



# 2023 Amendments

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August 29, 2023

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# Amendments

**Public Comment**

*Over 10,000 received*

**Four days of hearings**

*62 witnesses*

**Advisory Group Input**

*Meetings with experts*

# Amendments

Sentencing Reduction Motions

First Step Act – Drug Offenses

Criminal History

Career Offender

Firearms

Circuit Conflicts

Fake Pills

Criminal Sexual Abuse

# **Reduction in Sentencing/ "Compassionate Release"**



# Reduction in Sentencings

Section 3582(c)(1)(A) authorized a court, upon motion of the **Director of the Bureau of Prisons**, to reduce a defendant's term of imprisonment if **“extraordinary and compelling reasons”** warrant a reduction.

Congress delegated the task of describing “extraordinary and compelling reasons” **to the Commission**, including the criteria to be applied and a list of specific examples.

# Why did the Commission Act?

The First Step Act (FSA) expanded § 3582(c)(1)(A) to allow a **defendant** to file a motion.

Commission starts studying the issue to fill the void of BOP rarely granting motions.

From FY 2019 through March 2023, over 4,700 motions granted.

# Commission Analysis for the Amendment

Reasons identified by courts in granting reductions

Thousands of public comments

Public hearing testimony from 25 witnesses

Examined plain language of § 3582(c)(1)(A) and its legislative history

Found circuit differences regarding what is an extraordinary and compelling reason and likelihood of motion being granted



# Testimony From Public Hearing

- Commission's Advisory Groups
- Judicial Branch
- Executive Branch
- Practitioners
- Law Enforcement
- Community Groups
- Formerly Incarcerated Individuals
- Family Members of Victims
- Academia





# What does the Amendment Do?

Revises §1B1.13 to include **defendant motion**

**Expands list of extraordinary and compelling reasons** at §1B1.13 to better account for plain language of § 3582(c)(1)(A) and to reflect what reasons courts used in granting motions.

