U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.[1] We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come to improve public safety and further the cause of justice for all.

I. Calculating Criminal Histories for Crimes Before the Age of Eighteen

The Department is focused on working to reduce violent crime and is concerned about any amendment to the Guidelines that would prevent sentencing courts from holding accountable violent offenders who have recidivated within a short period of time. Each of the three options in Part A of the proposed amendment would do just that by categorically excluding juvenile

[1] U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at Federal Register : Sentencing Guidelines for United States Courts.

sentences, even for violent crimes, from consideration in the Guidelines' criminal history calculus without respect to the nature of those sentences.

In part for this reason, we are concerned that the proposed amendment offers too simple an answer to a complex question. As the Commission notes, research generally shows that brain development continues well into one's twenties, affecting reasoning and decision making. Behaviors generally change as young people mature. No one approach fits all experiences.

The Department believes that we must be able to identify adults who are most at risk of continuing to commit violent offenses – *e.g.*, homicides, non-fatal shootings, and carjackings.[2] The research on youthful offending recognizes the substantial heterogeneity in youth who commit crime,[3] in part as a result of the heterogeneity of cognitive development among youth generally.[4] Most young people do not commit crime at all. Some young people commit minor offenses; some commit serious and violent offenses;[5] and some are chronic offenders[6] who commit serious and violent crimes over and over again.[7] Rather than supporting a bright-line provision like the Commission's current proposals, the research supports a more nuanced approach – as a result, the Department opposes Part A of the proposed amendment.[8]

II. Acquitted Conduct

a. *Summary*

As it did during the last amendment year, the Commission has proposed amendments limiting the use of acquitted conduct in determining the guidelines range. Consistent with federal statutes, the proposals would continue to allow district courts to consider acquitted conduct when determining where within the applicable guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 ("[N]o limitation shall be

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[2] Given the recent spike in incidents of carjacking, including by juvenile offenders, the Department looks forward to working with the Commission in the next amendment cycle to evaluate current sentencing policy for such offenses, with consideration given to increasing penalties on those who recruit juveniles to engage in carjacking. Such penalty increases would complement law enforcement and community engagement steps the Department is taking to reduce such crime.

[3] National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (2013), ch. 1, 23, available at https://nap.nationalacademies.org/catalog/14685/reforming-juvenile-justice-a-developmental-approach.

[4] *See e.g.* Rachel M Brouwer, et al., The Speed of Development of Adolescent Brain Age Depends on Sex and Is Genetically Determined, 31 Cerebral Cortex 2, (2021), available at: https://academic.oup.com/cercor/article/31/2/1296/5929823; Stephanie K. Scott & Kelli A. Saginak, *Adolescence: Emotional and Social Development*, in D. Capuzzi & M. Stauffer (eds), *Human Growth and Development Across the Lifespan: Applications for Counselors*, ch. 12 (2016); Albert Dustin et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 Current Directions in Psychological Science 2, 114-20 (Apr. 2013).

[5] *Reforming Juvenile Justice: A Developmental Approach*, *supra* note 3.

[6] We use the term "offender" as the Commission did in the amendment and the issue for comment.

[7] *Reforming Juvenile Justice: A Developmental Approach*, supra note 3, citing to Kimberly Kempf-Leonard et al., *Serious, Violent, and Chronic Juvenile Offenders: The Relationship of Delinquency Career Types to Adult Criminality*,18 Justice Quarterly *3*, 449-78 (2001); Rolf Loeber & David P. Farrington, *Serious and Violent Juvenile Offenders. Risk Factors and Successful Interventions* (1999).

[8] Because we do not view the proposal contained in Part B as altering a sentencing court's discretion to depart, either downward or upward, based on a defendant's individual circumstances, we take no position on Part B of the proposed amendment.

placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with an amendment, the Department believes the definition of acquitted conduct should be amended. Of the Commission's proposed options, we believe that Option Two, with the Department's revised definition, would present fewer administrability concerns, litigation risks, and uncertainty.

b. *Background*

The Supreme Court has long recognized a judge's broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., Watts*, 519 U.S. at 157 ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as the conduct has been proven by a preponderance"); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"). The Court in *Watts* reiterated its holding in *Williams v. New York*, that "[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 151-52 (quoting *Williams,* 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of conduct underlying acquitted counts at sentencing would be a significant departure from this longstanding sentencing principle. *Watts*, 519 U.S. at 152 (noting that even "[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted").

Section 3553(a) requires the sentencing judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. Section 3661 codifies the longstanding principle that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" that a sentencing judge may receive and consider.

c. *Option One Would Be Difficult for Courts to Administer*

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Likewise, §6A1.3(a) specifies that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility

under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Citing 18 U.S.C. § 3661 and the Court's decision in *Watts*, the commentary to that provision explains that "a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

Option One would make four changes to the Guidelines and commentary. It would –

- add a new subsection (c)(1) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3;

- add a new subsection (c)(2) to §1B1.3, in the Guidelines text, defining "acquitted conduct" as "conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure." A consistent definition would also apply under Options Two and Three;

- propose, if the new subsection (c)(2) to §1B1.3 is adopted, excluding from the definition, conduct that was either "admitted by the defendant during a guilty plea colloquy" or "found by the trier of fact beyond a reasonable doubt" and "establish[es] in whole or in part, the instant offense of conviction [regardless, of whether such conduct also underlies a charge of which the defendant has been acquitted]"; and

- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that "[a]cquitted conduct, however, is not relevant conduct for purposes of determining the guideline range;" remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine "the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4."

We appreciate the Commission's changes to the definition of acquitted conduct that was published for comment last year in response to commentators' concerns: combining the exceptions with the definition; adding *"constituting an element of a charge"*[9]; limiting the definition to federal acquittals to address concerns regarding parallel state and federal prosecutions; and adding clarification for overlapping verdicts ("*regardless of whether such conduct also underlies a charge of which the defendant has been acquitted*").

We continue to believe, however, that the Commission cannot practicably prohibit the consideration of acquitted conduct in determining the guidelines range. Though well intentioned, Option One will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a

[9] We appreciate the Commission's inclusion of "*a charge"* to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase "*underlying a charge"* adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct, and for the reasons we stated last year, *"underlying a charge"* would not provide sufficient guidance.

defendant's conduct.[10] As the Supreme Court recognized in *Watts*, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define "acquitted conduct," the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

If adopted, Option One (and the corresponding definitions in Options Two and Three) would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as "*underlying a charge of which the defendant has been acquitted*" will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.[11] The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission's proposal fails to account for an acquittal unrelated to the defendant's innocence as to the conduct at issue – for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence was established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the guidelines range.

Option One and the corresponding definitions in Options Two and Three also fail to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of

[10] Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would "be unsound as a practical matter." *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022). "It will frequently be "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *McClinton v. United States*, 143 S. Ct. 2400, 2405 (2023) (Alito, J., concurrence respecting denial of *certiorari*) (*quoting Watts*, 519 U.S. at 155).

[11] Like last year, we appreciate the Commission's inclusion of "*a charge*" to recognize that triers of fact decide charges, not conduct. Juries generally do not acquit defendants of conduct, they acquit on charges. We also recognize that the phrase "*underlying a charge*" adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion from the definition conduct either "admitted by the defendant during a guilty plea colloquy" or that was "found by the trier of fact beyond a reasonable doubt" and "establish[es], in whole or in part, the instant offense of conviction" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in to both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

d. *A More Workable Definition for (c)(2), Applicable to All Three Options*

Many commentators from last year's consideration of this issue shared our concerns with the Commission's proposed definition.[12] If the Commission proceeds with some amendment nonetheless,[13] defining "acquitted conduct" as clearly as possible is essential. While only Option One of the published proposals contains a definition with exceptions, we believe all three of the Commission's options necessitate a definition that is as clear, calibrated, and workable as it can be. We recommend a narrower definition of "acquitted conduct" for each option that would: (1) include specific exceptions; (2) clarify the definition to reduce administrability concerns; and (3) focus on the conduct that the evidence proves rather than what the trier of fact found. This narrower definition will not fully resolve our concerns. But it would better account for overlapping, split, or inconsistent verdicts, and verdicts unrelated to factual innocence. It would also better protect victims' rights. Should the Commission proceed with any of the three options, we recommend incorporating our definition below.

Our recommended changes are <u>underlined</u> and explained below.

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[12] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Feb. 15, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf.

[13] Beyond the citation to *Watts* already in §6A1.3.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(2) DEFINITION OF ACQUITTED CONDUCT. For the purposes of this guideline, "***acquitted conduct"*** means conduct (*i.e.*, any acts or omissions) constituting an element of a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

"Acquitted conduct" does not include any conduct (*i.e.*, any acts or omissions) that—

A) was admitted by the defendant under oath ~~during a guilty plea colloquy;~~ or

B) was determined by the court to have been established at trial beyond a reasonable doubt ~~was found by the trier of fact~~;[14]

~~to establish~~, and relates, in whole or in part, to the instant offense of conviction, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted.

"Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771.

The Department recommends these changes for the following reasons:

First, separating the definition of acquitted conduct from any rule governing its use would help reduce confusion. Conduct which the evidence at trial established beyond a reasonable doubt and relates to the instant offense of conviction is not acquitted conduct, even if the same conduct also underlies a count of acquittal. Reframing the exclusion as to what the evidence shows, *i.e.,* whether the trial evidence established the conduct beyond a reasonable doubt accomplishes the Commission's goals of affording due respect to the jury's verdict while allowing the judge to properly sentence the defendant for conduct found proven. These changes will help clarify that the Commission's proposal is not intended to prevent a sentencing judge from considering conduct underlying the elements of a charge for which the defendant was convicted and thus which a jury necessarily found beyond a reasonable doubt. Because a defendant may also properly admit to conduct during testimony under oath, we recommend deleting the limitation regarding an admission made "*during a guilty plea colloquy*."

