PROBATION OFFICERS ADVISORY GROUP

An Advisory Group of the United States Sentencing Commission

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

Dear Judge Reeves,

The Probation Officers Advisory Group (POAG) submits the following commentary to the United States Sentencing Commission (the Commission) regarding the proposed amendments issued on December 19, 2024.

Career Offender

POAG's focus as these amendments were discussed was aimed at finding a process that is fair and workable, yet also establishes a process that does not produce arbitrary results. The structure and intent of the proposed amendments represents an overarching intention to amend the current process to ensure that those identified as career offenders constitute individuals whose criminal histories include serious offenses, such as controlled substance offenses and crimes of violence. While the proposed amendment thankfully includes several options and subsections for consideration, the interplay of those interconnected options created an added challenge in building supportive consensus among the circuit representatives. POAG's position related to each option is discussed below, starting with the conduct-based approach, changes to serious drug offense, and changes to point qualification for predicate offenses. POAG's considerations below identified concerns related to workability and application of the conduct-based approach, causing the further loss of support in other areas where changes had been suggested. As the problems with the conduct-based approach were revealed, it became difficult to support the other parts of the amendment.

POAG overwhelmingly does not support the proposed amendment that would define the term "crime of violence" based on the defendant's own offense conduct. This would include relevant

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. Many members of POAG endorsed the idea of holding defendants accountable for their conduct and, in previous submissions, POAG has advocated for such an approach. However, POAG endorses the proposed change to the definition of crime of violence under the force clause by including the definition of force (i.e., force capable of causing physical pain or injury to another person) and believes that the proposed crime of violence definition covers the conduct it is intended to capture (i.e. an arson offense, as proposed at USSG §4B1.2(b)(1)(E)). POAG also appreciates the Commission's recognition of the difficulty in determining what qualifies as crimes of violence under the categorical and modified categorical approach. However, POAG has significant concerns with the amendment as written and does not believe this simplifies or solves the issue regarding crime of violence determination.

First, POAG believes that the new crime of violence definitions that center on the defendant's conduct rather than the elements of the offense will result in a new area of uncertainty and may present additional application issues. Currently, all circuits have guiding caselaw as to what does and does not qualify as a crime of violence under either the force clause or as an enumerated offense. The definitions listed in USSG §4B1.2(e) that were added under the 2024 amendments have provided clarity, consistency, and assistance with application. Shifting from an elements-based approach to a conduct-based approach will require the Court to determine if the defendant's conduct rises to the level of violence that is required under the new definitions. Each determination made by the Court will be as unique as the case before them. As such, POAG is concerned that the individualized nature of this approach will result in "mini-trials," as well as ongoing litigation both at sentencing and on appeal, in determining if prior convictions qualify as a crime of violence for the purpose of applying a career offender enhancement. Additionally, the litigation that results will have holdings that are largely case specific, producing less useful guidance than a holding focused on the elements of the offense. The uncertainty and application difficulties are of significant concern.

The prospect of expanding the sentencing hearing to include resolving these matters for each and every potential predicate offense raises many additional concerns. While at times, the current structure of the career offender guideline produces results that are counterintuitive, the results are at least predictable. A defendant that pleads guilty to an offense has, with the assistance of his legal counsel, some understanding of the guideline range they can expect to face when entering that plea. That understanding would be substantially diminished if a conduct-based approach were in place. Many of the factors that would determine the outcome would hinge upon prosecutorial discretion, availability of *prima facie* documents, availability of reported and historical evidence, availability of victim testimony, and the Judge's interpretation of the available evidence. These different factors create a high degree of indeterminacy in the outcome of applicability, such that a defendant could not reasonably know whether he or she were likely to be a career offender at the

time they enter their guilty plea. Presently, probation officers are likely the first stakeholders to obtain documentation on prior convictions. Such records may not be made available to defense counsel until the initial disclosure of the presentence report, thereby blindsiding defense counsel and defendants upon reviewing the presentence report and predicate offense records. Absent a continuance, the defendant, defense counsel, and the government would have 35 days to prepare for the hearing. The parties would likely need to gather more information about the defendant's conduct from documents and have time to see what witness testimony is available. Further, there would be an increased expenditure of judicial resources and time at the sentencing hearing. A sentencing that takes approximately half an hour to an hour could now be several hours long. Alternatively, prosecutors could decide that they will not pursue the enhancement despite the evidence supporting it due to other factors. Regardless of the rationale, such a decision would still increase disparity.

Another issue in shifting to a conduct-based approach that POAG has identified is the discrepancy in availability of the permissible documents listed to make a *prima facie* showing amongst districts. There is also a concern that some charging documents may not adequately capture the defendant's violent conduct as some charging documents are innately vague and becoming more automated. There is a consensus amongst POAG that some of the other permissible documents, such as the jury instructions, judge's formal rulings of law, and plea colloquies tend to be either largely unobtainable or difficult to acquire, which would limit the number of defendants who qualify as career offenders. Furthermore, after a prima facia showing is made, POAG is concerned over the additional documents the Court can rely on to determine whether a prior conviction is a crime of violence. If after a prima facia showing is made and the Court can expand its consideration to other forms of evidence or documentation, there is a concern amongst POAG that prior convictions that are not necessarily violent in nature but included some form of violent conduct during or after the commission of the offense charged, might be considered a "crime of violence" through this new approach. This may unintentionally negatively impact defendants who would not ordinarily be considered career offenders. For example, Criminal Complaints, Affidavits, and arrest reports may reflect violent conduct but that conduct was not charged or was otherwise dismissed as part of plea negotiations. An example POAG members discussed was a Grand Theft conviction which involved the defendant assaulting a store clerk or another patron during or while fleeing from the scene of the theft offense. Consequently, POAG foresees this would lead to relitigating prior convictions, arguments surrounding facts rather than elements, and would not adequately resolve the "odd" and "arbitrary" results of utilizing the categorical and modified categorical approach, trading the oddity of outcomes based on statutory construction for that of disparity based on availability of documents.