# Extraordinary and Compelling Reasons (§1B1.13)

**Expands Medical Circumstances**

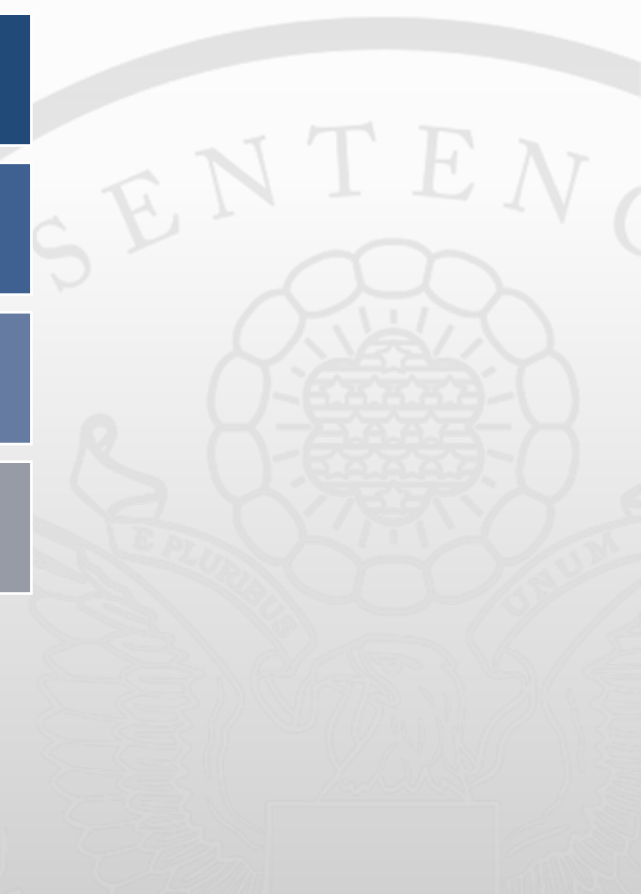
**Modifies Family Circumstances**

**Adds a Victims of Abuse**

**Revises Catchall**

**Adds Unusually Long Sentences**

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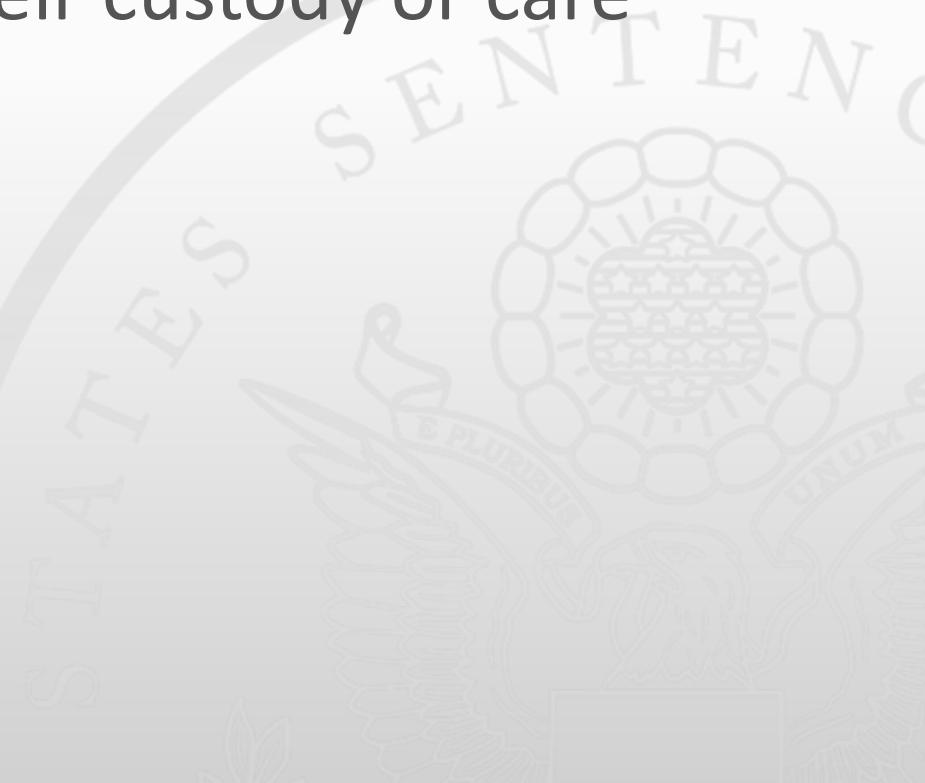


# **Sexual Abuse of a Ward**



# Why did the Commission Act?

DOJ expressed concerns about the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody or care