Second, our reframing of subsection B so that it would exclude from the definition of acquitted conduct, conduct that *was determined by the court to have been established at trial*

[14] We share the concerns expressed by Justice Alito in his denial of certiorari in *McClinton v. United States* that "while the *[United States v.] Watts* regime has been shown to be eminently workable, significant practical concerns pervade the alternatives," identifying, among other issues, that "it will frequently be 'impossible to know exactly why a jury found a defendant not guilty on a certain charge,'" which will lead to a proliferation of special-verdict forms, "despite the fact that they are generally disfavored in criminal cases and thought to disadvantage defendants." *McClinton v. United States*, 143 S. Ct. 2400, 2405-06 (2023) (Alito, J., concurring).

beyond a reasonable doubt, would, in addition to accounting for overlapping, split or inconsistent verdicts, also account for an acquittal unrelated to the defendant's conduct.

Finally, we recommend adding language to ensure that limiting a sentencing judge's ability to consider acquitted conduct does not unintentionally limit the ability of a victim to be "reasonably heard" under 18 U.S.C. § 3771(a)(4) or unduly limit the judge's discretion to consider any information concerning the conduct of a defendant.

e. ***A More Workable Construction for (c)(1)***

If the Commission decides to proceed with Option One, we recommend two changes. First, we recommend incorporating our revised definition discussed above. Second, because of the evolving case law questioning the validity of certain guideline commentary, we also recommend moving from the commentary in §6A1.3 the permitted use of acquitted conduct to the text of §1B1.3. While these changes will not fully resolve the Department's administrability concerns, splitting the prohibited use in the guideline from the permitted use in the commentary would add unnecessary complexity, invite additional litigation over the authoritativeness of guideline commentary, and be inconsistent with actions to preserve the validity of the commentary. The Department's recommended changes are underlined below.

> (C) ACQUITTED CONDUCT. (1) EXCLUSION. Acquitted Conduct is not relevant conduct for the purposes of determining the guideline range. The court is not precluded from considering acquitted conduct in determining the sentence to impose within the Guidelines range, or whether a departure or a variance from the Guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

The Commission also solicited comments on whether it should completely ban consideration of acquitted conduct for all purposes when imposing a sentence – including for § 3553(a) considerations – and whether it has the legal authority to do so. We think that the answer to both is: no. Congress created the Commission and charged it with promulgating the Guidelines.[15] In addition to directing the Commission to meet general goals for federal sentencing, *see Neal v. United States*, 516 U.S. 284, 290–91 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply, 28 U.S.C. § 994(a) - (y). Among those requirements is the provision stating that the Commission "shall promulgate" the Guidelines "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). As the Supreme Court has noted, Congress did not grant the Commission "unbounded discretion" and "broad as that discretion may be, however, it must bow to the specific directives of Congress."[16] A blanket prohibition against consideration of acquitted conduct would be inconsistent with federal statutes, including §§ 3661 and 3553(a), and outside the bounds of Congress's specific grant of authority. *See Concepcion v. United States*, 597 U.S. 481, 494 (2022) ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution."); *see generally United States v. Booker*, 543 U.S. 220, 250 (2005) ("Congress'

[15] 28 U.S.C. § 991; *Mistretta v. United States*, 488 U.S. 361, 366 (1989).
[16] *United States v. LaBonte*, 520 U.S. 751, 753, 757 (1997).

basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.").

f. *Option Two's More Workable Alternative*

If the Commission proceeds with an amendment now, we recommend Option Two with our revised definition. Option Two would allow courts to consider a downward departure if the use of acquitted conduct results in a disproportionate guidelines range relative to the offense of conviction. This option would preserve judicial discretion to determine how much – if any – weight to accord conduct underlying an acquitted count, address unfairness concerns about acquitted conduct driving sentences, and present fewer operational challenges. As opposed to a bright-line rule, it would also raise fewer legal concerns regarding the interplay with federal statutes such as 18 U.S.C. §§ 3661, 3771, and 3553(a). Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Two would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. For consistency and to avoid unintended consequences,[17] we recommend modeling the downward departure provision on the language currently in Application Note 2 to §4C1.1. If the Commission eliminates departures under its simplification proposal, we recommend restyling the departure provision as an "additional consideration." The Department's recommended changes are underlined below:

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range).

10. Downward Departure Consideration for Acquitted Conduct.—If the use of acquitted conduct (*i.e.*, conduct ~~[underlying] [~~constituting an element of~~]~~ a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure) results in a guideline range that overrepresents the seriousness of the defendant's conduct ~~has [an extremely] [a] disproportionate impact in determining the guideline range~~ relative to the offense of conviction, a downward departure may be warranted.

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[We recommend incorporating our full revised definition discussed in part d, above].

[17] We note that the "disproportionate impact" language comes from *United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (holding that facts supporting guidelines enhancements that have a "disproportionate impact" on the sentence require proof by clear and convincing evidence). *Staten* was not about acquitted conduct, decided before *Apprendi* and *Alleyne*, and other circuits have declined to follow this rule post-*Booker*. *See, e.g., United States v. Reuter*, 463 F.3d 797, 793 (7th Cir. 2006); *United States v. Mohammed*, 2023 WL 8853035 (D.C. Cir. 2023). Because we do not understand the Commission to be adopting any rule as what constitutes a "disproportionate impact," we recommend that the Commission avoid any potential unintended consequences from introducing this language into the guidelines and instead use the "overrepresents" (and "underrepresents") language used in existing departure provisions. *See, e.g.,* app. n. 6(i) §2G2.3; app. n. 3(B) §4A1.2; §4A1.3(a)(1); app. n. 2 §4C1.1; app. n. 4. §4B1.1.

g. *Option Three's Elevated Standard of Proof and Administrability Challenges*

Compared to Option Two, Option Three presents far greater administrability challenges. Many of these concerns are similar to those for Option One. Option Three would require acquitted conduct to be proven by clear and convincing evidence before the court could consider that conduct for Guidelines purposes. Raising the standard of proof to clear and convincing evidence would distinguish acquitted conduct from other relevant conduct, which may address some concerns, but also lead to more litigation. Because of the concerns involving overlapping, split or inconsistent verdicts, and verdicts unrelated to factual innocence, Option Three would still require a calibrated definition of acquitted conduct that is separate from the rule to ensure that judges can properly sentence defendants for crimes of conviction. On balance, it would retain judicial discretion to consider acquitted conduct sufficiently proven and shift the focus from what the trier of fact found to what the evidence shows, making it a more viable option than Option One. But because it still requires judges to siphon off acquitted conduct from relevant conduct, it will result in many of the same administrability concerns outlined above.

III. Simplification of the Three-Step Process

a. *Summary*

The Department supports simplification of the Guidelines, but we think it must be done through a meticulous, deliberative, and fully researched process to ensure both its legality and effectiveness. We are concerned with the speed at which this proposal is moving and that it is happening without adequate consideration of the numerous legal and policy issues it raises. We are especially concerned that portions of the Commission's amendment conflict with express congressional directives and will cause confusion over a judge's authority to fashion an appropriate sentence pursuant to all the factors listed in 18 U.S.C. § 3553(a). Given the scope of this amendment and its legal vulnerabilities, we encourage the Commission to defer consideration of the proposal until it can carefully and fully review its effects and the implicated legal issues.

Before the Supreme Court's decision in *United States v. Booker*,[18] judges were required to impose sentences within the sentencing ranges prescribed by the Guidelines, except under narrow and specifically defined circumstances.[19] In the pre-*Booker* sentencing regime, departures were vital to the integrated structure of the Guidelines.[20] A sentencing judge granted a "departure" when it invoked the discretion under the mandatory guidelines regime to sentence outside the applicable guideline range under specified circumstances.[21]

Booker invalidated the mandatory features of the Guidelines, allowing judges to exercise discretion to impose a sentence outside the applicable guidelines range regardless of the presence or absence of departure authority. Departures and variances are distinct, though very similar,

[18] 543 U.S. 220 (2005).
[19] 18 U.S.C. § 3553(b)(1) (excised by *Booker*, 543 U.S. at 259).
[20] *United States v. Rivera*, 994 F.2d 942, 948-50 (1st Cir. 1993).
[21] *See*, *e.g.*, USSG §4A1.3 (authorizing departures when a defendant's criminal history score inadequately reflects the defendant's prior criminal conduct); USSG §5K2.0 (permitting departures based on relevant circumstances that the Guidelines have overlooked entirely or have accounted for insufficiently).

concepts in the post-*Booker* sentencing scheme. Although they may lead to the same result – a sentence outside the applicable guidelines range – a variance and departure reach that result in different ways. A variance is a sentence imposed outside the guidelines range when the judge determines, for a reason independent of the guidelines or Guidelines Manual, that a sentence within that range will not adequately further the purposes reflected in 18 U.S.C. § 3553(a).[22] A departure, by contrast, is a sentence imposed outside the applicable guideline range[23] for a reason described in the Guidelines Manual, including the departure provisions.[24]

We agree with the Commission that, as a general matter, judges use departures less frequently than variances.[25] Nonetheless, it is still critical for the Commission to carefully analyze the legal and practical implications of the proposal before enacting it. The proposed amendment is comprehensive – removing even the mention of departures in commentary – essentially requiring republication of the entire Guidelines Manual as part of the amendment.[26] Given the proposal's scope and structure, there are serious legal and policy questions raised by it and many potential unintended consequences. Until those questions and consequences are more fully explored, we think the Commission should not move forward.

b. *Conflicts with Congressional Directives, Federal Statutes, and the Federal Rules of Criminal Procedure*

One of our primary concerns with the proposal is that portions of it conflict or appear to conflict with express congressional directives and other legislative enactments. For example, Section 401(b) of the PROTECT Act,[27] which amended the Guidelines addressing departures and below-guideline sentences for crimes against children and sexual offenses, is not mentioned or analyzed.[28] That provision directly inserted a new subsection (b) into §5K2.0 to clarify the limits of downward departures in these cases.[29] It also created a new policy statement in the Guidelines (§5K2.22) delineating the circumstances in which a judge could use a defendant's age and serious physical impairment as a ground for a downward departure. It required that "[d]rug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines" in such cases.[30] The Act directly amended §5K2.20 (aberrant behavior) to limit departures on those grounds in these cases.[31] And it included language in §5H1.6 barring a downward departure in such cases based on family ties and responsibilities and community ties.[32] Finally, it amended §5K2.13 to state that a judge could not depart downward on the

