propose the Note be kept and amended as follows:

> (B) ~~Departure for~~ Cases Where the Applicable Guideline Range Overstates the Severity of the Offense.—~~A departure, including a departure to~~ A sentence below the guideline range, including a sentence other than a

> sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

4. §5G1.3

Defenders again suggest the Commission should revisit §5G1.3 in its entirety in the near future, given how frequently courts and practitioners are confused by its subject matter. Meanwhile, we propose the Commission amend Application Note 4(E) to read:

> ~~**Downward Departure**~~ **Certain Extraordinary Cases.**—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, ~~in an~~ extraordinary cases may arise involving a~~n~~ undischarged term of imprisonment under subsection (d) ~~it may be appropriate for the court to downwardly depart~~. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a court may decide to consider how ~~a downward departure may be warranted~~ to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. ~~Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.~~
>
> To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the

> Commission recommends that the court clearly state ~~any downward departure under this application note be clearly stated~~ on the Judgment in a Criminal Case Order that the adjustment is made as a variance ~~as a downward departure pursuant to §5G1.3(d)~~, rather than as a credit for time served.

B. The Commission should revise the new introduction to Chapter Five by adding language about departures' historical role and should emphasize its goal of neutrality in the amendment's RFA and at trainings.

Shifting from specific guidelines to more general principles that might impact the outcome-neutrality of this set of amendments, Defenders think that clear language in Chapter Five is key. The Commission's new introduction to Chapter Five should: (1) briefly explain the former departure provisions and why they were removed, (2) unequivocally express that the Commission intended to effect no change in sentencing outcomes by deleting departures, and (3) explicitly recognize courts' authority to vary from the guideline range both for reasons that previously justified departures and otherwise. This new language would help ensure that judges—especially new judges—understand their authority to sentence outside the guideline range when warranted by § 3553(a) factors. And including this language at the beginning of Chapter Five makes sense: at this point, judges have already calculated the offense level and criminal history category under Chapters 2, 3, and 4. All that's left is to review the sentencing table to determine the sentencing range before moving to the holistic review mandated by § 3553(a).

This is the sort of language we envision:

> From the Guidelines' inception until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 244 (2005), the Guidelines were mandatory. The Guidelines provided a limited number of "departures," many of which were located at Parts H and K of this Chapter. Those departure provisions permitted courts to impose sentences outside of the otherwise-mandatory guideline range based upon certain, limited, Commission-established criteria. The Commission promulgated those

> departures consistent with 28 U.S.C. § 994's constraints, and as directed by certain subsequent legislation, both of which applied only to the Commission and not sentencing courts.
>
> Following *Booker*, courts are permitted to vary from the applicable guideline range, both for reasons related to the operation of the applicable guideline provisions and individual characteristics unrelated to the guideline provisions. In years since *Booker*, variances became the norm and departure use dramatically decreased.
>
> In 2025, the Commission amended the Guidelines Manual to remove departures. In so doing, the Commission sought both to bring the Manual in line with the post-*Booker* legal landscape and to better reflect sentencing practices nationally. The Commission intended and framed the 2025 Amendment to be outcome neutral, understanding that judges who would have relied upon departures would have the authority to vary from the applicable guideline range as appropriate under 18 U.S.C. § 3553(a).

Defenders are optimistic that language such as this would decrease the likelihood of departure-only judges responding to this amendment by imposing higher sentences based solely on removing departures from the Guidelines Manual.

Second, and additionally, the Commission's Reason for Amendment (RFA) should make clear that the Commission intends the amendment to be outcome neutral. This language, in concert with Defenders' proposed Chapter Five introduction, provides a proverbial "belt and suspenders" to reinforce that the Commission is updating the Manual in light of current law, not insisting on greater compliance with guideline ranges.[21]

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[21] Including information regarding the Commission's intent within the Guidelines' text, not only in the RFA, is particularly important given the Third Circuit's holding that courts need not defer to the Manual's commentary, *see, e.g., United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), and presumably would not defer to RFAs.