# What does the Amendment Do?

## §2A3.3

14



18

# Criminal History

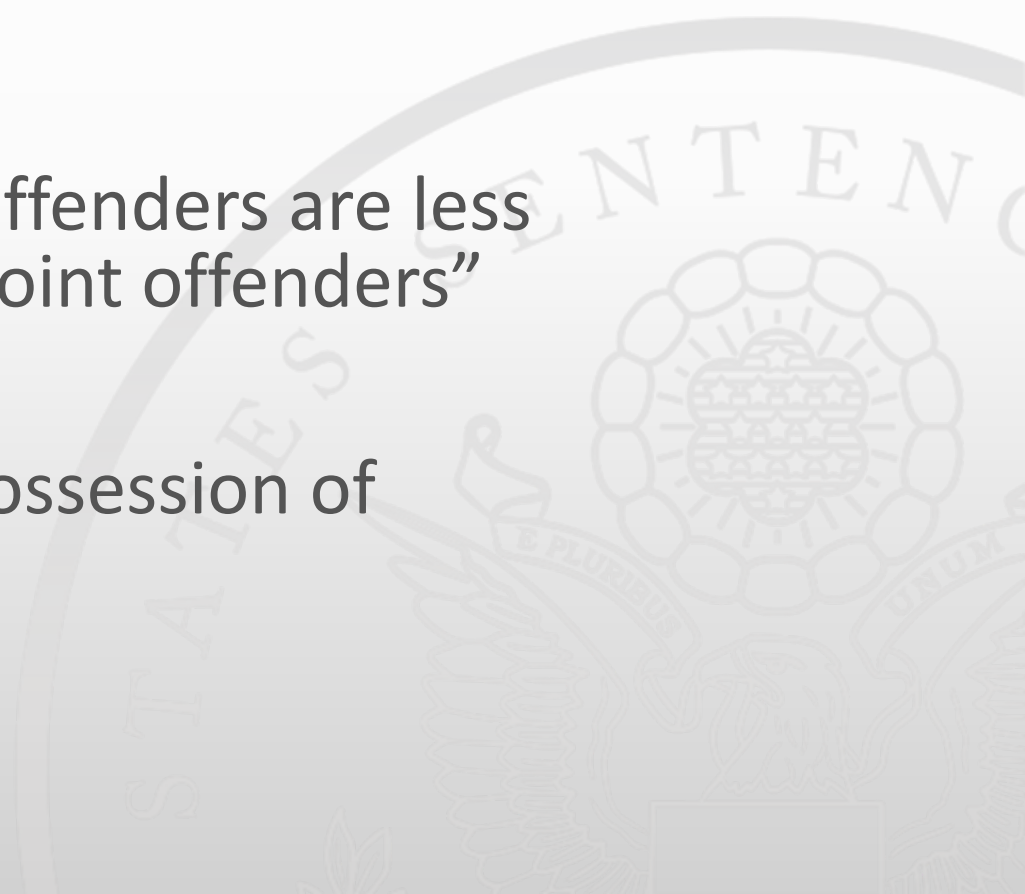


# Why did the Commission Act on Criminal History?

“Status points” do not improve predictive value of criminal history score

Recidivism studies show “zero-point offenders are less likely to be arrested than even “one-point offenders”

Changing legal landscape on simple possession of marihuana offenses



# Why did the Commission Act on Status Points ?

An individual's criminal history calculation is **strongly associated with the likelihood of future recidivism**

However, status points **only minimally improve** the predictive value of the criminal history score

The guidelines **separately accounts for consecutive punishment imposed upon revocations of supervised release**, a likely occurrence if an offender is already under a criminal justice sentence



# What does the **Status Amendment** Do?

Eliminates status points for defendants with 6 or less criminal history points

Reduces from 2 to 1 status point for defendants with 7 or more points



# Why did the Commission Act on Zero-Point Individuals?

Commission's **recidivism data** showed that offenders with **zero criminal history points** have **considerably lower recidivism** rates than other offenders, even those with one criminal history point

Higher **below guideline departure and variance** rates for zero-point offenders

# Recidivism of Federal Offenders Released in 2010



# What does the Zero-Point Offender Amendment Do?

Promulgated §4C1.1(a)

Two-Level Decrease If . . .

1

**Zero Criminal History  
Points**

§4C1.1(a)(1)

2

**No Exclusions Apply**

§4C1.1(a)(2)–(10)

# Zero-point Exclusions

Terrorism Adjustment Applied (§3A1.4)