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[22] *See Gall*, 552 U.S. at 49–50.
[23] App. n. 1(F) USSG §1B1.1.
[24] *Irizarry v. United States*, 553 U.S. 708, 714 (2008).
[25] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 123 (noting that "courts have been using departures provided under step two of the three-step process with less frequency in favor of variances").
[26] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 121-621.
[27] Pub. L. No. 108-21, § 401(b) (2003).
[28] Most of the limitations expressly apply to a defendant convicted of an "offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code." *Id*. §§ 401(b)(2), (3), (4), (5).
[29] *Id*. § 401(b)(1).
[30] *Id*. § 401(b)(2).
[31] *Id*. § 401(b)(3).
[32] *Id*. § 401(b)(4).

grounds of diminished capacity in these types of cases.[33] Taken together, these amendments sought – by creating one policy statement and making specific amendments to several other policy statements – to set the limits on the use of downward departures in certain cases on certain grounds (age; serious physical impairment; drug, alcohol, or gambling dependence; aberrant behavior; family ties and responsibilities and community ties; and diminished capacity). There are Commission policies on non-guideline sentences that are acceptable and some that are not. But the changes from the PROTECT Act reflect deliberate policy choices made by Congress, and the current Guidelines include these congressionally mandated amendments.

The Commission's proposed amendment disregards Congress's directives in the PROTECT Act. It eliminates §§5K2.0, 5K2.22, 5K2.20, 5H1.6, and 5K2.13 entirely, including the language that Congress specifically directed be part of the Guidelines Manual as policies of the Commission. It does so without acknowledging the PROTECT Act or explaining how the amendment is consistent with it. Of course, judges, as part of their § 3553(a) analysis, may disagree with these aspects of the PROTECT Act, as they may disagree with Commission's policy statements generally.[34] And Congress may subsequently amend one or more of these portions of the Act. Currently, however, Congress, through federal law, has specifically and directly authored portions of the Guidelines Manual. Judges must consider all of the § 3553(a) factors in imposing sentences, and those factors include the Guidelines' policy statements. The proposed amendment does not explain how the Commission may set aside those congressional directives consistent with the legal requirements of the PROTECT Act and § 3553(a).

There are other legal questions raised by the proposed amendment, questions related to the interplay of the Guidelines with federal statutes and rules of procedure that specifically reference departures.[35] Before moving forward, we think the Commission must rigorously research all these legal issues.

c. *Parts of the Proposed Amendment Conflict with the Mandate of § 3553(a)*

We also are concerned that the Commission's proposed amendment will create confusion and intrude on sentencing judges' authority – and requirement – to fashion an appropriate sentence under § 3553(a), and that it in part conflicts with § 3553(a). Since *Booker*, judges have enjoyed broad discretion in evaluating and accounting for the factors under 18 U.S.C. § 3553(a).[36] This is based on the statute's requirement that the sentencing judge consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Moreover, in § 3661, Congress clearly provided that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing

[33] *Id*. § 401(b)(5).
[34] *See, e.g., United States v. Herrera-Zuniga*, 571 F.3d 568, 585-86 (6th Cir. 2009) (collecting cases).
[35] *See, e.g.,* 18 U.S.C. § 3742; Fed. R. Crim. P. 11, 32.
[36] *See, e.g., Beckles v. United States*, 580 U.S. 256, 263 (2017) ("Yet in the long history of discretionary sentencing, this Court has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'" (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005))); *see also United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) ("The decision about how much weight to assign a particular sentencing factor is 'committed to the sound discretion of the district court.'" (quoting *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) (quotation marks omitted))).

an appropriate sentence."[37] Similarly, the Supreme Court has "long recognized that sentencing judges exercise a wide discretion in the types of evidence they may consider when imposing sentence and that [h]ighly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[38]

The Commission's proposed amendment to §1B1.1, however, appears to add requirements to § 3553(a). It appears, for instance, to shape a judge's sentencing discretion by *requiring* the judge to "consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) *and the guidance provided in Chapter Six* to determine the sentence that is sufficient, but not greater than necessary" (emphasis added). Similarly, the proposed commentary to §1B1.1 "*instructs* courts to consider guidance provided by the Commission in Chapter Six."[39] The new Chapter Six mandates and limits the factors a judge may consider as part of the § 3553(a) analysis. Such a policy statement is not content-neutral compared to the current Guidelines (as the Commission says it is aiming for with the amendment), and also seeks to impose new obligations on the sentencing judge which may exceed the Commission's authority and will sow confusion.[40]

The proposed Chapter Six amendments similarly seek to limit or shape the judge's sentencing discretion. For example, the policy statement in proposed § 6A1.3 states that, in "considering the nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1), the following factors, *if not accounted for in the applicable Chapter Two guideline*, may be relevant" (emphasis added).[41] Proposed §9C5.1 (addressing the nature and circumstances of an organization's offense in determining an organization's guideline fine range) contains similar language. This language implies that certain factors are not relevant as part of the § 3553 analysis if they were already accounted for in the Guidelines. These and other policy statements sprinkled through the hundreds of pages of the proposed amendment limit judges' discretion at the § 3553 stage of the sentencing process. They are at odds with the statutory mandate in § 3553(a)(1) that the judge consider "the history and characteristics of the defendant" and with the statutory mandate in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

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[37] 18 U.S.C. § 3661.
[38] *Williams*, 337 U.S. at 246-47.
[39] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines, at 151 (proposed §1B1.1 Application Background (emphasis added)).
[40] *See, e.g.*, *LaBonte*, 520 U.S. at 753 ("the Commission, however, was not granted unbounded discretion.").
[41] Section 3553(a)(5) requires the sentencing court to consider "any pertinent policy statement . . . issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 28)." Even assuming that the policy statements in Chapter Six fall under § 3553(a)(5), the Commission's proposed policy statements create confusion about how they interact with the full range of § 3553(a) factors. They also, as described here, are not content-neutral.

The calculation of the advisory guideline range and the judge's § 3553(a) analysis are two separate steps in the sentencing process.[42] A judge considers the application of departures in the process of calculating the applicable sentencing guideline range – something consistent with the Commission's traditional authority. That focus on the Guidelines also respects a judge's authority to weigh the § 3553(a) factors and the broad range of evidence that it may consider when fashioning a sentence. At that point, practitioners may argue, and judges are free to determine, how much weight to give any facts under § 3553(a), even if the Guidelines include those facts as an "additional offense specific consideration." Listing factors that a judge may consider as part of the § 3553(a) analysis intrudes on the authority of the sentencing judge to determine a sentence pursuant to § 3553(a) and directly conflicts with the statute, in many places. These are serious legal questions that go to the Commission's authority and the constitutional balance the Supreme Court reached in *Booker*. They demand careful legal analysis by the Commission before effectuating the proposal.

It is also unclear why the proposed amendment highlights certain factors for § 3553(a) consideration but not others. The proposed new Chapter Six includes detailed lists of factors for a judge to evaluate when considering a defendant's individual circumstances and the nature and circumstances of the offense.[43] Aside from a general reference to the factors under § 3553(a)(2),[44] however, the proposed new chapter does not meaningfully address promoting respect for the law; providing just punishment; affording adequate deterrence to criminal conduct; and protecting the public from further crimes of the defendant.[45] For example, the Commission has not provided guidance about how a judge should consider a significant increase in shootings or fentanyl overdose deaths when considering defendants whose offenses are driving those outcomes. By contrast, it lists many factors relating to employment or skills. Including some factors but omitting others may cause confusion among litigants and judges about how to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)" of § 3553(a).

Similarly, the proposed revisions are not content neutral when compared with the current Guidelines Manual. For example, the proposals removed, or at least deemphasized, the specifics of a defendant's prior convictions. Those specifics – which are separate from the criminal history calculation – suggest that whether a defendant has committed similar offenses repeatedly or tends to use violence when committing those offenses is relevant in imposing a sentence. Such details often are critical to understanding a defendant's "history and characteristics" pursuant to § 3553(a)(1). The proposed Chapter Six does not appear to mention these considerations. Moreover, the criminal history commentary in Chapter Four, where it was once discussed, has been edited to no longer refer to such circumstances explicitly. Indeed, these sentences seem to

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[42] *See, e.g.*, *United States v. Adorno-Molina*, 774 F.3d 116, 126 (1st Cir. 2014) (describing variances as "non-Guidelines sentences that result from the sentencing judge's consideration of factors under 18 U.S.C. § 3553"); *United States v. David*, 682 F.3d 1074, 1077 (8th Cir. 2012) ("factors that have already been taken into account in calculating the advisory Guidelines range can nevertheless form the basis of a variance"). *See also, e.g., United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008) (explaining that courts are "allowed to contextually evaluate each § 3553(a) factor, including those factors the relevant guideline(s) already purport to take into account").

[43] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 652 (proposed §§6A1.2, 6A1.3).

[44] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 651-52 (proposed §6A1.1(a)(2)).

[45] 18 U.S.C. § 3553(a)(2).

have been deleted: "For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious."

The amendment also makes many changes to portions of Chapter Two that describe when departures may be appropriate despite the Commission's intent not to "expand or contract the scope and content of those provisions." For example, Application Note 1 of §2A1.2 states, "[i]f the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted." Similar departure language appears in the commentary to §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2, 2K1.4, and others. The proposed amendment replaces those changes with the more neutrally-phrased, "[i]n determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a), evidence that the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim may be relevant."[46] Again, similar language appears throughout the proposed amendment.[47] In moving from the current language to the proposed language, the Commission removes the notion that the judge should consider an above-guideline sentence. And although some portions of the proposed amendment use bolded headers such as "Aggravating Factors Relating to the Offense"[48] before including this language, not all such proposed text has it.[49] Additionally, the proposal removes examples throughout the commentary.