POAG also notes that, as written, the shift to a conduct-based analysis would be limited to USSG §4B1.2, and the current elements-based approach would be moved to other guidelines, such as USSG §2K2.1. Currently, there is one definition of crime of violence in the guideline manual and it is listed under USSG §4B1.2. The new conduct-based approach would introduce both new

definitions and a new approach in determining what constitutes a crime of violence as there would be no changes to the elements-based approach under those other Guidelines or the elements-based approach in determining a violent felony under the Armed Career Criminal Act at USSG §4B1.4. POAG believes that having different definitions and methodologies, depending on which guideline is being used, promotes inconsistency, complication, and confusion, which is contrary to the Commission's efforts of simplification. Further, the resulting case law would be divided between the two different processes, compounding the complexity of tracking the correct application of one definition with two different approaches to the application.

POAG also discussed the Commission's proposal to revise the definition of "controlled substance" in USSG §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. POAG acknowledges that this approach would allow for an easier and more-straightforward application of the Guideline. Caselaw in several Circuits already prohibits the counting of certain controlled substance offenses as qualifying prior convictions. This includes instances where the state offense is broader than the guideline definition because it addresses the possession with intent to sell or deliver or purchase of substances not covered by the Federal Controlled Substances Act (CSA), marijuana convictions, or attempted crimes. Some examples are as follows: The Second Circuit held that New York's definition of cocaine is categorically broader than its federal counterpart, see *United States v. Minter*, 80 F.4th 406 (2nd Cir. 2023) and also that Attempted Criminal Sale of a Controlled Substance in the 3rd Degree is not a controlled substance offense because New York's controlled substances schedule included naloxegol, which was removed from the federal schedules promulgated under CSA, see *United States v. Gibson*, 55 F.4th 153 (2nd Cir. 2023); the Fifth Circuit found that prior marijuana convictions were no longer predicates, see *United States v. Minor*, 121 F.4th 1085 (5th Cir. 2024); the Sixth Circuit found that attempt crimes such as offers to sell do not qualify as predicates under the career-offender enhancement, see *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), and also held that it was plain error to apply career offender designation where the predicate offense prohibited "offers to sell controlled substances," see *United States v. Cavazos*, 950 F.3d 329 (6th Cir. 2020); the Seventh Circuit held that the Illinois definition of cocaine, which includes positional isomers, was overbroad compared to the CSA, see *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020); and the Ninth Circuit found that an Arizona statute including hemp in the marijuana definition was facially overbroad, as hemp no longer falls under the federal CSA, see *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021).

Circuits such as those mentioned above are already familiar with certain prior state drug offenses being excluded for consideration of the career offender enhancement. However, in receiving feedback from probation officers across districts and discussions within POAG, it is still of great concern if all state drug offenses are excluded with consideration strictly limited to controlled substance offenses under the federal drug trafficking statutes. It is noted that the conduct involved in state drug offenses is often similar, if not the same, as the conduct involved in federal drug offenses. Therefore, it seems arbitrary and inconsistent to limit controlled substance offenses to

only federal convictions while moving to capture a conduct-based approach for crimes of violence. Additionally, reducing the number of predicates that qualify as a controlled substance offense will impact how often a defendant with a single crime of violence predicate will qualify as a career offender and, consequently, drastically reduce the total number of defendants who qualify as career offenders.

Such an approach may also have unintended consequences in rural and tribal areas and smaller counties, where due to a lack of resources or crimes committed on federal land, cases are disproportionately prosecuted federally. If the Commission moves forward with only counting federal drug trafficking offenses towards career offender, it will disproportionately impact defendants in these areas, likely resulting in higher levels of punishment concentrated in those population groups and rural areas.

Furthermore, POAG previously raised the issue that there is a high downward variance rate amongst career offender cases. If less defendants qualify as career offenders under this amendment, it may have bearing on a sentencing judge's decision to impose variances, or the amount of variance, if they no longer believe that the offense level and criminal history category is overstated. If certain offenses are disqualified from career offender eligibility, especially with a defendant who has incurred multiple convictions for state controlled substance offenses, we may see judges accounting for that aggravating conduct in fashioning a just sentence.

POAG has previously advocated for the career offender guideline to include at least one crime of violence. If this amendment is adopted in whole, fewer individuals will qualify on the basis of a controlled substance offense and more individuals will qualify based upon a prior conviction for a crime of violence, thereby increasing the focus of the career offender analysis on individuals with violent histories. Capturing individuals with violent histories in the career offender analysis would be in line with the Commission's findings in the Recidivism of Federal Offenders Released in 2010 that reflects that those individuals with violent offenses had a higher rate of rearrest than those with exclusively controlled substance offense instant offenses and predicate offenses (Recidivism of Federal Offenders Released in 2010). It may be an easier and more direct method to explore a requirement that either the underlying offense or one of the qualifying predicates be a crime of violence.