Def. did not use violence/threats

No death or serious bodily injury

Not a sex offense conviction

Def. did not cause substantial financial hardship

Def. did not possess, transfer, receive firearm

Offenses against Individual Rights

No adjustment for vulnerable victim or hate crime

No aggravating role under §3B1.1

# §1B1.10 (Reduction in Term of Imprisonment)

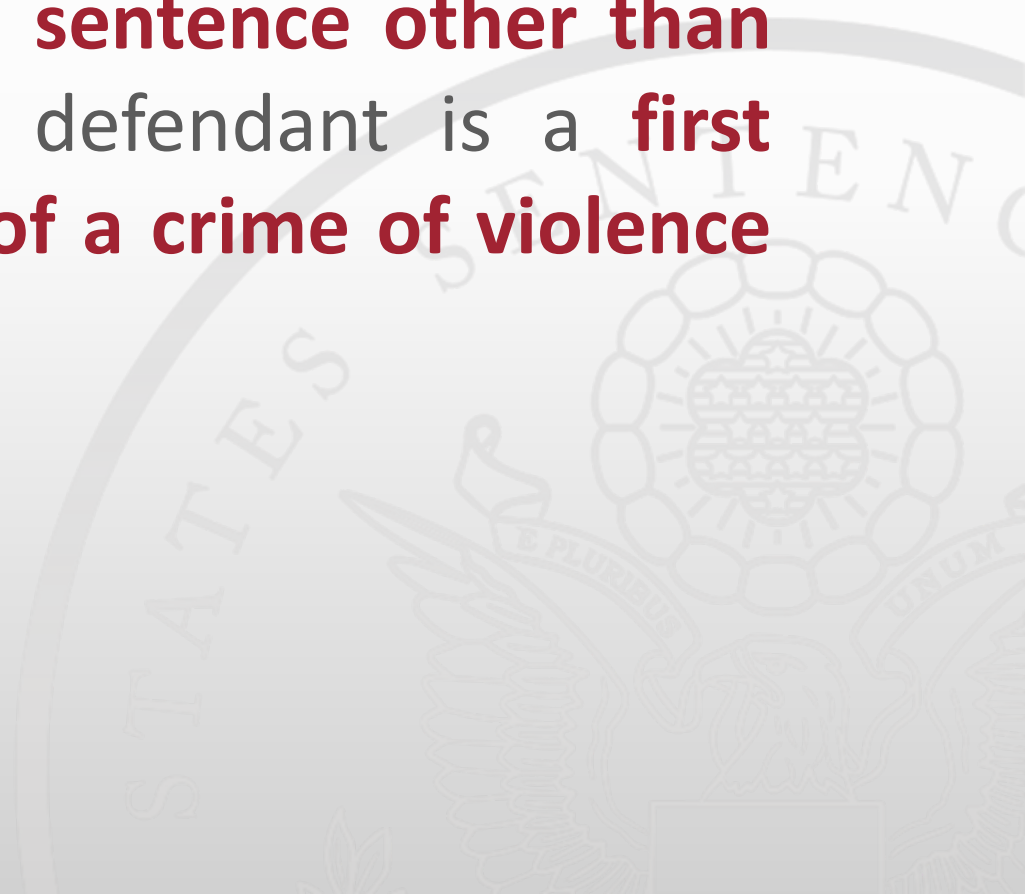
“Status points” and “Zero-Point Offenders” added to the list at §1B1.10.

## Delayed Implementation

The court shall not order a reduced term of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court’s order is February 1, 2024, or later.

## 28 U.S.C. § 994(j)

“The Commission shall insure that the guidelines reflect the **general appropriateness of imposing a sentence other than imprisonment** in cases in which the defendant is a **first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .**”



# Implementation of 28 U.S.C. § 994(j)

If defendant **qualifies under §4C1.1:**

## **Zone A or B**

a sentence other than imprisonment is generally appropriate.

## **Zone C or D**

a departure, other than imprisonment may be appropriate, if offense is not a crime of violence or otherwise serious offense.



# Simple Possession of Marihuana Departure

A downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use and no intent to sell.