Third, the Commission should ensure that its trainings for judges (both new and veteran), probation officers, and practitioners, highlight the outcome-neutral reason that departures were eliminated while also highlighting the courts' authority to vary from guideline ranges—that is, the content of this Chapter Five introduction and the RFA.

C. The Commission should strike language that conflicts with the Commission's revised Chapter One and *Booker*.

Finally, in reviewing the Proposal, Defenders identified additional language in tension with the post-*Booker* advisory guidelines system—that is, language suggesting certain Commission guidance is mandatory. For example, §5B1.1 provides that the guidelines "do not authorize" probation for individuals whose guideline range falls within Zones C or D. Post-*Booker*, the Guidelines do not "authorize" specific increased sentences; they only advise in favor of (*i.e.* recommend) them. Thus, that provision should instead say the Guidelines "do not recommend" probation.

While *Booker* plainly renders such provisions advisory, replacing language that mandates a specific sentence with permissive language is consistent with the rest of the Proposal's post-*Booker* update. Defenders sought to identify each such instance of this language, as well as to propose alternative language, in the attached Appendix A.

III. Conclusion

Defenders are encouraged by the Commission's improved and streamlined approach to simplifying the Guidelines Manual—an approach that is more faithful to the amendment's purpose and to the statutory sentencing framework than last year's Simplification proposal. Like last year, we have endeavored to offer content-neutral suggestions to improve upon this version in a manner that is hopefully acceptable to all stakeholders. Defenders look forward to discussing this proposal, and our ideas to improve upon it, during the upcoming hearing.

APPENDIX

List of mandatory provisions in the Guidelines Manual and Defenders' proposed alternative language

Provision	**Current Text** **(text-at-issue in bold)**	**Defenders' Proposed Text** **(proposed revision in bold)**
§2K2.4 App. N. 3	"In a case involving multiple counts, the sentence **shall be imposed** according to the rules in subsection (e) of §5G1.2 . . . ."	"In a case involving multiple counts, **it is recommended that** the sentence **be imposed** according to the rules in subsection (e) of §5G1.2 . . . ."
§4B1.1 App. N. 4	Same as above	Same as above
Chapter Five, Introductory Commentary	"For certain categories of offenses and offenders, the guidelines **permit the court to impose** either imprisonment . . . ."	"For example, for certain categories of offenses and offenders, the guidelines **recommend that the court** impose either imprisonment . . . ."
§5B1.1(a)	"Subject to the statutory restrictions in subsection (b) below, a sentence of probation is **authorized** if . . . ."	"Subject to the statutory restrictions in subsection (b) below, a sentence of probation is **recommended** if . . . ."
§5B1.1(b)	"A sentence of probation **may not be imposed** in the event . . . ."	"A sentence of probation is **not recommended** in the event . . . ."
§5B1.1 App. N. 1	" . . . the guidelines **authorize**, but do not require, a sentence of probation . . . ."	" . . . the guidelines **recommendation includes**, but do**es** not require . . . ."

Provision	Current Text (text-at-issue in bold)	Defenders' Proposed Text (proposed revision in bold)
§5B1.1 App. N. 2	"Where the applicable guideline range is in Zone C or D . . . the guidelines do not **authorize** a sentence of probation."	"When the applicable guideline range is in Zone C or D . . . the guidelines do not **recommend** a sentence of imprisonment."
§5B1.1 Background	"The court **may** sentence a defendant to a term of probation . . . unless . . . a term of imprisonment is **required** under §5C1.1 . . . . Section 5B1.1(a)(2) . . . under which a 'straight' probationary term is **authorized** and those where probation is **prohibited.**"	"The court may sentence impose term of probation **a sentence consistent with the guidelines** unless . . . a term of imprisonment is **recommended** under §5C1.1 . . . . Section 5B1.1(a)(2) . . . under which a 'straight' probationary term is **consistent with the guidelines' recommendation** and those where probation is **not recommended**."
§5B1.2(a)	"When probation is imposed, the term **shall** be:"	"When probation is imposed the term **should** be:"
§5C1.1(b)	"If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment **is not required**, . . . "	"If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required **to conform with the guidelines' recommendation**, . . . "