While we appreciate the Commission's efforts to simplify the career offender guidelines and reflect the seriousness of the predicates, POAG unanimously voted against all three options presented in the amendments and recommends that no changes be made to the point-system currently in place. Regarding Option 1 (Limitation applicable to both "crime of violence" and "controlled substance offense"), and specifically Suboption 1A, prior convictions to sentences receiving points under §4A1.1(a) [or (b)], POAG felt it presented an ease and practicality of application, where the same rules of application apply to both controlled substance offenses and crimes of violence. However, POAG was still not in favor of this proposed amendment because it

eliminated considering convictions that garnered one point under subsection (c). POAG believes this would limit a large pool of individuals with serious felony drug convictions that would have otherwise counted towards career offender. Specifically, POAG observes that, in certain regions and especially more populated cities, serious drug offenses may receive more lenient sentences given the number of prosecutions needing to be processed in these very busy courts. Although in theory, an offense garnering one point seems like it should involve a less serious controlled substance offense, this is frequently not the case. Different jurisdictions view the seriousness of charges differently and the method in which they impose sentences also differ and may rely on variables such as size of court, number of cases, prosecutorial resources, custodial resources, and other issues. Therefore, offenses that garner one point may still be as serious as offenses that resulted in two or three points and should not be completely disqualified from the analysis.

POAG was also not in favor of Suboption 1B (Limitation applicable only to "crime of violence"). While felony convictions for controlled substance offenses that fall under §4A1.1(c) may be considered, it limits the number of eligible defendants who have sustained felony crime of violence convictions. As mentioned above, based on statistical research conducted by the Commission, there is a higher rate of recidivism amongst violent offenders. Therefore, we would not be in favor of limiting the number of crimes of violence convictions that may be considered for the career offender enhancement.

With regard to Suboptions 2A and 2B and utilizing sentence imposed as part of the analysis, it seems arbitrary to select a certain sentence when a felony conviction carries a punishment of one year or more. Similar to what POAG has shared already, jurisdictional norms again come into play with regard to the sentence imposed, making the sentence imposed an unreliable metric for capturing the seriousness of the offense. Additionally, if the conduct of the defendant is an important metric in predicting recidivism, why then limit the consideration of that conduct based on a sentence imposed structure? We are not in favor of this approach and do not believe that this change would capture the group of individuals the career offender guideline is meant to identify. As mentioned above, we would also not be in favor of omitting convictions that fall under §4A1.1(c) from the analysis.

In terms of Suboptions 3A and 3B, POAG was unanimously not in favor of any options that used the sentence served approach. In many cases, determining the amount of time served could be impossible due to restrictions in the availability of this information or records that pertain to it, leaving concerns that the career offender guideline would rarely be used or disparately applied based on availability of records. Determining the amount of time served becomes even more difficult to decipher when there are multiple sentences being served at one time. Also, unlike publicly available court records, records pertaining to incarceration are not necessarily available to the public and vary per correctional system. The time a defendant serves on a sentence can also have more to do with correctional resources than the sentencing court's measurement of the degree of seriousness of the offense. POAG believes the time-served approach would not adequately

capture individuals with more severe criminal histories, who would otherwise be exposed to greater levels of punishment under the career offender guideline. Additionally, utilizing a time-served approach to determine career offender eligibility would be contrary and inconsistent with the method already used throughout the Guidelines of a sentence-imposed approach to determine criminal history points.

POAG is appreciative of the Commission's efforts to simplify the Guidelines, especially with regards to the career offender guideline by shifting away from the categorical approach. POAG acknowledges that a conduct-based approach appears to be more of a "common sense" solution; however, for the reasons stated above, the amendments as proposed pose their own set of application issues and legal challenges. POAG encourages the Commission to consider re-evaluating the most recent career offender approach from 2023 that, with some additional guidance and refinement, could produce a more workable approach.

Firearms

(A) Machinegun Conversion Devices

POAG overwhelmingly supports the proposed amendment to revise USSG §2K2.1 to include additional enhancement(s) for Machinegun Conversion Devices (MCDs). These include devices which are commonly referred to as a "Glock switch," "auto sear," or "Glock auto sear," among other labels. These MCDs present an extraordinary threat to public safety, as they can be readily and inexpensively made using 3D printing technologies and will quickly turn a semiautomatic firearm into a fully automatic weapon. These devices are generally small, easily concealable, and non-serialized. Moreover, POAG has received feedback that districts have seen a sharp increase in the production, possession, and distribution of MCDs; and the data from the Commission supports this observation. See the Commission's Public Data Briefing, Proposed Amendment on Firearms, Part A: Machinegun Conversion Devices, dated January 13, 2025 ("the Commission's Data Briefing").

Regarding Option 1, POAG believes that amending the definition of "firearm" applicable to §2K2.1 would provide consistency in the definition of "firearm" between the Guidelines and under Federal Statutes. However, simply incorporating the statute of 26 U.S.C. § 5845(a) to the definition of a firearm may also produce unintended application issues and disparities. This is because a MCD can be affixed to a semiautomatic firearm, can be found in close proximity to a semiautomatic firearm, or can be a standalone device, and using the definition alone would provide confusion as to whether an affixed MCD has the same weight as a standalone MCD. Further, POAG was split on the inclusion of MCDs to certain specific offense characteristics, as further provided below.