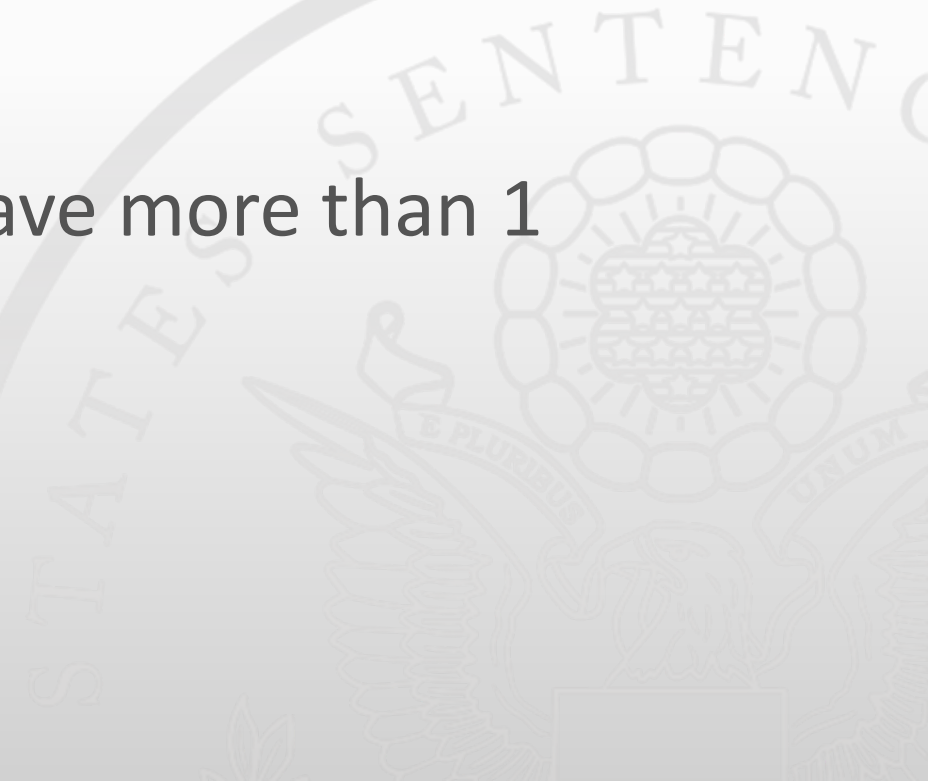
# **First Step Act Safety Valve**



# Why did the Commission Act?

FSA broadened the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of individuals eligible for relief from mandatory minimums

Pre-FSA criteria: The defendant did not have more than 1 criminal history point



# 18 U.S.C. § 3553(f)(1) Criteria

## Defendants cannot have:

- 1) more than 4 criminal history point (excluding 1-pointers);
- 2) a prior 3-point offense...; **and**
- 3) a prior 2-point violent offense.

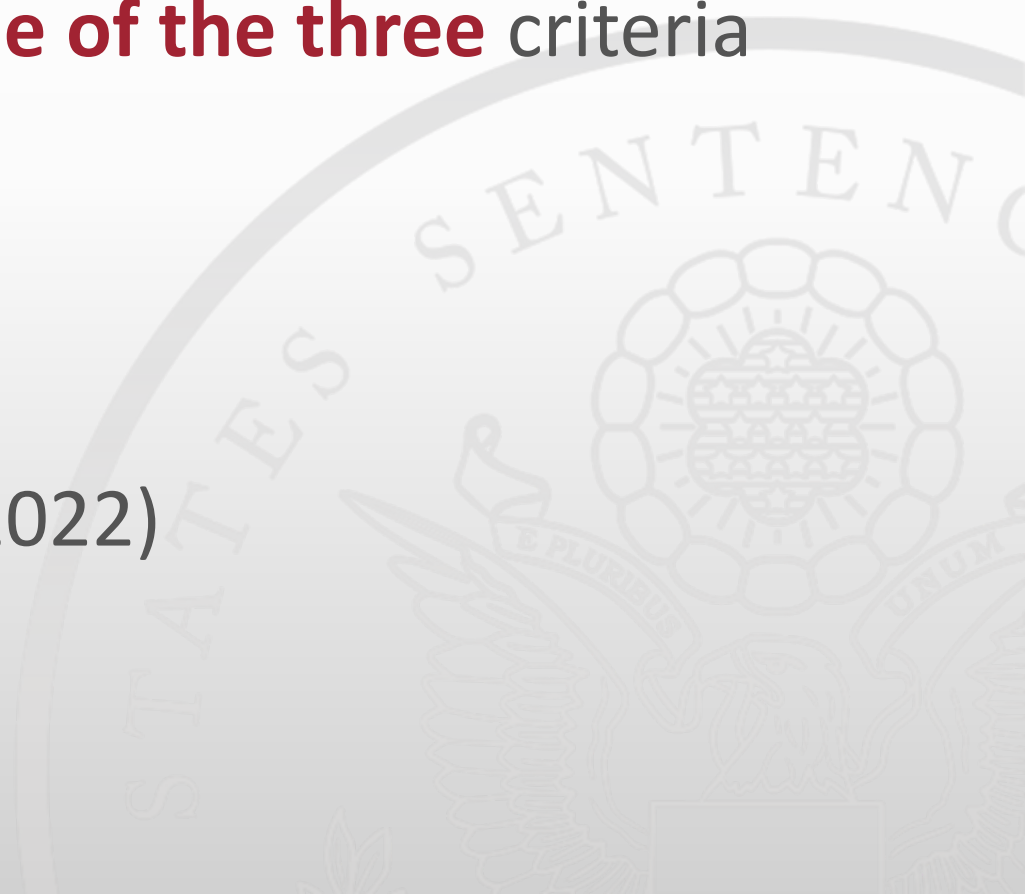


# What Does “AND” mean?

Circuit split whether defendant is disqualified from relief under the safety valve if he satisfies **one of the three** criteria or must satisfy all **three criteria**.

