PRACTITIONERS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 3, 2025

Hon. Carlton W. Reeves
Chair, United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

RE: Practitioners Advisory Group Comment on Proposed Amendments to the Sentencing Guidelines, December 19, 2024

Dear Judge Reeves:

The Practitioners Advisory Group (PAG) submits these comments to the Commission's proposed amendments regarding: (1) the career offender guideline and the categorical approach; (2) the application of §2K2.1 to machine gun conversion devices; (3) a *mens rea* requirement for the enhancement under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers; (4) a circuit split as to when the enhancement for physical restraint under §2B3.1(b)(4)(B) applies; (5) a circuit split on whether a traffic stop is an intervening arrest when calculating criminal history under §4A1.2(a)(2); and (6) simplifying the guidelines by removing most departure provisions.

I. The Career Offender Guideline and the Categorical Approach

Over the past year, the Commission has sought input on revising the career offender guideline, and the PAG has appreciated the opportunity to provide feedback during roundtable discussions with Commission staff and other stakeholders. The Commission has proposed significant revisions to the definitions contained in the career offender guideline and the approach employed to determine whether a prior conviction qualifies as a predicate offense. The PAG addresses: (1) the proposed definition of controlled substance offense; (2) the proposed conduct-based approach and definition of crime of violence; and (3) the use of sentence length to limit the convictions that can be relied upon as predicate offenses.

A. Revising the Definition of Controlled Substance Offense

The PAG supports revising the definition of controlled substance offense to exclude state drug offenses and limiting its scope to specific federal drug statutes. First, such a revision is consistent with the text of 28 U.S.C. § 994. Section 994(h) only requires a sentence near the statutory maximum if a defendant has two or more prior felony convictions for specific enumerated offenses under the federal Controlled Substances Act, the Controlled Substances Import and Export Act, and provisions governing the Maritime Drug Law Enforcement Act.[1] Congress's mandate does not contemplate applying the career offender guideline to those with prior state drug convictions. Thus, the proposed amendment revising the definition of controlled substance offense is consistent with the text of § 994(h).

Second, Congress's decision to only include federal drug trafficking priors in § 994(h) is logical as federal drug convictions typically involve far more serious conduct than state drug convictions. Federal drug prosecutions tend to involve a much higher quantity of controlled substances, larger amounts of money being transacted, and large drug trafficking organizations rather than individuals. Federal drug prosecutions often target large-scale suppliers. State prosecutions, on the other hand, often target individual dealers standing on the corner (or sitting in a car) and selling personal use amounts directly to consumers. As state convictions often reflect less serious conduct, it makes sense to amend the career offender guideline to target those with prior federal drug trafficking convictions rather than street level dealers.

Third, the proposed revision is consistent with the Commission's 2016 study recognizing that the career offender guideline is inappropriate for drug trafficking only offenders: "Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive."[2] Defendants categorized as career offenders based solely on drug trafficking offenses had lower recidivism rates than other career offenders — indeed drug trafficking only career offenders had relatively similar recidivism rates as non-career offenders.[3] The Commission's 2016 report also found that the average sentence imposed on career offenders who only had drug trafficking offenses was well-below the career offender guideline range, and approximated what the non-career offender guideline range would have been.[4] By reducing the number of defendants subject to the career offender guideline, the proposed revision more accurately reflects the empirical recidivism and sentencing data documented in the Commission's 2016 report.

---

[1] *See* 21 U.S.C. § 841; 21 U.S.C. §§ 952(a), 955 & 959; 46 U.S.C. § 70501 *et seq*.

[2] *See* U.S.S.C., *Report to the Congress: Career Offender Sentencing Enhancements* at 3 (2016) ("2016 Career Offender Report"), available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

[3] *See id*. at 40-41.

[4] *See id*. at 3.

Fourth, data suggest that the proposed revision of the definition of controlled substance offense would reduce, though not eliminate, racial disparity. The Department of Justice has stated that career offender guidelines can result in sentences that are lengthy and produce "a clear racial disparity in application."[5] This disparity is reflected in the data from Fiscal Year 2022 when 57.7% of defendants subjected to the career offender enhancement were Black while only 25.2% of all federally sentenced defendants were Black.[6] Excluding state drug prior convictions from the career offender guideline while including some actual-conduct crimes of violence reduces the number of Black defendants subject to the enhancement to 47.7%.[7] This data suggests that redefining controlled substance offense under the career offender guideline to include only federal drug trafficking offenses would reduce, though not eliminate, racial disparity.

The proposed revision to the definition of controlled substance offense includes federal statutes that are not specifically listed in § 944(h). The PAG urges the Commission to define controlled substance offense using only the specific statutes listed in § 994(h). This is consistent with the statutory text. In addition, the other statutes listed are not drug trafficking offenses, such as the possession of a tablet making machine under 21 U.S.C. § 843(a)(6), or include behavior that can be prosecuted under 21 U.S.C. § 841 (such as 21 U.S.C. §§ 856 and 860 and 18 U.S.C. § 924(c)). The offenses enumerated by Congress cover all of this conduct, so there is no need for the guideline definition to include any statute not listed in § 994(h).

In sum, the PAG supports the Commission's proposed amendment to the definition of controlled substance offense under §4B1.2, limiting prior drug convictions to those offenses specified in § 994(h).

B. Revising the Definition of Crime of Violence

1. *The Continued Importance of an Elements-Based Approach*

The PAG understands the concerns of various stakeholders regarding the difficulties of using an elements-based approach, the categorical approach and the modified categorical approach, to determine whether a prior conviction constitutes a crime of violence. Despite these difficulties in application, the reasons for an elements-based approach have been repeatedly endorsed by the Supreme Court:

> [A]n elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a

[5] *See* Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice to U.S.S.C. at 27 (Feb. 27. 2023), available at page 457 of public comment: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf.

[6] *See* U.S.S.C., *Individuals Sentenced Under §4B1.1, Proposed Amendment, Data Background* at Slide 5 (Jan. 10, 2025), available at: https://www.ussc.gov/education/videos/2025-career-offender-data-briefing.

[7] *See id*. at Slide 23.

> defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to" — or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.[8]

As recently as last year, the Court again recognized that documents underlying prior convictions, including *Shepard* documents, can be "prone to error" when it comes to non-essential, non-elemental, facts.[9]

The need for an elements-based approach applies not just to recidivist statutes like the Armed Career Criminal Act, but also to the career offender guideline. While the Supreme Court has not directly held that the categorical approach must apply to sentencing guidelines, every Circuit Court of Appeals has applied the categorical approach to the guidelines.[10] Going beyond the elements necessary for a prior conviction to look at the way a prior offense was committed invites uncertainty and unreliability in how the guideline is applied. The actual conduct underlying a prior offense is often not clear from the documents that are available for the court's review. Moreover, documents, such as criminal complaints, affidavits supporting arrest warrants, or plea memoranda, often reflect only the police or prosecution's version of how the underlying offense occurred. For strategic reasons or in the context of plea bargaining, a defendant and counsel may choose not to contest alleged facts that simply are immaterial to the elements of the offense or the ultimate outcome of the case. Going beyond the elements of the offense would allow a sentencing court to rely on such unsound alleged facts.

For all of the reasons described above, the PAG recommends that the Commission maintain an elements-based approach (the categorical approach) in applying the career offender guideline. The PAG also offers the following comments regarding the proposed amendment.

---

[8] *Mathis v. United States*, 579 U.S. 500, 512 (2016) (quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)); *see also Taylor v. United States*, 495 U.S. 575, 601-602 (1990).

[9] *See Erlinger v. United States*, 602 U.S. 821, 841 (2024) ("The risk of error may be especially grave when it comes to facts recounted in *Shepard* documents on which adversarial testing was unnecessary in the prior proceeding.") (citation and quotation marks omitted).

[10] *See, e.g., United States v. Rabb*, 942 F.3d 1, 3 (1st Cir. 2019); *United States v. Scott*, 990 F.3d 94, 104 (2d Cir.) (en banc), *cert. denied*, 142 S. Ct. 397 (2021); *United States v. Bullock*, 970 F.3d 210, 214–15 (3d Cir. 2020); *United States v. Carthorne*, 726 F.3d 503, 511 (4th Cir. 2013); *United States v. Zuniga*, 860 F.3d 276, 284 (5th Cir. 2017); *United States v. Camp,* 903 F.3d 594, 599 (6th Cir. 2018); *Adams v. United States*, 911 F.3d 397, 405 (7th Cir. 2018); *United States v. Brown*, 1 F.4th 617, 619–20 (8th Cir. 2021); *United States v. Barragan*, 871 F.3d 689, 713–14 (9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 535 (10th Cir. 2017); *United States v. Gandy*, 917 F.3d 1333, 1339 (11th Cir. 2019); *United States v. Sheffield*, 832 F.3d 296, 314 (D.C. Cir. 2016).

2. *An Alternative Definition for Crime of Violence*

The Commission proposes a fully conduct-based approach and defines a crime of violence far more expansively than the current definition.[11] The proposed definition appears to include any prior conviction, even a conviction for a clearly non-violent offense such as fraud, retail theft, criminal trespass or criminal mischief, in which any of the defendant's conduct, not just the conduct underlying the offense of conviction, involved the use of force or any of the other conduct described in proposed §4B1.2(b)(1). Such a definition, completely divorced from the actual statute of conviction, would make every prior conviction a potential predicate offense requiring an investigation into the underlying conduct alleged and how it was described in the prior court proceeding. With this approach, a defendant charged with robbery but convicted only of retail theft can be subject to the enhancement. Similarly, a defendant charged with bank robbery but convicted only of fraud or bad checks can be subject to the enhancement. The proposed definition is over-inclusive and makes it impossible for defense counsel to advise clients on their potential sentencing exposure. To address these concerns, the PAG offers the following suggestions.

a. Combining an Elements-Based Approach with a Conduct-Based Approach

In defining crime of violence, the Commission should continue to rely on the elements-based definition in the current §4B1.2(a)(1) ("the elements clause"). There has been significant litigation settling what offenses are covered by that definition and counsel, probation officers and judges are accustomed to the application of the elements clause. Under the current proposed amendment, counsel, probation officers, and judges will still have to employ the categorical approach when applying other guidelines that use the terms crime of violence and controlled substance offense. Thus, it appears that the motivation for the proposed amendment is not so much the administrative difficulty of using the categorical and modified categorical approaches, but rather, to capture the anomalous case where the defendant's actual conduct underlying a prior conviction clearly involved the use of physical force but the statute of conviction did not require the use of physical force. The Commission could capture these cases by expanding the definition of the current enumerated offense clause, §4B1.2(a)(2), to include offenses in which the defendant's *actual conduct underlying the conviction* involves the use of force and would satisfy the elements or means of any of the enumerated offenses. This maintains the categorical approach in applying the elements clause, but allows for a conduct-based approach in applying the enumerated offense clause.

Take, for example, a defendant with a prior conviction for robbery of a motor vehicle in Pennsylvania. The language of the statute itself does not require the use, attempted use, or

[11] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines ("Proposed Amendments") at 5-7 (Dec. 19, 2024), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20241230_rf_proposed.pdf.

threatened use of physical force against the person of another.[12] Robbery of a motor vehicle in Pennsylvania also does not fit the generic definition of robbery. Under the alternative approach proposed in the paragraph above, however, a sentencing court could look to the actual conduct underlying a defendant's conviction of Pennsylvania robbery of a motor vehicle. If that conduct involved the use of force and met the elements of generic robbery, then it would qualify as a prior crime of violence for purposes of the career offender guideline.