POAG unanimously supports Option 2, but had various positions regarding each specific offense characteristic, as detailed herein:

Subsection 2K2.1(b)(1) Based on the Number of Firearms

POAG unanimously supports expanding §2K2.1(b)(1), to include firearms under 26 U.S.C. § 5845(a), which would increase the offense level if the offense involved three or more firearms.

POAG had a lengthy discussion regarding how MCDs should be factored when calculating the number of firearms depending on whether the MCD was affixed to a semiautomatic firearm, in close proximity to a semiautomatic firearm, or a standalone MCD. Ultimately, the majority felt that a treating each MCD as the equivalent to one firearm, regardless of the circumstances, was reasonable to account for the increased danger of the MCD. The one-to-one ratio also provides the most workable outcome given the available evidence in a case. Investigative reports vary in quality and detail and do not always provide clear information to support if the MCD was fully affixed or compatible with the semiautomatic firearm in close proximity. Essentially, this one-to-one valuation will provide less disparity among defendants based on the degree of detail provided by law enforcement investigation.

POAG believes that treating a MCD affixed to a firearm as one firearm for purposes of subsection (b)(1), and treating a MCD located in close proximity to a semiautomatic firearm and the semiautomatic firearm as two firearms for purposes of subsection (b)(1) would result in an unjust outcome because the affixed MCD is arguably more dangerous due to the firearm having fully automatic capabilities. Additionally, the MCD affixed to the firearm could also be readily separated to be sold or attached to different firearm.

The Commission's Public Data Briefing supports this one-to-one valuation. Specifically, 82.3% of offenses involving affixed firearms included only one MCD affixed to a firearm. In cases when there is only an affixed MCD and a firearm, there would be no increase in the offense level under subsection (b)(1), as the offense must involve three or more firearms for an enhancement to be applicable. By contrast, more than 50% of cases involving only standalone MCDs involved three or more. The majority of those standalone MCDs fell between 3 to 24. Surprisingly, for cases involving 25 or more standalone MCDs, there were no affixed MCDs noted. See, the Commission's Data Briefing.

If the Commission does expand the definition of firearm, POAG requests that additional clarifying language be included in the guideline to specify the weight that should be given to an affixed MCD, a standalone MCD, or a MCD in close proximity to a semiautomatic firearm. While POAG believes a MCD should be treated as a separate firearm in all circumstances, the Commission can provide clarity on this issue with additional guidance.

Subsection 2K2.1(b)(4) Stolen Firearms, Modified Serial Number, or Non-serialized Firearms

POAG is unanimously opposed to including the definition of 26 U.S.C. § 5854(a) to subsection USSG §2K2.1(b)(4), which addresses stolen firearms, firearms with a modified serial number, or non-serialized firearms.

POAG was unanimously opposed to expanding the definition of firearm under USSG §2K2.1(b)(4)(B)(ii) or the inclusion of a new specific offense characteristic in that subsection. This is a unique circumstance because of how universally the "ghost gun" enhancement would be applicable to MCDs as opposed to other semiautomatic firearms. MCDs are generally privately made and not marked with a serial number. This increase will apply regardless of whether the MCDs is standalone or if the MCD is affixed to a serialized firearm. POAG observes that the Guidelines take into account the type of firearm used in an offense when assessing a base offense level. The base offense level for offenses involving firearms described in 26 U.S.C. § 5845(a) are greater than for offenses involving other firearms. For example, a firearm not marked with a serial number that is possessed by a defendant who is a prohibited person would score a base offense level of 14 (or lower if the defendant is a non-prohibited person convicted of certain listed offenses). To account for the firearm not being marked with a serial number, the defendant would then receive a four-level enhancement under USSG §2K2.1(b)(4)(B)(ii). On the other hand, if a firearm under 26 U.S.C. § 5845(a) is included in USSG §2K2.1(b)(4)(B)(ii), a defendant who possessed a MDC, which is generally not marked with a serial number, would receive a base offense level of 18 and then receive a further four-level increase under USSG §2K2.1(b)(4)(B)(ii). With the difference in the base offense levels, the Commission has already acknowledged the dangerousness and deadliness of 26 U.S.C. § 5845(a) firearms.

Finally, some of the SOCs under §2K2.1(b)(4) are not generally applicable to MCDs. Since MCDs are generally not serialized, it would be difficult to trace and determine if the MCD was stolen. In the rare situation where there is a proof of theft, the extent of that conduct may better be addressed through other means such as a higher end sentence within the advisory range or a variance. Similarly, since MCDs are generally not serialized, the enhancement for a modified serial number would not apply.

Subsection 2K2.1(b)(5) Trafficking in Firearms

A slight majority of POAG supports the expansion of §2K2.1(b)(5) to include an increase based on the trafficking of firearms as defined in 26 U.S.C. § 5845(a). POAG recognizes that this subsection captures a particular harm that is different from the harm captured by the number of firearms at USSG §2K2.1(b)(1). POAG discussed that subsection (b)(5)(B) and (C) targets the trafficking in firearms which the defendant knows or has reason to believe, would be used for a nefarious purpose, or to an individual with a more serious criminal history. Those in favor of the increase pointed to the increased danger of trafficking MCDs and, in those circumstances, believe the dangers warrant some additional increase.