**Supreme Court grants *cert.***

*U.S. v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022)



# What does the Amendment Do?

Revises §5C1.2 to **conform** to the statutory safety valve

Will impact the 2-level reduction at **§2D1.1(b)(18)**



# Career Offender



# Why did the Commission Act?

Circuit split over whether the **Commentary** to §4B1.2 that provides that "crimes of violence" and "controlled substance" offenses include inchoate and accessory offenses is **authoritative**.

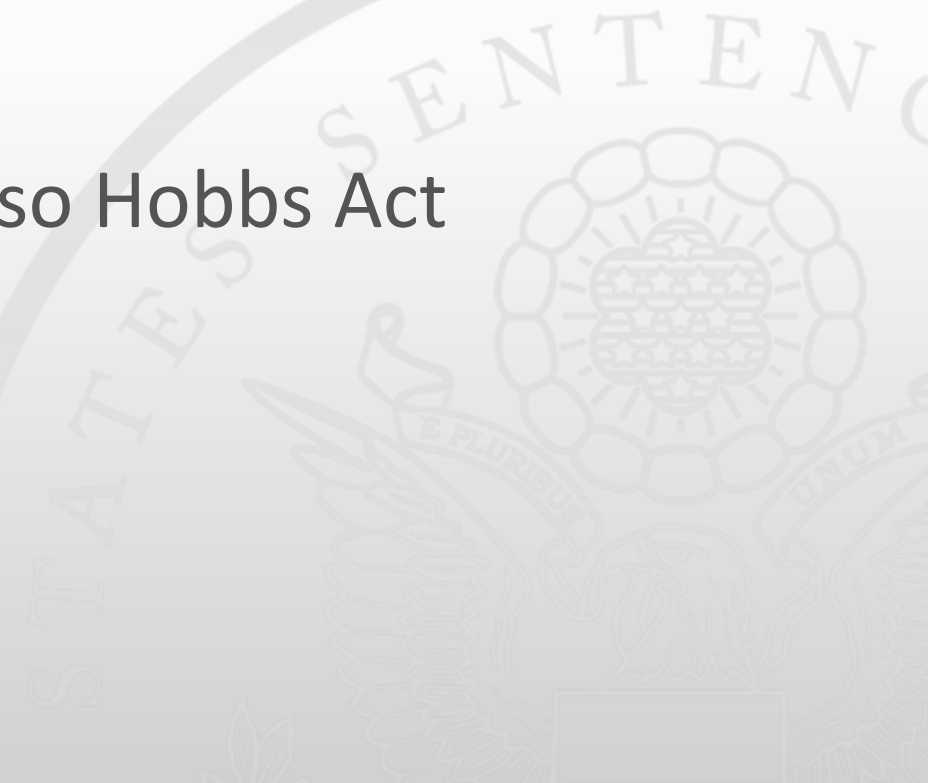
Courts have recently held **Hobbs Act robbery** is not a crime of violence under §4B1.2.



# What does the Amendment Do?

Moves, without change, the definitions that include inchoate and accessory offenses, from the §4B1.2 Commentary to the guideline itself to resolve circuit split

Creates new robbery definition at §4B1.2 so Hobbs Act robbery will qualify as a crime of violence



# Firearms



# Why did the Commission Act?

Bipartisan Safer Communities Act

Proliferation of “ghost guns” (no serial number)