The PAG believes that this approach will significantly limit the number of cases in which parties will have to investigate the conduct underlying prior convictions, while capturing the anomalous cases in which a defendant committed a violent offense akin to those listed under the enumerated offense clause, but which would be excluded under a pure categorical approach.

b. Relying Solely on the Conduct Underlying the Offense of Conviction

The current proposed amendment imports the definition of relevant conduct from §1B1.3 to define the conduct that could be considered in determining whether a prior offense is a crime of violence. Determining such conduct on a historical basis, sometimes looking back over a decade, presents administrative challenges. Conduct that is irrelevant to proving the elements or means of the crime of conviction is not subject to challenge or testing by the parties. The police and/or prosecution may include allegations of such conduct in their charging document and the accuracy of these allegations is unlikely to be tested during the litigation of the case simply because they are not relevant to the charge of conviction. The only conduct that should be considered for determining whether a prior conviction constitutes a crime of violence is the conduct that underlies the offense of conviction – that is, the conduct that serves as the basis for the elements or the means of completing the prior offense of conviction.

c. Excluding the Charging Document as a Source of Information

Given the inaccuracies contained in charging documents, the PAG believes that charging documents alone should not be used to establish the conduct underlying a prior conviction. The allegations in the charging document can be based solely on the statement of a single witness without any assessment of that witness's credibility or reliability. At the time that the charging document is filed, the defense has had no opportunity to challenge the allegations in the charging document. Out of all sources of information listed in proposed §4B1.2(b)(4), the charging document is the least reliable. While the charging document may help inform what specific subsection of a divisible offense a defendant was previously charged with when using the modified categorical approach, the allegations contained within the charging document cannot be considered reliable for purposes of a conduct-based approach. For all the reasons described by the Supreme Court in *Mathis*, *Descamps*, *Taylor*, and *Erlinger*, the Commission should not permit the prosecution to rely on a charging document alone to establish a prima facie case that a prior conviction constituted a crime of violence.

[12] The offense is defined as: "[a] person commits a felony of the first degree if he steals or takes a motor vehicle from another person in the presence of that person or any other person in lawful possession of the motor vehicle." 18 Pa. Cons. Stat. § 3702(a).

d. Excluding Inchoate Offenses

The PAG urges the Commission to exclude inchoate offenses, including conspiracy, attempt, and aiding and abetting, from the definition of crime of violence. These inchoate offenses often involve no violence at all on the part of the defendant. A conspiracy offense is based on an agreement only and does not require any actual violence.[13] An attempt is based on a substantial step only and the substantial step does not have to involve violence or the use of force.[14] And aiding and abetting can occur after the violence has already been completed.[15]

Inchoate offenses should not be included in the definition of crime of violence because they are inherently less serious than the completed offense and reflect a lower level of harm than the related substantive offense.[16] Under the common law, all conspiracy offenses were treated as *misdemeanors* in recognition of the fact that an agreement to commit an offense is fundamentally different than committing the offense itself.[17] Recognizing that inchoate offenses should be treated more leniently than substantive offenses, the North Carolina General Assembly directs that attempts and conspiracies are to be punished "one class lower than the felony [the defendant] conspired [or attempted] to commit."[18] Similarly, someone in North Carolina who

---

[13] *See United States v. Dennis*, 826 F.3d 683, 689 (3d Cir. 2016) (defendant convicted of conspiracy to commit robbery in a reverse stash house sting where the defendant participated in a walk-through and rehearsal of a robbery but never actually committed a robbery or used force against any individual); *see also United States v. Vargas*, 74 F.4th 673, 698 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 828 (2024) (holding that inchoate offenses like conspiracy are included in the definition of controlled substance offense).

[14] *See United States v. Williams*, 531 Fed.App'x 270, 271-72 (3d Cir. July 19, 2013) (defendant convicted of attempted Hobbs Act robbery by recruiting and meeting with others to plan a robbery, driving to the location of the planned robbery, and then expressing frustration when the robbery was called off by others).

[15] *See United States v. Troupe*, No. 2:22-CR-18-3 (D. Vt.) (defendant who drove others to scene of robbery where drug dealer was shot and killed and who drove away from the scene was convicted of aiding and abetting the use of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c))).

[16] *See United States v. Robinson*, 547 F.3d 632, 638-39 (6th Cir. 2008) ("conspiracy is an inchoate offense that needs no substantive offense for its completion" and culpability for conspiracy must be distinguished "from culpability for the substantive offenses of co-conspirators"); *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) ("An attempt to commit a crime . . . is recognized as a crime distinct from the crime intended by the attempt"); *United States v. Trevino*, 720 F.2d 395, 399 (5th Cir. 1983) ("culpability [for an inchoate offense] is based on a defendant's intent rather than on the consummation of the underlying offense").

[17] *See* Wayne R. LaFave, 2 Subst. Crim. L., Ch. 12, § 12.4(d) (3d ed. 2017).

[18] *See* N.C. Gen. Stat. Ann. §§ 14-2.4(a) & 14-2.5; *see also* Ohio Rev. Code Ann. § 2923.01(J)(2) (punishing conspiracy as "[a] felony of the next lesser degree than the most serious offense that is the object of the conspiracy" for felonies excluding murder, aggravated murder or an offense for which the maximum penalty is life imprisonment).

solicits another to commit a felony or serves as an accessory after the fact to such a felony is punished two classes lower than one who commits the corresponding substantive felony.[19] Because inchoate offenses are inherently less serious than the substantive offense, the PAG proposes that they be excluded from the definition of crime of violence.

The current proposal, which is completely conduct-based, appears to require a defendant to personally engage in the use of force in order for a prior conviction for an inchoate offense to be included as a crime of violence.[20] Yet, by including relevant conduct, the current proposal then expands crime of violence to include inchoate offenses in which the use of force may have been planned or "counseled" but never committed at all or not committed by the defendant.[21] In order to avoid capturing defendants who never personally committed the use of force, or in which no force was ever actually used, inchoate offenses should not be included in the definition of crime of violence.

C. Restrict Qualifying Prior Convictions Based on Sentence Length

The PAG supports the Commission's proposal to limit prior convictions based on sentence length. The career offender guideline, which results in sentences close to the statutory maximum sentence, should only apply to those defendants who have the most serious prior convictions. Sentence length can be a proxy for the seriousness of a prior conviction. Thus, it is logical, both for controlled substance offenses and crimes of violence, to restrict the applicability of the career offender guideline based on the sentence length of the prior conviction.

Under § 994(h), the Commission maintains the authority to do this. The Commission currently defines "two or more prior felonies," as set forth in § 994(h), as "two prior felony convictions" in §4B1.2(c). Section 4B1.2(c), in turn, restricts the application of the career offender guideline to those prior convictions that are counted as separate sentences under §4A1.1. Thus, the Commission already exercises the authority to count only prior convictions that are within a specific time period and are counted as separate sentences. Restricting application of the career offender guideline to cases where a defendant has prior convictions in which significant sentences were imposed is a similar and permissible exercise of the Commission's authority.