Those opposed to the expansion of §2K2.1(b)(5)(B) and (C) believe that where defendants are trafficking in standalone MCDs, such that the trafficking conduct would not currently be captured under (b)(5) provisions, those defendants are likely to possess multiple standalone MCDs. Therefore, those defendants would already receive a significant increase under (b)(1) that would sufficiently capture a defendant's culpability. It was discussed that in cases involving numerous standalone MCDs (such as 25 or more as previously noted in the discussion of (b)(1)), the purpose of the possession of those MCDs was to traffic the MCDs to others or use them for some other nefarious purpose. As such, some members of POAG felt that an increase under (b)(1) and (b)(5)(B) or (C) was "double-counting."

If the Commission does expand the definition of firearm, POAG requests that additional clarifying language be included in the guideline to specify the weight that should be given to an affixed MCD, a standalone MCD, and an MCD in close proximity to a semiautomatic firearm. This is especially important in this subsection, as trafficking in one firearm versus two firearms could increase the offense level by either two levels under USSG §2K2.1(b)(5)(B), or five levels under USSG §2K2.1(b)(5)(C), if the other factors in those subsections are met. For instance, if a defendant transferred an affixed MCD to an individual who the defendant knew or had reason to believe intended to use or dispose of the firearm unlawfully, the defendant could receive a two-level increase under USSG §2K2.1(b)(5)(B) if the affixed MCD and semiautomatic firearm is considered one firearm, or the defendant could receive a five-level increase under USSG §2K2.1(b)(5)(C) if the affixed MCD and semiautomatic firearm is considered two firearms.

Subsection 2K2.1(b)(6)(A) and (B) Transportation Outside of the United States/Possession/Use in Connection with Another Felony Offense and (c)(1) Cross Reference

A slight majority of POAG supports the expansion of the firearms definition to USSG §§2K2.1(b)(6)(B) and (c)(1). POAG discussed that in most cases where these enhancements or cross-reference would apply, the MCD would be affixed to a semiautomatic firearm so the expansion would not have an overall impact. POAG discussed that the issue is when there is a standalone MCD.

POAG members in favor of the expansion in (b)(6)(B) and (c)(1) believe that the dangerousness of the MCD is not adequately captured elsewhere if the MCD was used in connection with another felony offense.

POAG members opposed to the expansion in (b)(6)(B) and (c)(1) believe that a standalone MCD is not inherently dangerous, and the inclusion of this expansion may lead to litigation to determine if a standalone MCD facilitated, or had the potential of facilitating, another felony offense. For example, if a standalone MCD was located near drug trafficking activities, but no semiautomatic firearm was located, there may be an argument that although an operable firearm was not present, the presence of a standalone MCD is indicative that a semiautomatic firearm capable of accepting the MCD was possessed in connection with the other felony activity. There is already a circuit split

regarding the treatment of firearms near drug trafficking activities, and the inclusion of standalone MCDs may exacerbate this disparity.

The cross reference at (c)(1) generally functions the same at subsection (b)(6)(B) but requires the firearm to be cited in the offense of conviction. For the reasons provided herein, POAG members took the same position as the treatment for subsection (b)(6)(B).

Further, the majority of POAG was in favor of including the definition of 26 U.S.C. § 5845(a) to subsection USSG §2K2.1(b)(6)(A) which applies if the defendant possessed the firearm while leaving or attempting to leave the United States or had reason to believe it would be transported outside of the United States. POAG's general consensus is that this applies in very limited circumstances, which is consistent with the Commission's Data Briefing (the application of this subsection would have potentially applied to 16 cases in fiscal year 2023). Further, POAG recognizes that the transportation of MCDs outside of the United States, particularly to areas that involve a lot of violence and firearm offenses, is concerning.

Subsection 2K2.1(b)(7) Recordkeeping Offense

POAG noted that USSG §2K2.1(b)(7) would likely not apply to MCDs because MCDs are generally illegal to possess, so it is unlikely that records would be kept regarding these firearms. However, if the Commission is adopting the expanded definition of firearms to include firearms under 26 U.S.C. § 5845(a) to all other provisions, POAG does not oppose the inclusion of this proposed amendment for consistency and simplification purposes.

Additional Guidelines to Include in the Body of the Guideline

POAG is appreciative of the Commission's efforts to move the commentary into the Guidelines themselves, as POAG members noted challenges to the commentary. POAG overwhelmingly supports moving the definitions in the commentary to the main body of the Guideline.

Concerns were raised that an unintended impact of moving only one definition of "firearm" from the commentary to the Guideline would be to seemingly weaken the remaining commentary of USSG §2K2.1 and the overall commentary of the Guidelines. By drawing these terms into the main body of the Guideline, much of the remaining commentary may be able to be brought in as clarifying any perceived ambiguities.