These proposed changes and the resulting questions will impose a serious cost on litigants and courts. They also will create confusion at the pretrial, plea negotiation, sentencing, and appellate stages. As the parties work through those questions (including, among others, how proposed Chapter Six interacts with the courts' discretion under § 3553), that litigation will impose additional burdens. Judges and practitioners understand the concept of departures and how they fit into the sentencing process. Caselaw has developed for decades to ensure that departures are handled uniformly. Although the Guidelines can be tailored and adjusted to address changes in the law and other needs, such a wholesale restyling – particularly in such a short period of time – should not proceed without far more extensive legal and operational consideration.

IV. Rules for Calculating Loss (§2B1.1)

The Department supports the Commission's proposal to move the definition of "loss" from the commentary to the substantive text of §2B1.1. Doing so will resolve a circuit conflict over whether the commentary's inclusion of intended loss is authoritative and will ensure consistency when determining the culpability of fraud offenders, both across federal courts and within the Guidelines themselves. The Department also does not oppose the Commission's proposal to "conduct[ ] a comprehensive examination of §2B1.1 during an upcoming amendment

[46] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 184 (proposed Note 1 of §2A1.2).
[47] *See, e.g.*, U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 187 - 256 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2).
[48] *See, e.g.*, *id.* at p.185, 217, 242, 279, 393 (proposed §§2A1.4, 2B1.1, 2B1.5, 2D1.1, 2K2.1).
[49] *See, e.g.*, *id.* at 187, 191, 197, 211, 213, 254, 389 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B3.2, 2K1.4).

cycle."[50] The Commission should ensure, however, that §2B1.1 operates consistently and uniformly while any such examination is pending.

a. *Background*

Recent appellate decisions have called into question the validity of guideline commentary.[51] Several circuits have held that, under the Supreme Court's decision in *Kisor v. Wilkie*,[52] guideline commentary is entitled to deference only if, "[a]fter applying our traditional tools of statutory interpretation," the guideline is ambiguous and the commentary resolves that ambiguity.[53] Other circuits have rejected that approach and have relied on pre-*Kisor* precedent to hold that "the guidelines commentary is 'authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'"[54] The Commission has proposed legislation that would resolve that conflict by putting guidelines, policy statements, and commentary on the same authoritative footing. The Department supports the basic outlines of that legislative proposal.[55]

Meanwhile, the circuits' underlying disagreement over whether and in what circumstances guideline commentary is entitled to deference has spawned related circuit conflicts over the validity and application of particular commentary provisions. One recent example involves the definition of "loss" in §2B1.1. That section provides an escalating series of offense-level enhancements for fraud and theft offenses based on the amount of loss attributable to the offense.[56] The commentary to §2B1.1 defines "loss" as "the greater of actual loss or intended loss."[57] The commentary further defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," and defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict, . . . includ[ing] intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)."[58]

In *United States v. Banks*,[59] the Third Circuit held that the commentary's definition of "loss" in §2B1.1 is not entitled to deference because it includes intended loss, whereas the guideline itself is limited to actual loss.[60] The court acknowledged that §2B1.1 refers only to "loss" and that, "in context, 'loss' could mean pecuniary or non-pecuniary loss and could mean actual or intended loss."[61] The court determined, however, that "in the context of a sentence

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[50] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 12.
[51] *See id.* at 3.
[52] 139 S. Ct. 2400 (2019).
[53] *United States v. Dupree*, 57 F.4th 1269, 1277-78 (11th Cir. 2023) (en banc) (citing cases).
[54] *United States v. Vargas*, 74 F.4th 673, 677 (5th Cir. 2023) (en banc) (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)); *see id.* at 678 & n.3 (citing cases).
[55] *See* Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEPT. OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. SENT'G COMM'N (Mar. 21, 2023).
[56] USSG §2B1.1(b)(1).
[57] *Id.* §2B1.1 comment. (n.3(A)).
[58] *Id.* §2B1.1 comment. (n.3(A)(i), (ii)).
[59] 55 F.4th 246 (3d Cir. 2022).
[60] *Id.* at 257-58.
[61] *Id.* at 258.

enhancement for basic economic offenses, the ordinary meaning of the word 'loss' is the loss the victim actually suffered."[62] Accordingly, the court held that the loss-related enhancements in §2B1.1 apply only where defendants' schemes resulted in actual loss.

Every other court of appeals to have considered the question after *Banks* – including courts that otherwise agree with the Third Circuit's restrictive approach to determining whether guideline commentary is entitled to deference – has determined that intended loss remains a valid form of "loss" under §2B1.1.[63] As those courts have explained, the reasoning in *Banks* suffers from two flaws. First, it fails to take account of the fact that §2B1.1 uses the term "loss" as a proxy for the defendant's culpability, not the harm suffered by the victim.[64] "Literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, legal language."[65] Because the ability of fraudsters and thieves to inflict actual harm on their victims may be thwarted by factors beyond their control – a sting operation, a change in the location or value of assets, the fortuitous intervention of a vigilant police officer, or a victim who unexpectedly fights back – "intended loss is frequently a better measure of culpability than actual loss."[66]

Second, defining "loss" in §2B1.1 to mean only actual loss would create unnecessary tension with other Guidelines provisions. In determining the Guidelines offense level, courts must apply the relevant conduct guideline (§1B1.3) in addition to the guideline applicable to the substantive offense.[67] The relevant conduct guideline directs courts to consider, among other things, "all harm that resulted from the acts and omissions [of the defendant], *and all harm that*

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[62] *Id.* at 257-58 (citing dictionary definitions of "loss" that refer to actual destruction, diminishment, or failure).
[63] *See United States v. Smith*, 79 F.4th 790, 797-98 (6th Cir. 2023) (holding that "loss" in § 2B1.1 is ambiguous and that commentary appropriately defines that term to include intended loss); *United States v. You*, 74 F.4th 378, 397-98 (6th Cir. 2023) (same); *see also, e.g.*, *United States v. Gadson*, 77 F.4th 16, 19-22 (1st Cir. 2023) (same on review for plain error); *United States v. Verdeza*, 69 F.4th 780, 793-94 (11th Cir. 2023) (same); *United States v. Limbaugh*, No. 21-4449, 2023 WL 119577, at *3-4 (4th Cir. Jan. 6, 2023) (unpublished) (same); *cf. United States v. Ekene*, No. 22-20570, 2023 WL 4932110, at *1 (5th Cir. Aug. 2, 2023) (unpublished) (rejecting challenge to loss commentary in light of circuit precedent applying *Stinson* deference to commentary generally).
[64] *See, e.g.*, *Gadson*, 77 F.4th at 21; *You*, 74 F.4th at 397-98; *see also* USSG § 2B1.1, comment. (background) (explaining that Guidelines use loss to assess "the seriousness of the offense and the defendant's relative culpability"); *id.* App. C Supp., at 104-05 (Amend. 793) (noting "the Commission's belief that intended loss is an important factor in economic fraud offenses" because it focuses "specifically on the defendant's culpability"); *id.* App. C, Vol. II, at 177 (Amend. 617) (same).
[65] *You*, 74 F.4th at 397 (brackets and quotation marks omitted).
[66] *Gadson*, 77 F.4th at 21 (quotation marks omitted). Indeed, in *Banks* itself, the defendant's scheme almost succeeded: he managed to execute several fraudulent wire transfers into bank accounts he controlled, which were clawed back at the last moment when his intended victim realized what was happening. Other cases similarly involve circumstances where actual losses were avoided due solely to fortuitous intervention by others. *See, e.g.*, *United States v. Walker*, 89 F.4th 173, 178 (1st Cir. 2023) (police intervened at last moment to prevent a robbery); *United States v. Tellez*, 86 F.4th 1148, 1150, 1154 (6th Cir. 2023) (police unexpectedly discovered fraudulent gift cards during traffic stop); *United States v. Kennert*, No. 22-1998, 2023 WL 4977456, at *1-3 (6th Cir. Aug. 3, 2023) (unpublished) (police investigating defendant's sale of counterfeit sports trading cards discovered "a fake 1916 Babe Ruth card" during a search of his home); *United States v. Corker*, No. 22-10192, 2023 WL 1777195, at *1, *4 (11th Cir. Feb. 6, 2023) (defendant received loan check as part of scheme to defraud bank, but alert bank employee canceled loan before defendant could cash the check).
[67] *See* USSG §1B1.2(b) ("After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).").

was the object of such acts and omissions," in determining the appropriate offense level.[68] As the Sixth Circuit has explained, "[i]f the fraud guideline does not include intended loss, then the court cannot meaningfully apply the relevant-conduct guideline, which is applicable to all sentencings and contemplates intended harm as conduct for which a defendant should be held accountable."[69] Interpreting §2B1.1 to exclude intended loss also creates tension with other guidelines applicable to fraud offenses. A defendant convicted of attempt or conspiracy to commit fraud, for example, is subject to "the base offense level from the guideline for the substantive offense, *plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty*."[70] And in the context of tax crimes – for which the offense level is similarly tied to the amount of "loss" – the relevant guideline provides that loss "is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)."[71] The possibility of "vastly different sentences for similarly culpable defendants" provides a further reason not to interpret the loss table in §2B1.1 as applying only to actual loss, as defendants who engaged in conduct of equal complexity and/or severity are otherwise subject to different guideline ranges based only on the fortuity of whether their misconduct was detected in time.[72]

b. *We Support Resolving the Circuit Conflict by Moving the Commentary's Existing Definition into the Guideline Text*

The Department supports the Commission's proposal to resolve the circuit conflict over the meaning of "loss" in §2B1.1 by moving the commentary's existing loss definition into the text of the guideline, thus resolving any uncertainty over whether that definition is binding. As the Commission notes in its proposed amendment, "approximately one-fifth of individuals sentenced under §2B1.1 in fiscal year 2022 were sentenced using intended loss," representing about 750 defendants.[73] Consistent application of such a commonly used guideline is critically important. The Commission's proposed amendment will ensure uniform application of §2B1.1 throughout the country; it will resolve the internal inconsistencies within the Guidelines that the Third Circuit's interpretation of that provision creates; and it will ensure that the fraud guideline continues to function as the Commission has intended, including by maintaining consistency in the treatment of similarly culpable defendants and avoiding unwarranted sentencing windfalls for fraudsters and thieves who fully intended to cause significant losses to their victims but were thwarted by circumstances outside their control. The Commission's proposal also appropriately resolves this particular conflict while deferring to Congress on broader questions related to the deference due to guidelines commentary generally.