Of the options presented on how to limit prior convictions based on sentence length, the PAG recommends the sentence-served approach in Option 3A. Given the differences in sentencing practice among the states, a sentence-served approach is the most accurate proxy for the seriousness of the prior offense. In some jurisdictions that have parole and require a sentencing judge to impose a minimum and maximum term when imposing a term of imprisonment, the judge may impose a sentence of 2-23 months' imprisonment and grant immediate parole at 2 months, thus leaving the defendant to serve 21 months on parole. In a jurisdiction without parole, that exact same sentence would be imposed as 2 months of imprisonment followed by 21 months of probation. These two sentences are the same sentence – the defendant serves two

[19] *See* N.C. Gen. Stat. Ann. §§ 14-2.6 & 14-7.

[20] *See* §4B1.2(b)(2), Proposed Amendments at 6.

[21] *See* §4B1.2(b)(3), Proposed Amendments at 6.

months in prison and serves 21 months on supervision in the community. In the first example, however, the defendant would receive three criminal history points, while in the second example the defendant would only receive two criminal history points. To avoid such disparities based solely on the vagaries of how different states impose their sentences, the PAG believes that it would be appropriate to limit prior convictions based on the sentence actually served.[22]

Congress has recognized that sentence-served rather than sentence-imposed more accurately reflects the seriousness of a prior offense. In the First Step Act, Congress defined a prior "serious drug felony" and "serious violent felony," which trigger recidivist mandatory minimum sentencing provisions, in part as a prior offense for which the defendant "served a term of imprisonment of more than 12 months."[23] Thus, Congress contemplated that it is more appropriate to use sentence-served rather than sentence-imposed when determining when to increase a sentence based on prior criminal history.

Further, relying on sentence-served rather than sentence-imposed would not create an administrative challenge. The sentence served is a regular calculus in criminal cases due to the First Step Act. Current Presentence Investigation Reports ("PSRs"), in describing a defendant's criminal history, include the date a defendant was paroled on a prior conviction. This information, already included in the PSR and necessary to determine whether a prior conviction is counted under §4A1.2(e)(1), is the only information needed to determine how much time a defendant served on a sentence.

In sum, the PAG supports Option 3A, which relies on sentence-served to determine which prior convictions trigger application of the career offender guideline. If the Commission chooses to limit prior convictions by sentence-imposed rather than sentence-served, then the PAG urges the Commission to adopt a greater sentence cutoff, such as five years imposed rather than three years or one year, to avoid inadvertently sweeping in less serious prior convictions from states with different sentencing practices.

II. Machine Gun Conversion Devices under §2K2.1

The Commission proposes amending §2K2.1 to expand the definition of firearm to include machinegun conversion devices (MCDs). "MCDs are devices designed to convert weapons into fully automatic firearms."[24]

Currently, §2K2.1 uses two definitions of firearm depending on the subsection at issue. One definition comes from the Gun Control Act (GCA), 21 U.S.C. § 921(a)(3); the other from the National Firearms Act (NFA), 26 U.S.C. § 5845(a). The NFA definition of firearm includes MCDs, whereas the GCA definition does not. At the outset, the PAG notes that those subsections of §2K2.1 that address the most serious firearms offenses use the broader definition

[22] To that end, the PAG proposes amending the definition of "sentence of imprisonment" under §4A1.2(b)(1) to refer to sentence served rather than sentence imposed.

[23] *See* 21 U.S.C. §§ 802(58), (59).

[24] *See* Proposed Amendments at 34.

of firearm, while provisions involving less serious offenses employ the narrower definition under the GCA.

The proposed amendment has two options, and both achieve equivalent results. Option 1 defines firearm to include any firearm described in either the GCA or the NFA. Option 2 expands the definition of firearm to include firearms described in both the GCA and the NFA in specific subsections: §§2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c). In effect, both proposed options expand the definition of firearm so that all provisions of §2K2.1 will apply to firearms and MCDs.

The PAG recommends that the Commission not revise §2K2.1 at this time. The concerns that prompted this proposed amendment do not appear to be supported by sentencing data, and the PAG objects to treating an MCD, alone, like a firearm. Treating MCDs like firearms will exacerbate the inequality and proportionality issues already inherent in this guideline.

The primary reason animating this proposal is the "significant recent proliferation" of MCDs and the increased danger to bystanders and law enforcement that they pose.[25] The Commission's statistics, however, show that MCDs are involved in very few cases. In Fiscal Year 2023, of the 380 offenses sentenced under §2K2.1, only 4.5% involved MCDs. The vast majority – 95.5% of cases – did not.[26] And even if the number of cases involving MCDs has risen from 1% to 4.5% since Fiscal Year 2019,[27] these cases still only account for a small fraction of the overall number of cases sentenced pursuant to §2K2.1. The PAG recommends holding off on amending §2K2.1 until data shows that cases involving MCDs are a statistically significant percentage of the cases sentenced under this guideline.

Similarly, concerns about the proliferation of home-made MCDs, such as those made on 3-D printers, or of defendants possessing large numbers of MCDs, also lack support in the data. In Fiscal Year 2023, 92.1% of the MCDs involved in §2K2.1 cases were purchased by the defendant, not made using a 3-printer or other materials.[28] And in the majority of cases involving MCDs that were affixed to a firearm, 82.3%, the defendant possessed only one MCD.[29] These statistics undermine the popular narrative that the streets have been flooded by home-made devices that easily convert legal firearms into fully automatic machineguns. Because MCDs are an issue in a small fraction of cases, and an even smaller fraction of these

---

[25] *See id*.

[26] U.S.S.C., *Public Data Briefing, Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices* at Slide 5 (Jan. 2025) ("MCD Data Briefing"), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Firearms-MCD.pdf.

[27] *See id*. at Slide 6.

[28] *See id*. at Slide 18.

[29] *See id*. at Slide 11.

cases involve home-made MCDs or multiple MCDs, the PAG does not support expanding the guideline definition of firearm to include MCDs.

Further, as noted above, the current guideline already treats cases involving MCDs more seriously. The broader, NFA definition of firearm is applied to the most serious offenses described in the guideline: those which involve the use of semi-automatic weapons, or weapons specified by the NFA.[30] The remaining provisions of the guideline, including the specific offense characteristics and cross-reference, use the narrower definition of firearm found in the GCA.[31] Thus, the guideline already addresses concerns about the problems associated with MCDs, particularly when these devices are used in connection with the most serious offenses.