Provision	Current Text **(text-at-issue in bold)**	Defenders' Proposed Text **(proposed revision in bold)**
§5C1.1(f)	"If the applicable guideline range is in Zone D . . . the minimum term **shall** be satisfied by a sentence of imprisonment."	"If the applicable guideline range is in Zone D . . . the minimum term **should** be satisfied by a sentence of imprisonment."
§5C1.1 App. N. 2	"the court **is not required to impose a sentence of imprisonment** . . . ."	"**a sentence** is not required to **include** imprisonment **in order to conform with the guidelines' recommendation**, . . ."
§5C1.1 App. N. 3	" . . . the court **has three options**:"	"the court has three options **to conform to the guidelines recommendation:**"
§5C1.1 App. N. 4	"the court **has two options**"	"the court has two options **to conform to the guidelines recommendation:**"
§5C1.1 App. N. 4	"The preceding example illustrates a sentence that satisfies the minimum term of imprisonment **required by** the guideline range."	"The preceding example illustrates a sentence that satisfies the minimum term of imprisonment **recommended by** the guideline range."
§5C1.1 App. N. 8 (as renumbered in the Proposal)	"where the applicable guideline range is in Zone D . . . the minimum term **must be satisfied by** a sentence of imprisonment . . . ."	"where the applicable guideline range is in Zone D . . . **the guidelines recommend only** a sentence of imprisonment . . . ."

Provision	Current Text **(text-at-issue in bold)**	Defenders' Proposed Text **(proposed revision in bold)**
§5D1.1(a)(2)	"The court **shall order** a term of supervised release . . . when a sentence of imprisonment of more than one year is imposed."	"The court **should order** a term of supervised release . . . when a sentence of imprisonment of more than one year is imposed."
§5D1.1 App. N. 1	"Under subsection (a), the court **is required to** impose a term of supervised release . . . ."	"Under subsection (a) the court **should** impose a term of supervised release . . . ."
§5E1.2(a)	"The court **shall** impose a fine in all cases . . . ."	"The court **should** impose a fine in all cases . . . ."
§5G1.1(c)	"In any other case, the sentence **may be imposed** at any point within the applicable guideline range . . . ."	"In any other case, **the guidelines recommend a** sentence at any point within the applicable guideline range . . . ."
§5G1.1 Commentary	"For example . . . the sentence **required** by the guidelines under subsection (a) is 48 months . . . ."	"For example . . . the sentence **recommended** by the guidelines under sub-section (a) is 48 months . . . ."
§5G1.3(a)	" . . . the sentence for the instant offense **shall** be imposed to run consecutively . . . ."	"the sentence for the instant offense **should** be imposed to run consecutively . . . ."
§5G1.3 App. N. 1	"Under subsection (a), the court **shall** impose . . . ."	"Under subsection (a) the court **should** impose . . . ."

Provision	**Current Text** **(text-at-issue in bold)**	**Defenders' Proposed Text** **(proposed revision in bold)**
§5G1.3 App. N. 4(E)	"subsection (d) does not **authorize** . . . ."	"subsection (d) does not **recommend** . . . ."
§7B1.3(a)(1)	" . . . the court **shall** revoke probation or supervised release."	"the court **should** revoke probation or supervised release."
§7B1.3(d)	"at the time of revocation **shall** be ordered . . . ."	"at the time of revocation **should** be ordered . . . ."
§7B1.3(e)	" . . . it **shall** increase the term of imprisonment . . . ."	"it **should** increase the term of imprisonment . . . ."
§7B1.3(f)	" . . . **shall** be ordered to be served consecutively . . . ."	" . . . **should** be ordered to be served consecutively . . . ."
§7B1.4 App. N. 4	" . . . **shall** run consecutively . . . ."	" . . . **should** run consecutively . . . ."
§7B1.5(a)	" . . . no credit **shall** be given . . . ."	" . . . no credit **should** be given . . . ."
§7B1.5(b)	Same as above	Same as above
§7B1.5(c)	Same as above	Same as above