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[68] *Id.* §1B1.3(a)(3) (emphasis added).
[69] *Smith*, 79 F.4th at 798.
[70] USSG §2X1.1(a) (emphasis added); *see Walker*, 89 F.4th at 181 ("[U]nlike the intended loss language in [§2B1.1], the textual hook for intended conduct in [§2X1.1] is contained in the Guideline itself."); *Smith*, 79 F.4th at 798 (same).
[71] USSG §2T1.1(c)(1); *see United States v. Upshur*, 67 F.4th 178, 181-82 (3d Cir. 2023) (distinguishing *Banks* on the ground that §2T1.1 "uses a definition of 'loss' that unambiguously includes both actual and intended losses").
[72] *You*, 74 F.4th at 398.
[73] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 3.

c. *The Importance of Resolving this Narrow Issue Now*

The Commission has additionally sought comment on "whether it should defer making changes to §2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of §2B1.1."[74] Although the Department does not oppose a future reexamination of §2B1.1, the Commission should not perpetuate the existing circuit conflict over the meaning of "loss" in the meantime. For one thing, the timing of any comprehensive examination is uncertain: as the Commission's proposal notes, no decision has yet been made about whether to undertake such a project in the first place, or to do so in any particular future cycle. Meanwhile, for the reasons we have already stated, consistent application of the loss table in §2B1.1 will be critically important. Thousands of defendants receive offense-level enhancements under that provision each year, hundreds of which are based on intended loss. Resolving the narrow circuit conflict on that issue now will ensure consistency across the circuits, among similarly culpable offenders, and within the Guidelines themselves while any potential future reexamination of §2B1.1 is pending. The Commission's action would therefore ensure that §2B1.1 continues to function uniformly and in the manner the Commission has historically intended, just like any other guideline the Commission might one day choose to reexamine. Under those circumstances – and in light of Congress's expectation that the Commission will resolve circuit conflicts over the meaning and application of the Guidelines without the need for Supreme Court intervention[75] – the Department urges the Commission to resolve the existing circuit conflict over the meaning of "loss" in §2B1.1 by moving that section's commentary into the guideline text. The Commission could then consider whether to conduct a broader reexamination of that guideline in a future amendment cycle.[76]

V. Circuit Conflicts

a. *Definition of "Altered or Obliterated Serial Number"*

The Department supports Option Two, which would retain the Commission's existing four-level enhancement for an offense involving a firearm that "had an altered or obliterated serial number" under §2K2.1(b)(4)(B). These offenses are often intended to evade accountability and thwart law enforcement. But we recognize the view that a four-level enhancement may be inappropriate where law enforcement can still determine the serial number with an unaided eye regardless of alterations. If the Commission adopts Option One's definition, we also recommend that it consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits, but would not meet the new definition because the altered serial number is still legible.

When the Commission increased this enhancement from two to four levels in 2006, it considered the full range of activity that this enhancement was expected to cover and elected to

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[74] *Id.* at 14.

[75] *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 347-39 (1991); *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

[76] Indeed, if the legislation proposed by the Commission to address the validity of commentary is not soon advanced, the Department would further support a comprehensive effort by the Commission to incorporate current commentary into text throughout the Guidelines manual, in order to restore in all Circuits without endless litigation the validity of all of the Commission's carefully considered commentary.

include instances where a serial number was altered in such a manner that did not prevent traceability. It did so because an altered serial number is evidence of an intent to evade detection.

Neither the Guidelines nor the criminal statute on which this particular guideline is based, 18 U.S.C. § 922(k), define "altered or obliterated."[77] Circuits are split regarding whether a defendant must make a serial number "illegible" or "less accessible" in order to receive the four-level enhancement under §2K2.1(b)(4)(B). The Second and Sixth Circuits have held that a serial number is not "altered or obliterated" unless it is no longer visible to the "naked eye" and thus illegible.[78] In contrast, the Fourth, Fifth, and Eleventh Circuits have held that a serial number is "altered or obliterated" if it has been "changed," "modif[ied]," "defaced," or "scratched" so as to make the serial number "less accessible," even if it is still legible.[79]

The Commission has proposed two options to amend §2K2.1(b)(4)(B) to define what constitutes an "altered or obliterated serial number." Option One would adopt the Second and Sixth Circuit's view.[80] Doing so would reduce the current applicability of the enhancement. Option Two would adopt the Fourth, Fifth, and Eleventh Circuit's view.[81]

Recognizing the effects of altered firearm serial numbers on public safety, the Commission has twice voted to increase that enhancement. In 1989, the Commission increased the enhancement from one level to two levels to "better reflect the seriousness of this conduct."[82] And, in 2006,[83] the Commission determined – notwithstanding concerns that §2K2.1(b)(4)(B) applies *even where a serial number can still be identified*[84] – that an increase to a four-level

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[77] *United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009) (noting that the "legislative history of §2K2.1(b)(4) suggest[s] that 'altered or obliterated' likely is derived from what is today found in 18 U.S.C. § 922(k)", but "'no progenitur of § 922(k) at any point define[d] these words.'") (*quoting United States v. Carter*, 421 F.3d 909, 910 (9th Cir. 2005)).

[78] *United States v. St. Hilaire*, 960 F.3d 61,66 (2d Cir. 2020); *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[79] *United States v. Harris*, 720 F.3d 499, 503-504 (4th Cir. 2013); *see also Perez*, 585 F.3d at 885 (5th Cir. 2009); *United States v. Millender*, 791 F. App'x 782, 783 (11th Cir. 2019) (unpublished).

[80] *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[81] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 54.

[82] USSC §2K2.1(b)(4) (Nov. 1989) (Amendment 189).

[83] The Department submitted public comments, at the time, recommending that the Commission consider increasing "§2K2.1 (b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers," explaining that "these offenses are often committed in furtherance of firearm trafficking" and noting that, "[b]y increasing sentences for firearms-trafficking offenses to reflect the serious harm these offenses may cause, the guidelines would provide a stronger deterrent and better reflect the harm of these offenses." *See* Letter from U.S. Dep't of Just. to the U.S. Sent'g Comm. (Aug. 15, 2005).

[84] The Assistant Public Defender for the District of Montana argued, during the Commission's March 15, 2006, Public Hearing, that:

> A defaced serial number is not an obliterated serial number. Crime labs will tell you that they can frequently recover serial numbers that are not visible to the naked eye. Only where the number is grounded down to below the imprint, below the stamp, is the recovery of the serial number impossible, and even in those occasions, many times manufacturers are placing a second hidden serial number on the gun.
>
> So unless the Commission recrafts the obliterated serial number enhancement to apply only where the firearm is untraceable--in other words the serial number cannot be recovered or there's not a second hidden

enhancement was appropriate because of the "difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."[85] In light of the firearms violence facing our country, we see no reason to retreat from the Commission's prior actions, and we recommend Option Two.

Option Two's definition of "altered or obliterated serial number" is consistent with the ordinary meaning of the phrase "altered or obliterated," as used in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k).[86] The "ordinary meaning of 'altered' is straightforward."[87] The term "altered" means "'to cause to become different in some particular characteristic . . . without changing into something else' or '[t]o change or make different; modify.'"[88]

The Fourth, Fifth, and Eleventh Circuits have applied this "straightforward" definition and held that a serial number that is "less legible is made different," "frustrate[s] the purpose of the serial numbers," and is therefore "altered" for purposes of §2K2.1(b)(4).[89] The term "obliterated" already embraces situations, as the Second Circuit identified, where the serial number is illegible. If the Commission interprets both "altered or obliterated" to mean the same thing – that the serial number must be illegible – then one of the two terms (either "altered" or "obliterated") in the Guideline text would have no meaning.[90] The courts in *Harris* and *Millender* defined the term "altered or obliterated" in a manner that would not render the term "obliterated" superfluous.[91]

In addition, retaining the scope of the four-level enhancement is consistent with the seriousness of the offense. Congress, in enacting the Gun Control Act of 1968 ("GCA"), created

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> serial number--enhancement is and will continue to be applied where the serial number is identified. In other words, sentences are being enhanced where the harm warranting the enhancement isn't even present. And this all happens without a mens rea requirement.

Testimony of John Rhodes, Assistant Fed. Pub. Def. for the District of Montana, Transcript of Public Hearing (Marh 15, 2006).

[85] USSC §2K2.1(b)(4) (Nov. 2006) (Amendment 691).

[86] *Perrin v. United States*, 444 U.S. 37, 42 (1979) (a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *see also Harris*, 720 F.3d at 503 (looking at the plain meaning of the terms "altered" or obliterated" since they were not defined in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k)); *see also Millender*, 791 F. App'x at 783 (same).

[87] Br. for Appellee at 17, *United States v. Sands*, Case No. 17-2420 (6th Cir. July 23, 2018) (*citing United States v. Carter*, 421 F.3d 909, 912 (9th Cir. 2005).

[88] *See id*. (*citing United States v. Carter*, 421 F.3d at 912) (quoting Webster's and the American Heritage dictionaries); *see also Harris*, 720 F.3d at 503 (holding that "[t]o 'alter' is 'to cause to become different in some particular characteristic . . . without changing into something else.'") (*quoting* Webster's Third New International Dictionary 63 (1993)); *Millender*, 791 F. App'x at 783 ("In 1986, 'alter' meant 'to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else;'" 'to become different in some respect;' or to 'undergo change usually without resulting difference in essential nature.'") (*citing* Webster's Third New International Dictionary, Unabridged 63 (1986)).

[89] *See Harris*, 720 F.3d at 503; *Millender*, 791 F. App'x at 783.