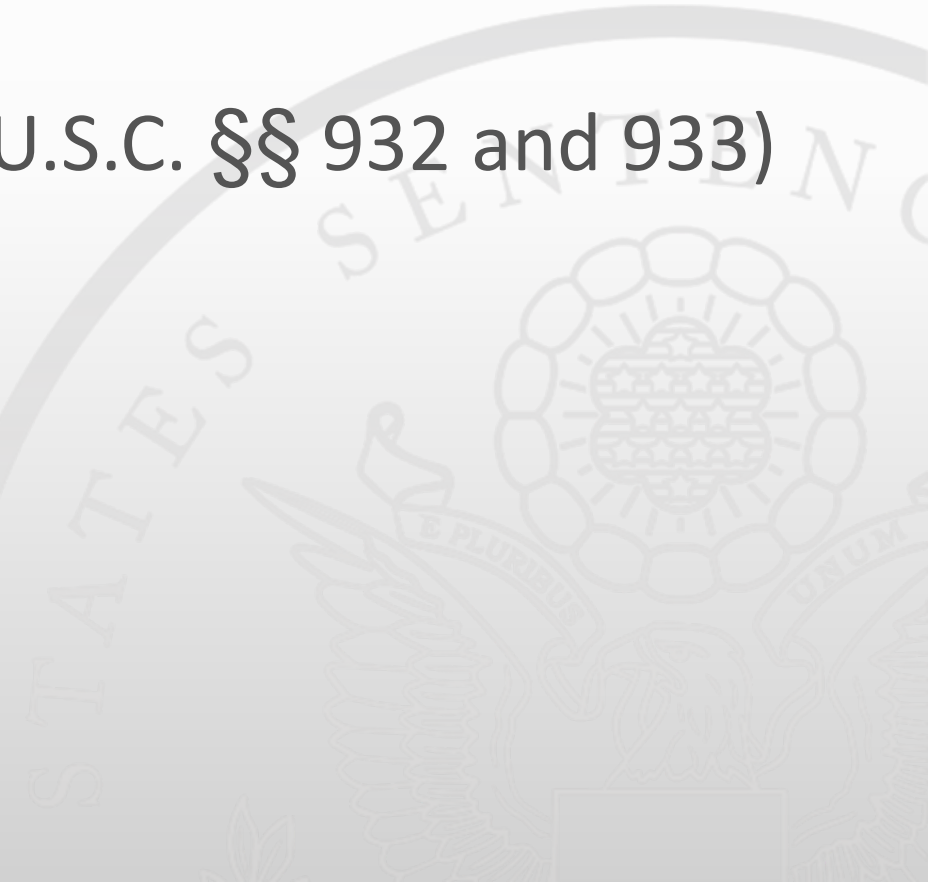


# Bipartisan Safer Communities Act

Increased **penalties** for several firearm offenses

Created **new firearms offenses** (*e.g.*, 18 U.S.C. §§ 932 and 933)

**Directive** to the Commission



# Directive to the Commission

Increase penalties for:

- straw purchasers
- trafficking in firearms
- organized crime affiliation

Account for mitigating circumstances for less culpable straw purchasers



# What does the Amendment Do for “Traffickers”?

Expands the current trafficking SOC to target those who traffic in firearms or induce others to traffic

New SOC for trafficking in connection with knowingly participating in criminal organization of five or more persons

Creates new decrease for less culpable straw purchasers

# Why did the Commission Act on “Ghost Guns”

DOJ expressed concerns about the proliferation of ghost guns being used in criminal activity

Commission concluded no meaningful distinction between a firearm with obliterated serial number, which gets a 4-level increase, and a firearm without a serial number

# What does the Amendment for “Ghost Guns Do?”

Provides a **4-level increase** if the defendant knew that the offense involved a firearm not marked with a serial number, or the defendant was willfully blind or consciously avoided knowing this fact.





# Fake Pills



# Why did the Commission Act?

DEA expressed concern about the proliferation of "fake pills" containing fentanyl.

In 2022, the DEA seized over 50 millions fake pills.

70% of these pills contained fentanyl.

15% increase in overdose deaths.



# What does the Amendment Do?

The amendment adds a 2-level increase where the defendant:

- **represented or marketed as a legitimately manufactured drug** another mixture or substance containing fentanyl/fentanyl analogue; **AND**
- acted with **willful blindness / conscious avoidance of knowledge** that such mixture or substance was not the legitimately manufactured drug

# **Circuit Split: Acceptance of Responsibility**



# Acceptance of Responsibility

**§3E1.1 (p. 376)**

**§3E1.1(a)**

2-level decrease if defendant demonstrates  
Acceptance of Responsibility

**§3E1.1(b)**

1-level decrease if OL  $\geq$  16 AND Government Motion  
(Avoid Trial Preparation)

# Why did the Commission Act? Two Circuit Splits

Two circuit splits involving whether the government can withhold §3E1.1(b) for:

- 1) filing suppression motion**
- 2) sentencing challenges**



# What Does the Amendment Do?

## Promulgated §3E1.1(b)

Preparing for trial ordinarily indicated by actions close to trial, such as:

- preparing witness for trial
- preparing jury instructions
- witness and exhibit lists

Preparing for trial is **NOT**:

- pretrial proceedings
- post-conviction matters