Counting an MCD as a firearm raises a host of fairness and proportionality concerns. It is simply unfair to treat a gun part, which is incapable of causing any harm by itself, the same as a fully functioning handgun, rifle, or shotgun. The MCD has no value as a piece of equipment unless it is attached to a firearm. For the same reasons, an MCD should not be counted as a firearm, for example under §§2K2.1(b)(1) & (b)(5)(C). What if a defendant possesses no actual firearms, but possesses multiple MCDs? It would be an absurd result to count each MCD as a firearm. And, where an MCD is attached to a firearm and used to commit an offense, the current guideline already addresses this by assigning an increased base offense level. The additional lethality of an MCD is factored into the guideline and additional specific offense characteristics are not necessary to account for the seriousness of an offense involving an MCD.

Finally, the PAG is concerned that these proposed amendments will exacerbate the documented disparate impact of this guideline.[32] Commission data shows that cases with MCDs involve younger and minority defendants. The average age of defendants who possessed MCDs was 28 years old, whereas the age of defendants sanctioned under §2K2.1 in offenses that did not involve MCDs was 35 years old. Further, a higher percentage of defendants of color are charged with and convicted of offenses involving MCDs than those charged or convicted of non-MCD cases.[33] Given this data, these proposed amendments seem likely to disproportionately impact younger and minority defendants.

---

[30] *See* §§2K2.1(a)(1), (3), (4), & (5).

[31] *See generally* §§ 2K2.1(b)(1)-(9).

[32] *See, e.g.,* Statement of M. Carter Before the U.S.S.C. Public Hearing on Firearms Offenses at 5-11 (Mar. 7, 2023), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230307-08/FPD1.pdf.

[33] Data shows that 81.5% of offenses involving MCDs were committed by black or Hispanic defendants, compared to 74.9% of offenses involving non-MCD offenses. Only 15.6% of MCD cases involve white defendants. *See* MCD Data Briefing at Slide 7.

For these reasons, the PAG recommends that the Commission not amend §2K2.1 at this time, in order to collect more data about the prevalence of MCD-involved offenses and to address concerns raised by treating MCDs, which are gun parts, as though they are firearms.

III. A Mens Rea Requirement for §2K2.1(b)(4)(B)

The PAG writes in support of Part B of the proposed amendment to §2K2.1(b)(4), which establishes a *mens rea* requirement for the enhancement for stolen firearms and firearms with modified serial numbers. This provides consistency across all sections of this enhancement, since §2K2.1(b)(4)(B)(ii) contains a knowledge requirement. There is no principled basis to draw a distinction between the subsections of this enhancement.

The PAG reasserts that *mens rea* is and should remain the underpinning for degrees of culpability in any advanced criminal justice system, as it has been historically since the foundation of our criminal code. The concept of *mens rea* is older than the country itself and its importance was highlighted by Blackstone, who stated: "Indeed, to make a complete crime, cognizable by human laws, there must be *both a will* and an act. … And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."[34] This is a cornerstone of our criminal justice system, which requires that the government prove a culpable criminal state of mind to commit an illegal act before a person's liberty can be taken away. Without the *mens rea* requirement, individuals are penalized when they do not have the knowledge, intent or culpable mental state with respect to the acts for which they are more harshly punished.

In practice, this enhancement allows a defendant's guidelines sentencing range to be enhanced even if the defendant had no knowledge that a firearm was stolen or had a modified serial number. There is no rationale for imposing harsher sentences on individuals who did not possess the knowledge that a firearm was stolen or contained a modified serial number, because there is no deterrent effect for a person who had no knowledge of these circumstances in the first place. The absence of a *mens rea* requirement here makes the enhancement a trap for the uninformed and offers zero deterrence.

The Commission asks for comment on whether evidentiary issues arise in proving *mens rea* in firearms cases. In the PAG's experience, the government has ample experience proving *mens rea* for similar issues in order to establish convictions for a number of firearms offenses.[35] And here, the government is only required to prove *mens rea* by a preponderance of the evidence, rather than the more exacting standard in a criminal prosecution. There is nothing inherently

---

[34] William Blackstone, 4 Commentaries at 20-21 (1769) (emphasis supplied).

[35] *See, e.g.*, *United States v. Staples*, 511 U.S. 600, 619 (1994) (requiring that government prove that defendant knew that the weapon he possessed had characteristics that made it a machinegun in order to establish a conviction under 26 U.S.C. § 5861(d)); *United States v. Howard*, 214 F.3d 361, 363 (2d Cir. 2000) (requiring that government prove that defendant knew that firearm was stolen in order to establish conviction for unlawfully possessing a stolen firearm under 18 U.S.C. § 922(j)).

more challenging in proving *mens rea* for these enhancements than when the government prosecutes any other firearms offense.

For these reasons, the PAG urges the Commission to adopt a *mens rea* requirement for these enhancements.

IV. Physical Restraint under §2B3.1(b)(4)(B)

The robbery guideline applies a 2-level enhancement if any person was physically restrained.[36] The question before the Commission is whether a person is physically restrained when restricted from moving at gunpoint but not otherwise immobilized through physical measures. Because the term "restrained" is modified by the term "physically" in the guideline text, the Commission should clarify that the 2-level increase applies only in cases where a person's movement is restricted through physical contact. Thus, the PAG supports Option 2, which is consistent with the plain language of the robbery guideline as currently written.

A majority of the appellate courts that have addressed this issue have found that the 2-level enhancement applies only when the defendant restricts movement by physical contact. For example, the D.C. Circuit has recognized that "[t]he required restraint must, as the language [of the guideline] plainly recites, be physical."[37] This view is shared by six of the Circuit Courts of Appeal – the D.C. Circuit, plus the Second, Third, Fifth, Seventh and Ninth Circuits.[38]

The minority view, that "physical restraint" can be accomplished simply by pointing a gun, is fundamentally flawed because it writes out of the guideline the word "physically." As Judge Rosenbaum explained in a recent concurring opinion:

> Indeed, if the framers of the guideline wanted it to apply whenever "any person was... restrained" in either a physical or a non-physical way, they wouldn't have included the qualifier "physically." But the guideline contains the modifier "physically" before "restrained." That adverb has meaning. And by its plain meaning, "physically restrained" should not include psychologically or emotionally "restrained." After all, "[i]t is a cardinal principle of statutory

[36] *See* U.S.S.G. §2B3.1(b)(4)(B).