An example of a current challenge to the commentary recently was presented in a Felon in Possession of a Firearm case. The government's position was that the language in USSG §2K2.1(a)(4)(B) "the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine" is unambiguous under *Kisor v. Wilkie*, 588 U.S. 558 (2019), and thus the commentary need not be applied. Specifically, the defendant possessed a .45 caliber semiautomatic handgun with eight rounds of ammunition. The police report did not provide any

information on the capacity of the firearm's magazine. The government argued for a base offense level of 20 pursuant to USSG §2K2.1(a)(4)(B). Their opinion was that if the firearm had the capability to accept a large capacity magazine, regardless of the type of magazine possessed or the weapon's proximity to a high-capacity magazine, the increased base offense level should apply. See, USSG §2K2.1, comment. (n.2).

POAG anticipates similar arguments to the definitions such as "controlled substance offense" and "crime of violence" as provided in USSG §2K2.1, Application Note 1, and "prior felony offense" as provided in USSG §2K2.1, Application Note 10, which refer to Chapter 4 of the Guidelines.

POAG recommends the Commission continue to examine the commentary to the guidelines and proactively address those being challenged as expanding the Guideline by moving such commentary into the main body of the guideline.

(B) *Mens Rea* Requirement

POAG understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement for stolen firearms. It may not be readily apparent that a gun is stolen, and it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen. POAG observed that, unlike "ghost guns," every stolen firearm involves an actual victim. A *mens rea* requirement would better reflect the increased culpability of a defendant who knew that a firearm was stolen compared to a defendant who was unaware. However, POAG unanimously is opposed to including the *mens rea* requirement of "willfully blind" or "consciously avoided knowing" without further guidance as to what is necessary to apply that standard.

POAG observed that a definition regarding the phrase, the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that…" has been the reason for many objections since its introduction in the 2023 Guidelines Manual. It has been extremely difficult for probation officers to be able to determine what is meant by "willfully blind" or "consciously avoided knowing," and, therefore, these terms have been left to the interpretation of sentencing judges without any uniformity. This has made supporting the increase for a firearm which was not otherwise marked with a serial number under USSG §2K2.1(b)(4)(B)(ii) very difficult. POAG discussed that the enhancement is vague and has led to disagreement as to when it should be applied. Further, there has been disparity among districts in applying this enhancement, as sometimes it is only applied if the defendant has agreed to this enhancement in a plea agreement.

Adding this language to the specific offense characteristic related to possessing a stolen firearm without adding definitions would further exacerbate the problem. The only other section of the Guidelines where terms related to willful blindness or conscious avoidance of knowledge are used is under USSG §2D1.1(b)(13)(B) regarding representing or marketing a drug containing fentanyl (represented or marketed as a legitimately manufactured drug another mixture or substance

containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug). POAG recognizes that similar concerns regarding the *mens rea* are addressed in the proposed amendments published on January 24, 2025 (See page 104). POAG encourages the Commission to make uniform changes or clarifications to these terms of definitions to both guidelines.

POAG was unanimously opposed to a *mens rea* requirement attached to a firearm that had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. Although the fact that a firearm has a missing, altered, or obliterated serial number is generally readily apparent from the firearm itself, under the proposed language, the defendant would have to have knowledge that the serial number is illegible to others. If the Commission does apply this *mens rea* requirement, POAG is concerned that this will cause the application to decrease drastically and will become, for all practical purposes, inapplicable.

Moreover, to promote consistency between the two enhancements in question, POAG suggests the Commission consider leaving the guideline as is for now and instead revisit the "ghost gun" enhancement and amend it back to a strict liability standard or otherwise amend the *mens rea* requirement.

Additional Considerations

POAG is concerned that the guideline does not have a mechanism to account for when a firearm or MCD is being produced or manufactured. POAG believes that additional consideration is needed regarding whether offense level enhancements are needed for individuals who produce or manufacture firearms and MCDs but may not specifically be held accountable for trafficking under USSG §2K2.1(b)(5). As noted previously, with a 3D printer, a person could inexpensively and readily produce a large quantity of MCDs for distribution. The Guidelines should capture the aggravating factors related to someone who chooses to produce these dangerous items.

POAG also discussed that a defendant possessing a standalone MCD may still be eligible for the zero-point offender reduction under USSG §4C1.1, which uses the more general definition of a firearm under USSG §1B1.1. POAG believes that additional consideration is needed if the general definition of firearm under USSG §1B1.1 should include MCDs.

Circuit Conflicts

(A) Circuit Conflict Concerning the "Physically Restrained" Enhancement at USSG §2B3.1(b)(4)(B)

POAG agrees that the circuit split related to the "Physically Retrained" enhancement at USSG §2B3.1(b)(4)(B) needs to be addressed by the Commission. As the Commission noted, there is a

circuit conflict concerning whether the 2-level "physically restrained" enhancement at USSG §2B3.1(b)(4)(B) should be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to USSG §1B1.1 (Application Instructions, "Physically restrained" means forcible restraint of the victim such as be being tied, bound, or locked up). The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement, while the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits have held that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. Notably, however, the Eleventh Circuit, in concurring opinions, recently brought into question whether the prior holdings on this issue should be revisited *en banc*. See *United States v. DeLeon*, 116 F.4th 1260 (11th Cir. 2024). Additionally, the Ninth Circuit has had caselaw on both sides of this issue. See *United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001) and *United States v. Albritton*, 622 F.3d 1104 (9th Cir. 2010). The nature of the circuit split, and even the fact that at least one circuit has signaled a need to revisit the issue and another circuit has cases supporting nuanced interpretations of the same language, all speak very clearly to the need for the adoption of one of the versions of this amendment.