[90] *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) ("one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation and internal quotation marks omitted).

[91] *See Harris*, 720 F.3d at 503 (further explaining that the "interpretation that a serial number rendered less legible by gouges and scratches is 'altered' prevents the word 'obliterated' from becoming superfluous."); *Millender*, 791 F. App'x at 783 (holding that the "district court properly declined to adopt an interpretation of 'altered' that would require illegibility because that interpretation would render 'obliterated' superfluous.").

a comprehensive scheme designed to assist Federal, State, and local law enforcement in targeting serious crimes involving firearms. Specifically, the GCA required manufacturers and importers to identify firearms by "a serial number engraved or cast on the receiver or frame of the weapon"; it mandated that Federal firearms licensees maintain records of their firearm transactions, including complete and accurate descriptions of the firearms; and it made it "unlawful for any person knowingly to transport, ship, receive . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered."[92] These requirements enabled "authorities both to enforce the law's verification measures and to trace firearms used in crimes."[93] This information, in turn, "helps to fight serious crime."[94]

ATF, through its National Tracing Center, can use serial numbers and other data points, in response to requests for "crime gun traces by Federal, State, and local law enforcement agencies," to trace the history of a specific firearm from the date it was manufactured or imported into the United States to the first retail purchase of the firearm, thus enabling ATF, and the law enforcement agencies it supports, to "identify suspects involved in criminal violations, determine if the firearm is stolen, and provide other information relevant to an investigation."[95]

As the Fourth Circuit noted in *Harris*, "the regulations reflect the government's interest in having serial numbers placed on firearms that have a minimum level of legibility."[96] A "less legible" serial number "frustrated the purpose of serial numbers" and tracing.[97] This is not new ground. In 2006, the Commission assessed if four levels was appropriate regardless of whether the alteration rendered the serial number untraceable. The Commission received comment explicitly addressing this point, noting that "an altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable."[98] The Commission further considered whether to narrow its enhancement only to firearms that were rendered untraceable.[99] The Commission declined the invitation to exempt incomplete or ineffective alteration and obliteration from application of its four-level enhancement.

Incorporating the definition set forth in Option Two would be consistent with the long-standing recognition from the Commission about the importance of serial numbers, even where tracing is still possible, and the significant efforts the Commission has taken to date to dissuade those who attempt to thwart the firearm-tracing process.[100] The Department commends the

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[92] Gun Control Act of 1968, § 102, 82 Stat. 1213.
[93] *Abramski v. United States*, 573 U.S. 169, 173 (2014) (*citing* H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)).
[94] *Id*. at 182; *see also* Identification Markings Placed on Firearms, 66 Fed. Reg. 40597 (Aug. 3, 2001) ("Firearms tracing is an integral part of any investigation involving the criminal use of firearms."); *Blaustein & Reich, Inc. v. Buckles*, 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).
[95] *Id*.
[96] *Harris*, 720 F.3d at 503.
[97] *Id.*
[98] *See* Letter from Jon M. Sands, Fed. Pub. Def. for the District of Arizona (Mar. 9, 2006).
[99] *See* Testimony of John Rhodes, Assistant Federal Public Defender for the District of Montana, Transcript of Public Hearing (Mar. 15, 2006) (suggesting that the Commission could narrow the enhancement to only apply to untraceable firearms).
[100] The Commission first addressed the issue in its September 1986 Preliminary Guidelines, where it proposed adding "6 to the base offense level" and noted, in general, that "appropriate penalties [were] added" where "specific offense characteristics address conduct that by law constitutes a particular danger to public safety." Preliminary

efforts the Commission has taken to date. If the Commission adopts Option One's definition, we also recommend that the Commission consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits but where law enforcement can still determine the serial number with an unaided eye.

b. *Grouping*

The Department does not oppose the Commission's proposal to amend §2K2.4, which applies to certain firearms offenses with mandatory-minimum terms of imprisonment, including 18 U.S.C. § 924(c). Section 3D1.2 permits grouping of closely-related counts of conviction, including "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."[101] This provision generally results in the grouping of firearms counts under 18 U.S.C. § 922(g), to which §2K2.1 applies, and drug counts under 21 U.S.C. § 841, to which §2D1.1 applies.[102] The courts of appeals disagree, however, whether those counts can group under §3D1.2 when a defendant is also convicted of a § 924(c) count. Because the § 924(c) count carries a mandatory term of imprisonment, it is covered by §2K2.4, not §2K2.1. And the Commentary to §2K2.4 (Application Note 4) provides that "[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." §2K2.4 cmt. (n.4). In other words, §3D1.2 allows grouping as a specific offense characteristic, whereas §2K2.4 seemingly does not. Thus, as the Seventh Circuit has correctly observed, there is no basis for grouping § 922(g) and drug trafficking counts because grouping rules are to be applied only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other."[103]

The Department agrees, however, that there are cases in which the firearms and drug trafficking counts are closely related and, but for the language in current Application Note 4, would be grouped. The Department thus does not oppose the Commission's proposal to amend Application Note 4 to permit grouping "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2."

Draft Sentencing Guidelines (Sept. 1986). The Commission, in its 1987 Guidelines, ultimately included a "1-level enhancement," *see* U.S. SENT'G COMM'N, GUIDELINES MANUAL, §2K2.1(b)(1) (1987), but increased it to a "2-level" enhancement in 1989 to "better reflect the seriousness of this conduct," USSC §2K2.1(b)(4) (Nov. 1989). And the Commission revisited the enhancement again, in 2006, and noted that an increase to a "4-level enhancement" was necessary to reflect "both the difficulty in tracing firearms with altered or obliterated numbers, and the increased market for these types of weapons." *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2006 (May 11, 2006).

[101] USSG §3D1.2(c).

[102] USSG §§2D1.1(b)(1), 2K2.1(b)(6)(B).

[103] *United States v. Sinclair*, 770 F.3d 1148, 1157-58 (7th Cir. 2014). B*ut see United States v. Bell*, 477 F.3d 607, 615-16 (8th Cir. 2007) (permitting grouping); *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010) (unpublished) (same); and *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006) (unpublished).

VI. Miscellaneous

a. *Stop Act*

The Department supports the Commission's proposal to incorporate the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, Pub. L. 117-258 (2022), into the Guidelines by adding the new offenses to Appendix A, linking the new offenses to the existing §2B1.5, and amending the commentary to §2B1.5 to reflect that 25 U.S.C. § 3073 is referenced in the guideline. The Department is committed to enforcing federal laws that enhance Tribal sovereignty by preserving the historical, cultural, and religious heritage of Native Americans and Alaskan Natives, and supports the STOP Act. The Commission's proposal helps progress Tribal public safety goals by protecting Tribal patrimony, which is welcomed by the Department, and will likely receive Tribal support.

b. *National Security Controls*

The Department supports the Commission's proposed revisions to §2M5.1, including the bracketed language, and appreciates the Commission's action on this Administration priority. Export controls are a critical tool to prevent U.S. adversaries from threatening national security, enhancing their own military capabilities, or engaging in mass surveillance programs that enable human rights abuses. Recognizing this threat, the Department, along with the Department of Commerce's Bureau of Industry and Security, launched the Disruptive Technology Strike Force to counter efforts by nation-state adversaries who engage in unlawful conduct to acquire sensitive technologies. Such sensitive technologies include those related to supercomputing, artificial intelligence, and advanced manufacturing equipment, as well as the components those technologies are built on, like semiconductors and microelectronics. The Strike Force represents "a more concerted approach to investigating those who seek to exploit technology to undermine our national security."[104] Keeping our country's most sensitive technologies out of the world's most dangerous hands is a mission essential to America's national security. "At no point in history has this mission been more important, and at no point have export controls been more central to our national security, than right now."[105]

The Commission's proposal to revise §2M5.1 to insert "controls related to national security" in place of "national security controls" appropriately reflects both the seriousness of the threats posed and the variety of controls at issue in Strike Force investigations. In its current form, §2M5.1's reference to "national security controls" could be narrowly construed to mean that the enhancement applies only where there was the unlawful export of items bearing the "NS" (for National Security) designation under the Export Administration Regulations (EAR). But the EAR regulates a broader array of export controls beyond the NS designation that are

[104] *See* Statement of Matthew G. Olsen, Assistant Att'y Gen., National Security Division, Before the Committee on the Judiciary, United States Senate, at a Hearing Entitled "Cleaning up the C-Suite: Ensuring Accountability for Corporate Criminals" (Dec. 12, 2023).
[105] *See* Statement of Matthew S. Axelrod, Assistant Sec'y of Com. for Export Enforcement Before the House Foreign Affairs Subcommittee on Oversight and Accountability, at a Hearing Entitled "Reviewing the Bureau of Industry and Security, Part II: U.S. Export Controls in an Era of Strategic Competition" (Dec. 12, 2023).

appropriately related to national security, including controls for missile technology,[106] regional stability,[107] and anti-terrorism,[108] and those for prohibited end-uses or end-users.[109]

Along with specific goods-based controls, other controls restrict the flow of money and services where appropriate and necessary. The EAR restricts exports to certain military end-users and certain foreign entities where the government has determined that they present an unacceptable security risk. In addition, sanctions and country embargoes imposed pursuant to the International Emergency Economic Powers Act protect national security by providing additional controls on the export of goods and services to certain countries.[110] The Commission's proposal helps ensure that the language of §2M5.1 unambiguously encompasses the full spectrum of appropriate national security-related controls, including those that could apply to the transfer of goods or services.