[37] *United States v. Drew,* 200 F.3d 871, 880 (D.C. Cir. 2000).

[38] *See United States v. Anglin,* 169 F.3d 154, 164-165 (2d Cir. 1999) (the plain meaning of the words of the guideline require that the restraint be physical); *United States v. Bell,* 947 F.3d 49, 57 (3d Cir. 2020) ("we should consider the plain meaning of the word 'physical' and therefore adopt the requirement that the restraint involve some physical aspect."); *United States v. Garcia,* 857 F.3d 708, 713 (5th Cir. 2017) ("'physical' is an adjective which modifies (and hence limits) the noun 'restraint'" such that physical restraint is required) (citation omitted); *United States v. Herman,* 930 F.3d 872, 875 (7th Cir. 2019) ("If the Guideline had been meant to apply to all restraints, it would have said so; instead it specifies *physical* restraints."); *United States v. Parker,* 241 F.3d 1114, 1118 (9th Cir. 2001) (to constitute physical restraint, "Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down.").

construction that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[39]

Permitting the enhancement to apply without actual physical restraint has at least three other deep flaws. First, if the enhancement is allowed to apply when a gun is pointed, then "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises."[40] The more logical interpretation is for the enhancement to apply only in the case of actual physical restraint because "physical bounding adds another dimension to the intimidation a victim of an armed robbery endures."[41]

Second, this approach is inconsistent with the guideline definition of "physically restrained," which specifies that the restraint must be forcible and further defines the term by reference to three examples: being tied, bound or locked up.[42] Although this list is not exhaustive, the examples it contains are "meaningful signposts."[43] Simply pointing a gun is "materially different from the Guideline examples" such that incorporating gun pointing into the list amounts to disregarding the list itself.[44] Pointing a gun is a common act that occurs during an armed robbery and surely, if the Commission had intended for that act to constitute physical restraint, it would have included gun pointing in the application note.

Third, this approach is unworkably complex. The Circuits that allow the enhancement based on gun pointing do not agree on when or how it should be applied. The First Circuit applies the enhancement when a gun is pointed "at close range."[45] The Sixth Circuit applies the enhancement when the gun pointing results in the victim being moved to a different place or lying down on the floor.[46] The Tenth Circuit applies the enhancement when the gun pointing is accompanied by verbal commands or standing in front of the exit door.[47] The Eleventh Circuit applies it when the gun is pointed in a way that allows the victim "no alternative but compliance."[48] Finally, the Fourth Circuit applies the enhancement "broadly" to encompass any

---

[39] *United States v. Deleon,* 116 F.4th 1260, 1267 (11th Cir. 2024) (Rosenbaum, J., concurring) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (additional citation omitted).

[40] *Anglin,* 169 F.3d at 165.

[41] *Deleon,* 116 F.4th at 1267 (Rosenbaum, J., concurring).

[42] *See* §1B1.1 n.(1)(L).

[43] *Garcia,* 857 F.3d at 712.

[44] *See Anglin,* 169 F.3d at 164.

[45] *See United States v. Wallace,* 461 F.3d 15, 34 (1st Cir. 2006).

[46] *See United States v. Howell,* 17 F.4th 673, 692 (6th Cir. 2021).

[47] *See United States v. Miera,* 539 F.3d 1232, 1235 (10th Cir. 2008).

[48] *See Deleon,* 116 F.4th at 1263 (citation omitted).

instance when the defendant points a gun at a victim.[49] Sticking to the plain language of the guideline avoids this unnecessary complexity.

In the PAG's view, Option 2 is consistent with the language of the guideline, comports with the majority view, and avoids the significant application challenges presented by the minority of circuits.

The Commission also asks whether, in implementing Option 2, the robbery guideline itself should be amended or whether it would be preferable to only amend application note 1(L). The PAG believes that amending the application note rather than the guideline may be preferable because it would result in consistency among the various guideline provisions that call for an enhancement for physical restraint by reference to the application note.

V. Traffic Stops and Intervening Arrests

The Commission proposes an amendment to resolve a split among Circuit Courts of Appeal on what qualifies as an intervening arrest under the single sentence rule for calculating criminal history under §4A1.2(a)(2). The single sentence rule defines when multiple prior sentences are considered a single sentence, or separate sentences. When there is an intervening arrest, sentences are to be treated separately, even if the charges resulting in the sentences are contained in the same charging document or the sentences are imposed on the same day.

The guidelines do not define arrest. The majority of appellate courts have held that an intervening arrest requires a formal, custodial arrest, and that a traffic stop is not an intervening arrest.[50] One outlying circuit, however, has held that a traffic stop is an intervening arrest.[51]

The Commission's proposed amendment clarifies that an:

> "Intervening arrest," for purposes of this provision, requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.[52]

The PAG agrees with the Commission's narrowed definition of arrest. In the PAG's view, arrests should be limited to situations where an accused person is informed that s/he is under arrest and transported to the police station, or booked into jail. Thus, an intervening arrest

---

[49] *See United States v. Dimache,* 665 F.3d 603, 607 (4th Cir. 2011).

[50] *See* Proposed Amendments at 54 (citing cases).

[51] *See United States v. Morgan*, 354 F.3d 621, 624 (7th Cir. 2003).

[52] *See* Proposed Amendments at 55.

should be dependent on two things: (1) a formal arrest; (2) that occurs at some point before the commission of a second offense.

The PAG supports the Commission's proposed amendment and suggests the following changes:

> An intervening arrest requires a formal, custodial arrest and is ordinarily indicated by any of the following: informing the accused that s/he is under arrest; transporting the accused to the police station; or booking the accused into jail. A noncustodial encounter with law enforcement, such as a traffic stop where either a citation or summons is issued, is not an intervening arrest.

This narrowed application is consistent with common usage, case law, and the context and purposes of the guidelines.