Three options were presented as possible responses to this circuit conflict by amending the enhancement at USSG §2B3.1(b)(4)(B). The first two options align with the positions presently taken by the two sets of circuits, respectively. The third option would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at USSG §2B3.1(b)(4)(B).

The majority of POAG is in favor of Option 3 and believes this option would capture the trauma suffered by victims whose movement is restrained in manners that fall short of actual physical contact while recognizing that harm may not rise to the level suffered by those who are actually "physically" restrained or bound. So often, the types of physical restraint that fall short of actual physical contact involve a threat to the victim's life to overcome that victim's individual will or autonomy. The just outcome that the guidelines endeavor towards would best be served by capturing that harm in some fashion.

While POAG supports Option 3, there were still some members who expressed concern that the language may not capture all the conduct involved in the supplanting of the victim's will. There have been situations in which persons have been moved to another location by means of gunpoint or a weapon (but not "abducted"), and this may not be adequately captured by the amendment. POAG, therefore, suggests the amendment, in (B), read, "if any person's freedom of movement was restricted *or any person's movement was directed,* through means other than…."

The majority of POAG supports Option 3, because they believe it more adequately captures the harm to the victim. However, a minority of POAG proposed a carve out to the Option 3 language

that disallows an application under USSG §2B3.1(b)(4)(C) if the defendant has already received an enhancement related to "otherwise used" a firearm or "discharged" a firearm. This is because when the defendant is already receiving an enhancement for leveling the firearm at a victim or discharging the firearm in proximity to the victim, it appears that action has already effectively restrained the victim. However, the majority of POAG disagreed with this carve out. The "otherwise used" enhancement can also encompass more than just pointing the firearm. It can include using the firearm to strike the victim. Additionally, while a defendant may point a firearm at a victim, the victim could choose not to comply, demonstrating they are not restrained. POAG further observed that the defendant has engaged in two different actions and that the (b)(2) special offense characteristic captures a separate harm than what is captured at the proposed USSG §2K2.1(b)(4)(C). The majority of POAG was also more comfortable with this potentially similar conduct only resulting in a single level increase. Such an increase appropriately acknowledged that there is an extra harm in restraining someone's movement or procuring their movement upon threat of violence.

There are a minority of POAG whose circuits' case law currently aligns with, or, until recently aligned with, Option 1. Those Circuit Representatives favor Option 1 because it provides clear guidance and ease of application, and it would continue to capture all situations in which a victim's movement is restricted. The minority that voiced interest in the noted carve out language in Option 3 had similar argument against the adoption of Option 1.

However, some POAG members noted that the harm suffered by a person who is forced to move at gunpoint, or whose path of escape is blocked, could be greater than those who are bound or physically moved.

None of POAG favored Option 2, which would require physical contact or confinement, as POAG unanimously believes Option 2 fails to address the trauma suffered by those whose movement is restricted by other means. A victim who was instructed at gunpoint under fear of serious bodily injury or death to engage in some action, inaction, or movement would have nothing within the guideline structure to capture the harm caused to them by the defendant. Without the guidance from the Commission on this issue, the outcome would continue to result in disparity. Courts would either sentence within the guideline range, without reflecting the harm to the victim in the offense level, or try to capture the conduct through variances commensurate with their perception of the harm. POAG believes the Commission has a more just outcome with the adoption of either Options 1 or 3.

After much deliberation, POAG maintains a recommendation for Option 3 and proposes the slight revision of the language.

With respect to the issue for comment, POAG unanimously agreed the Commission should amend all other relevant guidelines to mirror the approach taken by the proposed amendment to USSG §2B3.1. In general, POAG favors consistency throughout the Guideline definitions.

(B) Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)

POAG appreciates the Commission's efforts to define "arrest" for "intervening arrest" purposes when calculating a defendant's criminal history score under Chapter 4 of the Guidelines. Section 4A1.2(a)(2) sets forth the single sentence rule which provides that "[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest." The term "arrest," as it appears in USSG §4A1.2(a)(2), is not defined within the context of USSG §4A1.2 when determining if multiple prior sentences are counted as one single sentence or as separate sentences.

As recognized in the proposed amendments, most circuits hold that "a formal, custodial arrest is required," and that "a citation or summons following a traffic stop does not qualify." POAG overwhelmingly supports the proposed amendment, which seeks to align with this approach and provides a more specific definition of "intervening arrest."

POAG is concerned, however, that the proposed language "A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest" may cause more confusion as to what is considered an "intervening arrest." This is because the term "traffic stop" is broad and can either mean a routine traffic stop which results in a criminal traffic citation, or a traffic stop which results in an investigation and more serious charges. In either circumstance, a defendant may not be formally arrested and instead receive a warning, citation, or summons that will result in court intervention at a later date. If the Commission's intent is to only exclude traffic citations, then POAG recommends that the Commission include the alternative language, "The issuance of a written traffic citation alone is not an intervening arrest."

POAG also discussed instances when other noncustodial encounters with law enforcement were not initiated from a traffic stop and did not result in a formal arrest. In those circumstances, it is unclear from the proposed amendment when an "intervening arrest" occurred. POAG members received feedback that criminal histories are reflecting an increase in citation and summons cases for offenses that did not commence from a traffic stop but from more serious conduct such as theft or drug possession. It is also noted that non-felony offenses occurring on federal land, military bases, and on tribal land usually result in the issuance of citations or a summons instead of a formal arrest. Without guidance, districts are using inconsistent "arrest" dates. Some districts use the date of the citation/summons as the "arrest" date, while other districts use the date of first appearance in court as the "arrest" date. Further, in some cases, law enforcement reports are unavailable or purged, and a formal arrest cannot be confirmed.