The proposed amendment to §2M5.1 will ensure that a judge's analysis under the guideline does not start and end with an examination of whether the items at issue bear the "NS" designation under the EAR.[111] Rather, the proposed amendment would ensure that courts examine the array of possible national security underpinnings of the applicable controls on the flow of goods, money, and services in each case. Additionally, "controls relating to" would make the first clause of §2M5.1(A) for national security export offenses parallel to the second clause of §2M5.1(A), which provides a higher base offense level for offenses that involve evasion of export "controls relating to the proliferation of nuclear, biological, or chemical weapons or materials."[112]

The proposed amendment does not suggest, nor does the Department support, revising §2M5.1 such that an enhancement would apply to the entirety of export controls under the EAR, such as violations of controls related to Short Supply or to all violations involving items

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[106] 15 C.F.R. § 742.5.
[107] 15 C.F.R. § 742.6.
[108] 15 C.F.R. §§ 742.8, 742.9.
[109] 15 C.F.R. § 744.6.
[110] *See, e.g.*, *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir. 1997) (holding that §2M5.1 applies to "any offense that involves a shipment (or proposed shipment) that offends [a country] embargo"); *United States v. Hanna*, 661 F.3d 271, 294 (6th Cir. 2011) (same).
[111] In *Komoroski*, the government argued at sentencing for a broad interpretation of the phrase "national security controls" pursuant to §2M5.1, one that would encompass the totality of the controls that are available under the EAR. *See* United States' Sentencing Memorandum, ECF No. 51, *Komoroski*, at 11 ("[A]ll of the controls imposed by the EAR are national security controls."). The court rejected the government's interpretation of the guideline, noting that it would result in a sentencing enhancement—on national security grounds—for violations of export controls that apply to goods like horses, cedar wood, whips, and cattle prods. *See* Order, ECF No. 61, *United States v. Komoroski*, Case No. 3:CR-17-156 (M.D. Pa. July 30, 2019) ("*Komoroski*"), at 2-3 ("[T]he materials in question here have been identified . . . as controlled for Firearms Control (FC), Crime Control (CC) and Embargoes and Other Special Controls (UN), *not* National Security (NS).").
To be clear, DOJ does not support such a broad application of §2M5.1, whereby an enhancement would apply to violations of all controls under the EAR. DOJ does not seek an enhancement that would apply, for instance, to violations of controls related to Short Supply, such as horses by sea or unprocessed western cedar, or to all violations involving items designated as Crime Control, such as whips and cattle prods — the very items mentioned in the court's order in *Komoroski.*
[112] The second clause of §2M5.1(A) states "*or controls relating to* the proliferation of nuclear, biological, or chemical weapons or materials were evaded." (emphasis added).

designated as Crime Control. The Commission's proposal appropriately allows for examination of the applicable statutory and regulatory text, as well as the facts of the case, when determining whether a sentencing enhancement is warranted.

The proposed amendment is consistent with the Commission's prior revisions to §2M5.1. In 2001, the Commission revised the guideline to add a reference to biological and chemical weapons in response to the National Defense Authorization Act of 1997, which expressed the sense of Congress that stricter sentences were warranted for offenses involving the import and export of nuclear, chemical, and biological weapons, materials, or technology.[113] The following year, the Commission again expanded the scope of §2M5.1 to cover financial transactions with countries supporting international terrorism.[114] There, too, the Commission revised the Guideline in response to congressional action, specifically to incorporate the prohibition in 18 U.S.C. § 2332d against engaging in a financial transaction with the government of a country designated as supporting international terrorism.[115]

As the Commission observed in its synopsis of the proposed amendment, when Congress passed ECRA in 2018, it included new provisions relating to export controls for national security and foreign policy purposes, including, for the first time, explicitly identifying U.S. economic security as a component of national security. Just as in 2001 and 2002, this congressional action merits a corresponding change in the Guidelines, and the proposed amendment would help ensure that §2M5.1 is better aligned with the current export control regime set forth in ECRA.

c. *Structuring*

The Department supports the proposal to amend the specific offense characteristic at §2S1.3(b)(2)(B) to apply when the defendant committed the offense "while violating another law of the United States." The proposed technical fix is simple and straightforward, and we appreciate the Commission's consideration of this issue. Amending §2S1.3 to match the currently enacted statutory enhancement at 31 U.S.C. § 5322(b) will ensure, without the necessity of additional litigation, that the Guidelines are consistent with the current statute and that they properly reflect the intent of Congress.

Currently, §2S1.3(b)(2)(B) provides for a two-level increase when a defendant is convicted of a specified Title 31 offense and committed that offense "as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." This specific offense characteristic was added to reflect the statutory penalty enhancement in Title 31. But it only reflects part of it. The Section 5322(b) enhancement applies to certain willful violations committed "*while violating another law of the United States* or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period." (Emphasis added). The proposed amendment will give full effect to the enhanced penalty provisions in 31 U.S.C. § 5322(b), reflecting Congress's determination that criminal violations of these core Title 31 requirements

[113] USSC §2M5.1 (Nov. 2001) (Amendment 633).
[114] USSC §2M5.1 (Nov. 2002) (Amendment 637).
[115] *Id*., Reason for Amendment.

are more serious when they occur as part of other criminal activity or when they are part of a pattern of criminal activity.

Title 31's reporting and recordkeeping requirements are intended to support efforts to combat fraud, money laundering, tax evasion, and terrorist financing, and to safeguard the integrity of the financial system and national security. 31 U.S.C. § 5311. Secret offshore financial accounts not only cost the Treasury billions of dollars each year, but also facilitate corruption and finance terrorism and other crime. Section 2S1.3(b)(2) was added in 2002 in response to the statutory amendments providing enhanced criminal penalty provisions under 31 U.S.C. § 5322(b).[116] But the guidelines omit the language in the statute "while violating another law of the United States," which leaves a gap benefitting wealthy and especially culpable defendants. Currently, §2S1.3(b)(3) provides that if the elevated base offense level under §2S1.3(a)(2) applies but the specific offense characteristics under §§2S1.3(b)(1) and (b)(2) do not, then under the safe harbor provision of §2S1.3(b)(3), the offense level could drop back to 6, which is below the minimum offense levels under §2S1.3(a). For example, notwithstanding the "or" in § 5322(b), a defendant who commits a Title 31 offense *while violating another law* may be eligible for the "safe harbor" reset under §2S1.3(b)(3)(C),[117] unless the government also proves the other statutory enhancement – that the defendant "committed the [Title 31] offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." This technical fix would avoid this result.

The Department has had some success convincing courts that a defendant's commission of tax crimes alongside Title 31 offenses satisfies the "pattern of unlawful activity" requirement.[118] But not in all cases. In *United States v. Wommer*, 584 F. App'x 815, 816 (9th Cir. 2014) (unpublished), the court reversed the two-level increase even though the defendant used the unreported funds to evade taxes, because the "pattern of unlawful activity" did not involve more than $100,000 (he withdrew only $72,500 and caused $66,200 from those same withdrawals to be deposited). *See also, United States v. Simon*, No. 10-CR-56, 2011 WL 924264, at *9-10 (N.D. Ind. Mar. 14, 2011) (district court found defendant eligible for safe harbor reset even though defendant also committed wire fraud). The government has an interest in disrupting a criminal network before the crimes cross the $100,000 threshold. Adding the phrase "while violating another law of the United States" to §2S1.3(b)(2) would remove any ambiguity, thus fulfilling the provision's purpose of "giv[ing] effect to the enhanced penalty provisions under 31 U.S.C. § 5322(b)."[119] We recognize that this change may not affect a large number of cases, but it will help ensure proper enforcement of Title 31's reporting and recordkeeping requirements, which are critical to the government's efforts to strengthen the global financial system, provide greater transparency, and combat the use of offshore bank accounts to commit money laundering, corruption, and offshore tax evasion.

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[116] *See* Reason for amendment, USSG §2S1.3(b)(2) (amendment 637) (November 2002).

[117] Assuming the defendant meets the other requirements of the safe harbor provision under §2S1.3(b)(3) – that the defendant did not act with reckless disregard for the source of the funds, the funds in the undisclosed foreign bank account were amassed legally, and used for a lawful purpose.

[118] *United States v. Peterson*, 607 F.3d 975, 979-80 (4th Cir. 2010); Sentencing Transcript of Mar. 7, 2019, *United States v. Manafort*, No. 18-CR-83 (E.D. Va., Mar. 27, 2019), ECF No. 328); Sentencing Transcript of July 7, 2014, *United States v. Desai*, No. 11-CR-846 (N.D. Cal., July 8, 2014), ECF No. 286).

[119] *See* Reason for Amendment, USSG §2S1.3(b)(2) (amendment 637) (November 2002).

d. *Clarifying the Antitrust Statutory References*

We agree with the Commission's proposed amendment of the statutory references in Appendix A and the Commentary to §2R1.1. The proposed technical fix is simple and straightforward, and we appreciate the Commission's consideration of this issue. By its terms, §2R1.1 is intended to apply "only" to "agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation," that "have been recognized as illegal *per se*." U.S.S.G. §2R1.1, cmt. background. Such offenses are proscribed by Sections 1 (for interstate or foreign trade) and 3(a) (for trade in or involving the United States territories or the District of Columbia) of the Sherman Act. 15 U.S.C. §§ 1, 3(a). Yet Appendix A and the Commentary to §2R1.1 list Sections 1 and "3(b)" as the covered statutory provisions. (Section 3(b) proscribes monopolization conduct in or involving the United States territories or the District of Columbia; monopolization conduct may be committed by a single entity and thus does not depend on an agreement among competitors. 15 U.S.C. § 3(b).)