A. Common Usage

The Commission's proposed approach squares with the definition of arrest: "[a] seizure or forcible restraint, esp. by legal authority" or "[t]he taking or keeping of a person in custody by legal authority."[53] This also reflects common understanding of an arrest. In the PAG's experience, people stopped and ticketed for routine traffic violations, such as speeding; failing to stop for a school bus, a light or a stop sign; or following too closely, do not consider themselves to have been arrested.

B. Case law

Supreme Court jurisprudence provides ample support for the differing treatment of those who are formally arrested and those who are issued a citation after a law enforcement encounter. For example, in the Fourth Amendment context, concerns for officer safety and preservation of evidence authorize warrantless searches incident to a formal arrest.[54] But this exception to the warrant requirement does not apply to cases where a citation is issued after a traffic stop.[55] Thus, *Knowles* declined to treat the issuance of a traffic citation as a formal, custodial arrest.

There also is a distinction between a formal arrest and the issuance of a citation in the Fifth Amendment context. Where law enforcement stops a driver, questions him or her and asks the driver to perform field sobriety tests, law enforcement is not required to provide *Miranda* warnings because at that point, the driver is not in custody. At a traffic stop, a motorist expects "that he may . . . be given a citation, but . . . most likely will be allowed to continue on his way," unlike a person under formal arrest.[56]

---

[53] *See Black's Law Dictionary* 124 (11th ed. 2019).

[54] *See, e.g., United States v. Robinson*, 414 U.S. 218, 226, 236 (1973).

[55] *See Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

[56] *See Berkemer v. McCarty*, 468 U.S. 420, 437, 434 (1984).

C. The Context and Purposes of the Guidelines

The purpose of §4A1.2 is to reflect the seriousness of a defendant's criminal history, while, at the same time, not overstate it. A defendant's criminal history would be overstated if an intervening formal arrest for a serious offense were treated the same as convictions where a summons or citation were issued for minor offenses, such as jaywalking or driving without a license. Such a result would be at odds with a central tenet of the guidelines rubric to not overstate the seriousness of a defendant's criminal history.

For these reasons, the PAG supports the proposed amendment with its recommended revisions.

VI. Simplifying the Guidelines

Consistent with its proposal from last year, the Commission proposes to simplify the Guidelines Manual by removing most departures. One of the purposes of this amendment is to better reflect current sentencing practice, and this proposal is supported by practitioners' experience as well as sentencing data about the frequency of departures and/or variances. The Commission asks for comment on four issues, which the PAG addresses below.

A. Issues for Comment: Nos. 1 & 3

During the last amendment cycle, the Commission proposed simplifying the guidelines by reducing the sentencing process from three steps to two and by reclassifying departure provisions as factors that may be relevant to sentencing under 18 U.S.C. § 3553(a).[57] The PAG endorsed the adoption of a two-step process, but opposed the reclassification of departure provisions as sentencing factors on several grounds.[58]

First, that prior proposed approach, far from simplifying the sentencing process, would complicate it by conflating the guidelines calculation with the entirely separate § 3553(a) analysis required by statute. Second, we noted in our comment that empirical evidence clearly demonstrates that guideline departure factors are rarely utilized in the real world of federal criminal sentencing. Furthermore, while most of the departure provisions set forth in the guidelines authorize an upward departure, as a practical matter courts depart or vary upward in only a tiny fraction of cases. In our view, then, converting guideline departures into sentencing

[57] *See* U.S.S.C., Proposed Amendments to the Sentencing Guidelines at 123-125 (Dec. 26, 2023) (2024 Proposed Amendments), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

[58] *See generally* Letter from the PAG to U.S.S.C. at 26-31 (Feb. 22, 2024) ("PAG 2024 Letter"), available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=245.

factors that are heavily weighted in favor of upward departures would have the effect of importing an unwarranted upward bias into the § 3553(a) analysis.[59]

In addition, we noted in last year's comment, and emphasize once more, that the conversion of departures into sentencing factors blurs the line between the Commission's statutory role and the statutory role of sentencing courts.[60] As this cycle's proposed amendment correctly explains, the Commission's authority is cabined by the provisions of § 994.[61] In contrast, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[62] The incorporation of suggested sentencing factors into the guidelines themselves thus may exceed the Commission's statutory authority and intrude on the purview of the sentencing courts.

During the last amendment cycle, the PAG endorsed the proposed change from a three-step to a two-step sentencing process, but requested that the Commission "[d]elete all departure provisions in Chapters Two, Three, Four, and Five."[63] The PAG is gratified that this is the approach that the Commission has elected to take in this amendment cycle and believes it is the correct one. In addition to avoiding the infirmities discussed above, this approach reflects actual sentencing practice. Since *Booker*, the reality is that judges have largely abandoned the guideline departure regime in favor of variances.

In the nearly two decades since *Booker*, the three-step process has become a quaint fiction. A few judges pay lip service to the consideration of departures, but most leapfrog right over that second step to consideration of § 3553(a) factors. Empirical data reflects this reality. In Fiscal Year 2023, for example, only 4.3% of sentenced defendants received a departure on a departure ground other than §§5K1.1 or 5K3.1. By contrast, 33.1% of defendants received a variance in 2023.[64] The fact that the proportion of variances has increased over time from 16% of cases sentenced in 2009 to nearly a third of all cases in 2023 illustrates the overwhelming preference of

---

[59] *See id.* at 27.

[60] *See id*.

[61] *See* 2025 Proposed Amendments at 60 & proposed §1A1.1, Commission's Authority.

[62] *Concepcion v. United States*, 597 U.S. 481, 492 (2022) (citation and quotation marks omitted).

[63] *See* PAG 2024 Letter at 27, 30.

[64] *See* U.S.S.C., *2023 Sourcebook of Federal Sentencing Statistics* ("2023 Sourcebook"), Table 29, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table29.pdf.

sentencing judges to employ variances as the basis for non-guidelines sentences rather than traditional guideline departures.[65]

In the PAG's view, the proposed amendment, by deleting all departure provisions except for §§5K1.1 and 5K3.1, does nothing more than ratify current practice. Moreover, as we have previously pointed out, while most departures in the current Guidelines Manual are upward departures,[66] most departures actually granted are downward departures.[67] Upward departures are vanishingly rare and require prior notice.[68] Arguably, then, the current guideline departure regime at least nominally benefits our clients. Even so, we believe that it is in the interest of every stakeholder in the criminal justice system to streamline and simplify the sentencing process and to recognize the realities of sentencing practice. Consequently, the PAG supports the amendment as proposed.