POAG believes the Commission should address what, in the absence of an "arrest," may be used for purposes of USSG §4A1.2(a)(2), to establish sufficient criminal justice intervention. For noncustodial encounters with law enforcement, even though the defendant is not "arrested," one could conclude that, at minimum, his or her first appearance in court on the charge is appropriate notice to the defendant so as to serve as an equally sufficient intervening event.

POAG also discussed challenges that may arise based on the new definition of a formal arrest. This may occur if a defendant is in custody on other matters and is served a writ or a summons while he is in custody. Furthermore, the new definition may have the unintended result of treating persons who are temporarily detained as having an intervening arrest. This may include situations in which a defendant is temporarily detained at the scene of a crime, even if the defendant is not arrested at the scene, or if the defendant is brought to the police station for questioning and then released without being booked.

Based on the above concerns and discussion, the majority of POAG suggested, as an alternative to the proposed amendment, that the following be added to the definition of a formal arrest, "If an arrest date cannot be determined, or a defendant is not arrested, the defendant's first known appearance in court on the offense may be used."

Simplification

Consistent with POAG's February 2024 submission, POAG continues to overwhelmingly support the simplification of the three-step sentencing process. In essence, the proposed amendment alters the process to mirror the existing practice the Courts primarily utilize in determining the ultimate sentence, thereby removing the extraneous step to give consideration to formal departures and, instead, relying on the Court's already existing discretion to consider those same departure factors under 18 U.S.C. § 3553(a).

Removing the "additional considerations" section from the previous version of the amendment results in a further refined simplification of the sentencing process. However, a minority of POAG members were in favor of the 2024 amendment cycle's proposal that maintained various prior departures as "additional considerations." Those members take note of the fact that each departure was developed in response to an identified need as part of prior amendment cycles and maintaining those prior amendments as "additional considerations" allows them to continue to serve as an available reference. Also, members of POAG observed that some of the current departures were implemented because they constitute outlier circumstances, but in other cases they were implemented because there was not an agreement on how to incorporate those factors in the guidelines themselves. The loss of the "additional considerations" section of the Guideline Manual will result in the loss of an area for compromise wherein an issue is important enough to be addressed but not so weighty a consideration to warrant becoming a specific offense characteristic or enhancement to the base offense level. With this thought in mind, if this amendment is adopted, in order to maintain their historical relevance, some suggested that previous departures could be memorialized in an Appendix to the Guideline Manual. While others noted that the prior Guideline Manuals are readily available through online resources, the minority expressed concern that the use of those older guidelines as a resource would diminish over time.

Despite the aforementioned, a majority of POAG favors the removal of the "additional considerations" section. POAG observes that many of the departures were relevant at the time they

were developed as they were the only available avenue to impose a sentence outside of the guideline system. That is no longer the case and has not been the case for over 20 years. The current proposal's removal of "additional considerations" simplifies the guidelines and relies on the Court's existing practice of referring to the factors outlined in 18 U.S.C. § 3553(a). POAG members noted that not only does this amendment simplify the process, but it also clarifies the record. The factors that support a departure are often overlapping with the factors that support a variance, given that the departure factors are effectively encompassed within 18 U.S.C. § 3553(a). Rather than requiring that courts attempt to compartmentalize the record to clarify which factors support a departure and which factors support a variance, relying solely on variances simplifies the record and allows the Court to clearly state the basis for the sentence on the Statement of Reasons.

Further, in addition to retaining Substantial Assistance to Authorities at USSG §5K1.1 and Early Disposition Programs, relocated to the newly created USSG §3F1.1, some members of POAG also recommend retaining some variation of USSG §5K2.23 (Discharged Terms of Imprisonment). Departures under USSG §5K2.23 are presently the only avenue within the Guidelines Manual by which the Court can fashion a reasonable punishment in circumstances where the defendant has already served a term of incarceration on a sentence that qualifies as relevant conduct for the instant offense. These provisions not only provide a mechanism to account for duplicate terms of incarceration imposed for the same conduct, but they also create a record that the discharged term of imprisonment was considered in fashioning the sentence for the instant offense. Therefore, it is recommended that the Guidelines Manual retain the function of USSG §5K2.23 by relocating those same provisions to Chapter 5, Part G (Implementing the Total Sentence of Imprisonment) as a factor to consider when determining the sentence, rather than consider those same factors as a departure motion. This alteration would allow such considerations to continue to be a clear part of the record. Such an amendment would allow the Court to consider the amount of time served on a related discharged term of imprisonment in fashioning a reasonable sentence at the time sentence is imposed, thereby distinguishing the process under Chapter 5, Part G, from the Bureau of Prisons' exclusive authority to grant credit for time served after the sentence has been imposed.

In conclusion, POAG would like to sincerely thank the United States Sentencing Commission for the opportunity to be part of our evolving process of federal sentencing by sharing the perspective of the dedicated officers who make up the U.S. Probation Office.

Respectfully,

Probation Officers Advisory Group
February 2025