The PAG does not support the consolidation and preservation of deleted departure provisions in a new Appendix or some other format. In our view, the existence and availability of prior versions of the guidelines containing the deleted provisions make such an exercise unnecessary.

B. Issues for Comment: No. 2

The Commission seeks comment on whether this proposal is consistent with its authority under 28 U.S.C. §§ 994 & 995 and other federal laws, and with Congressional directives, such as those contained in the 2003 PROTECT Act, 18 U.S.C. § 2252A. The Commission has broad authority to promulgate and amend the guidelines.[69] Indeed, the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section."[70] Importantly, the statutory guidance that authorizes and guides the Commission's work does not include any mandate that the Commission include bases for reductions from otherwise applicable guidelines. Accordingly, the Commission's proposal to simplify the guidelines falls squarely within its authority to revise the guidelines considering the experience of stakeholders involved in the sentencing process and

---

[65] *Compare* 2023 Sourcebook, Figure 8, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Figure08.pdf *with* U.S.S.C., *2018 Sourcebook of Federal Sentencing Statistics* ("2018 Sourcebook"), Figure 8, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Figure08.pdf.

[66] *See* PAG 2024 Letter at 29.

[67] *See* 2023 Sourcebook, Table 29.

[68] *See id.*; *see also* F.R.Cr.P. 32(h) (requiring sentencing court to provide notice that it is considering a departure from the guideline range that has not been identified in the PSR or by the parties).

[69] *See* 28 U.S.C. §§ 994(a), (o).

[70] *See* 28 U.S.C. § 994(o).

the extensive data on sentencing that it has collected over years. In the PAG's view, the Commission's ability to amend the Guidelines Manual to appropriately reflect the actual practices of courts and practitioners throughout the country goes to the heart of the Commission's statutory mandate. The PAG believes that the Commission's proposed revisions in §1A1.1 accurately reflect its authority to enact guidelines and amendments.[71]

With respect to Congressional directives such as those contained in the PROTECT Act, the PAG submits that the Commission's decision to remove departures does not contradict this law, or any other directive regarding departures. In passing the PROTECT Act and other statutes that reference departures, Congress was operating within the structural framework already established by the Commission – namely, a system of mandatory guidelines with limited departures on specific, permissible grounds. In *Booker*, the Supreme Court held that this structural framework violates defendants' jury trial rights. Indeed, in *Booker* the Supreme Court noted the following about guideline departures:

> At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most.[72]

The fact that departures were largely unavailable in the "mine run" of cases was the very basis upon which the Supreme Court invalidated the guidelines as they then existed. As we all know, the Supreme Court's remedy for this constitutional infirmity was to make the guidelines "effectively advisory"[73] and to emphasize that the bases upon which courts can vary from those advisory guidelines are essentially limitless.[74] In this context, it would turn statutory construction on its head to suppose that statutes that rested upon a sentencing framework that subsequently has been found unconstitutional by the Supreme Court somehow mandate that that framework be maintained.

Even in the current sentencing world, with its extant departures and three-step process, sentencing courts are permitted to vary downward or upward from the correctly calculated guideline range after consideration of the sentencing factors under § 3553(a), even in cases in which the PROTECT Act would prohibit a departure. The bottom line is that courts may vary on § 3553(a) grounds, whether or not the Guidelines Manual contains departure provisions. We cannot emphasize enough that the proposed amendment does not change current sentencing practice. We urge the Commission to ratify this reality and to adopt the proposed amendment.

---

[71] *See* 2025 Proposed Amendments at 60 & proposed §1A1.1, Commission's Authority.

[72] *United States v. Booker*, 543 U.S. 220, 234 (2005).

[73] *See id.* at 245.

[74] *See Concepcion*, 597 U.S. at 492.

C. Issues for Comment: No. 4

The Commission also asks for comment on whether background information related to departures should remain in the commentary to various guidelines, such as application note 27 to §2D1.1, which contains information about the nature and impact of certain drugs. For all the reasons discussed above, it is the PAG's view that explanatory provisions that support bases for guidelines departures should be excised along with the departure provisions themselves. As we explained in our previous comment, "[a]ny attempt to list some of the infinite possibilities of factors that may bear on the § 3553(a) analysis inherently risks elevating the listed factors above others" and we urge the commission to "steer clear of offering guidance to courts that could be viewed as elevating some statutory factors over others."[75]

D. Additional Considerations

The PAG notes that deletion of guideline departures from the manual will necessitate a revision of the Statement of Reasons form ("SOR"). While we support the deletion of departure provisions from the Guidelines Manual and oppose their inclusion as sentencing factors on the grounds discussed above, we recognize the value in continuing to capture longitudinal data relating to the use of those departures as sentencing factors by sentencing courts. Accordingly, the PAG recommends that in revising the SOR form, the Commission include as sentencing factors the "Reasons for Departure" currently set forth in part V(C) of the SOR, and that the Commission continue tracking and reporting the reliance upon these factors by sentencing courts. Continuing to capture sentencing courts' reliance upon "legacy" departure grounds as sentencing factors will permit the Commission and other stakeholders in the federal criminal justice system to make apples-to-apples comparisons of pre- and post-amendment sentencing data.

VII. Conclusion

On behalf of our members, who work with the guidelines daily, we appreciate the opportunity to offer the PAG's input regarding the Commission's proposed amendments. We look forward to further opportunities for discussion with the Commission and its staff.

Respectfully submitted,

/s/ Natasha Sen
Natasha Sen, Esq., Chair
LAW OFFICE OF NATASHA SEN
P.O. BOX 871
MIDDLEBURY, VERMONT 05753
(802) 825-6385
nsen@senlawvt.com

/s/ Patrick F. Nash
Patrick F. Nash, Esq., Vice Chair
NASH ▪ MARSHALL, PLLC
129 WEST SHORT STREET
LEXINGTON, KENTUCKY 40507
(859) 254-3232
pfnash@nashmarshall.com

[75] *See* PAG 2024 Letter at 30.