This discrepancy has the potential to sow confusion in the Department's antitrust prosecutions. Specifically, Section 3(a) offenses fall within the intended scope of the current guideline, but Section 3(a) is not listed as a covered statute. Section 3(b) offenses fall outside the intended scope of the current guideline, but Section 3(b) is listed as a covered statute. The proposed amendment – replacing the references to Section 3(b) with references to Section 3(a) – would fix the discrepancy. We likewise agree with the proposed technical changes to the Commentary to §2R1.1.

e. *Death or Serious Bodily Injury Resulting from Controlled Substances*

i. *Summary*

It is the policy of this Administration that the mandatory minimum penalties set forth in 21 U.S.C. §§ 841 and 960 should be applied cautiously and only in cases that merit them. As Attorney General Garland stated in his December 16, 2022 charging policy memorandum, "[the] proliferation of provisions carrying mandatory minimum sentences has often caused unwarranted disproportionality in sentencing and disproportionately severe sentences."[120] Mandatory-minimum penalties should be reserved for instances in which the remaining charges "would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, [and] harm to victims" and serve the punishment, public safety, deterrence, and rehabilitation purposes of criminal law.[121] We also recognize that fentanyl and other controlled substances have led to an unprecedented number of overdose and drug poisoning deaths, and that traffickers should be held accountable when death or serious bodily injury results from their conduct. In some cases, it will be appropriate to charge an offense carrying a mandatory minimum penalty, and the government will do so. In others, the statutory mandatory minimum will not be

[120] Att'y Gen. Merrick Garland, *General Department Policies Regarding Charging, Pleas, and Sentencing*, December 16, 2022, available at Attorney General Memorandum - General Department Policies Regarding Charging Pleas and Sentencing (justice.gov).
[121] Att'y Gen. Merrick Garland, *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases*, December 16, 2022, available at Attorney General Memorandum - Additional Department Policies Regarding Charges Pleas and Sentencing in Drug Cases (justice.gov)

appropriate, and judicial consideration of a sentence below the mandatory minimum – but often above the quantity-driven guideline range – will be appropriate.

We advanced a proposal to accomplish this approach in our annual report to the Commission last year. We recommended that the Commission "adopt a new base offense level and enhancements" that "meaningfully account[] for death and serious bodily injury resulting from drug distribution, regardless of whether charges carrying mandatory minimum terms of imprisonment were brought."[122] As we noted, "consistent with the Department's charging policy, there may be particular cases where the circumstances suggest that it is inappropriate to pursue charges carrying a 20-year mandatory minimum term of imprisonment."[123] [124] This approach would still provide accountability when drug trafficking results in death or serious bodily injury without requiring reflexive charging and application of mandatory minimum penalties. It would allow consistent and more moderate sentences, reserving the highest penalties only for cases that warrant them. We continue to support that approach, and we ask the Commission to defer consideration of this issue so that it can consider other options – including ours – to assist judges in these difficult cases.

The Commission's proposed amendments to §2D1.1 would remove options that judges around the country are using to resolve these cases fairly, and it would result in negative unintended consequences. Option One would require the government either to charge an offense carrying a mandatory-minimum penalty or leave conduct resulting from death or serious bodily injury unaddressed in the guideline calculation. In many cases, neither result is appropriate. Should the Commission pursue Option One, we recommend adding language that would trigger the alternative base offense levels when prosecutors and defense counsel enter a stipulation establishing death or serious bodily injury without charging the offense carrying a mandatory-minimum penalty. This would enable the parties to resolve cases equitably. The government can avoid charging an offense carrying a mandatory minimum for the sake of ensuring that the guidelines range appropriately reflects the seriousness of the offense, and courts would have discretion to impose an appropriate sentence below what could have been the mandatory minimum. We think Option Two would partially accomplish the same result. We believe the same considerations suggest retaining the options that are being used now by judges and parties around the country to resolve these cases fairly.

ii. *Background*

The courts of appeals that have considered this issue have held that guideline offense levels for death or serious bodily injury are only triggered when the defendant is convicted of an offense that requires proof of death or serious bodily injury as an element because these provisions specifically refer to death or serious bodily injury being established by the "offense of

[122] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEP'T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 31, 2023), available at Public Comment Received on Proposed Priorities (ussc.gov).

[123] In instances where death or serious bodily injury results, the "safety valve" would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

[124] Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEP'T OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (July 31, 2023), available at Public Comment Received on Proposed Priorities (ussc.gov).

conviction."[125] Although some cases have upheld the application of the death or serious bodily injury offense levels absent a death-resulting conviction under specific circumstances, as the Seventh Circuit noted in *Lawler*, "these opinions are not on point."[126] Without a genuine circuit conflict on either the need for a conviction for the enhancement or on the newly-amended language in the recidivist provisions, we do not view these amendments as necessary at this time. And in light of possible negative unintended consequences, we think the Commission should consider a more holistic review of §2D1.1 as part of its multi-year simplification efforts. If the Commission proceeds with an amendment this cycle, we have concerns about the proposed options and recommend changes to them.

iii. *Option One's Unintended Consequences*

The portion of Option One that limits the death or serious bodily injury offense levels to cases where the government has charged and proven that death or serious bodily injury resulted from the drug trafficking offense reflects current case law. But because Option One would seem to permit these heightened offense levels only when an offense carrying a mandatory minimum has been charged, we are concerned that it would no longer allow us to charge statutes without mandatory minimums yet account for the death or serious bodily injury by stipulating to the application of these base offense levels.[127] These stipulations have been used to allow judges to account for the death or serious bodily injury resulting from the offense in the sentencing guidelines calculation without triggering the statutory mandatory-minimum sentence. As a result, we think Option One may lead to an increase in charges carrying mandatory-minimum penalties to account for the conduct's result, including in cases where such a charge would not otherwise be warranted. To avoid this, we recommend that the guidelines make clear that prosecutors and defendants may continue to stipulate to the application of these provisions in the absence of charged offense carrying a mandatory minimum. Although Option One with the stipulation provision would constrain the parties to the base offense levels at or near the mandatory-minimum penalties, it would allow for downward adjustments when warranted.

Even with these changes, we are concerned that Option One's changes to requiring § 851 filings for application of the recidivist provisions will have the unintended result of more

[125] *United States v. Lawler*, 818 F.3d 281, 283-85 (7th Cir. 2016) (the death resulting enhancement applies only when the elemental facts supporting the 'offense of conviction' establish beyond a reasonable doubt that death resulted from the use of the controlled substance and not through relevant conduct) (internal citations omitted); *United States v. Greenough*, 669 F.3d 567, 573-76 (5th Cir. 2012); *United States v. Rebmann*, 321 F.3d 540, 543–44 (6th Cir. 2003). The Third Circuit expressed the same view in dicta. *United States v. Pressler*, 256 F.3d 144, 157 n. 7 (3d Cir. 2001).

[126] *Lawler*, 818 F.3d at 284, n. 4 (distinguishing as "not on point": *United States v. Shah*, 453 F.3d 520 (D.C. Cir. 2006) (no plain error to apply §2D.1.1(a)(2) without charging death-results element when defendant plead guilty to causing death); *United States v. Rodriguez*, 279 F.3d 947 (11th Cir. 2002) (upholding judge finding of death resulting under preponderance standard and rejecting *Apprendi* claim because sentence did not exceed 20-year maximum under 21 U.S.C. § 841(b)(1)(C)); and *United States v. Deeks*, 303 Fed. Appx. 507 (9th Cir. 2008) (unpublished)).

[127] Some districts have used plea agreements to provide for the application of these higher base offense levels without the application of mandatory minimum sentences. Although the parties could also agree to a lower offense level or to an agreed-upon sentence, explicitly allowing stipulations is a reasoned alternative to pursuing charges carrying mandatory minimum penalties and can yield results that are more individually tailored to the circumstances of particular cases.

mandatory life sentences being sought and imposed.[128] Because the § 851 notice affects the applicable mandatory-minimum sentence, the adoption of Option One may significantly increase the sentences for individuals with prior convictions in cases in which death or serious bodily injury resulted. A conviction for a drug offense that resulted in death or serious bodily injury in a case where a notice of prior conviction under § 851 is filed triggers a mandatory-minimum life sentence under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 960(b)(1), 960(b)(2), and 960(b)(3). In that situation, the sentencing guideline calculations are no longer relevant to determining the actual sentence imposed and the sentencing court has no discretion in determining the final sentence.

iv. *Option Two*

The Department does not oppose the portion of Option Two that removes the term "offense of conviction" from §2D1.1(a). This option would permit judges to apply the death or serious bodily injury offense levels without requiring prosecutors to charge offenses carrying mandatory-minimum penalties.[129] In cases where the statutory mandatory-minimum sentence is not applicable, applying these guidelines would provide a mechanism for holding defendants accountable for the death or serious bodily injury that resulted from their conduct. It also would provide sentencing judges with the flexibility to grant departures or variances and make individualized sentencing determinations that are not limited by mandatory-minimum sentences. The parties also would be free to argue for, or stipulate to, variances or departures from the applicable base offense level.

The Seventh Circuit's *Lawler* case provides an example of how Option Two could affect charging decisions. In *Lawler*, the defendant was a heroin trafficker who pleaded guilty to selling heroin to an individual who died from its use. Without accounting for the death, the defendant's guideline range was 15 to 21 months.[130] If the defendant had been charged with and convicted of a death-resulting offense, she would have faced a 20-year mandatory-minimum sentence. But under Option Two, although the defendant's base offense level would be 38, the sentencing judge would have the discretion to adjust the sentence based upon individualized sentencing factors, likely resulting in a sentence below the otherwise-applicable 20-year mandatory minimum but higher than the 15 to 21 months that would be applicable if the death were not accounted for at all. The parties also would have the flexibility to negotiate a plea agreement under Fed. R. Crim. P. 11(c)(1)(B) or (C) that is lower than the otherwise-applicable mandatory-

[128] This will have an effect in at least some circuits. For example, in the Sixth Circuit *Johnson* interpreted "prior similar offense" (the prior guideline language) to be synonymous with "felony drug offense" (the language in 21 U.S.C. § 841(b)(1)(C) that has now been added to §§ 2D1.1(a)(1)(B) and 2D1.1(a)(3)) and has held that 21 U.S.C. § 851 notices are not required to trigger the increased recidivism penalty. *United States v. Johnson*, 706 F.3d 728, 731 (6th Cir 2013). Thus, under current Sixth Circuit precedent, courts would likely continue to apply the guidelines recidivism provisions even without the filing of a § 851 notice. The adoption of Option One would necessarily change that practice and result in lower guidelines sentences for recidivists if the § 851 enhancement is not filed.
[129] Option Two would apply the same base offense levels to death and serious bodily injury cases regardless of whether the death or serious bodily injury was charged and proved beyond a reasonable doubt or proven by a preponderance of evidence at sentencing. The Department's proposal would have retained the higher base offense levels of §2D1.1(a)(1)-(4) for those cases where the death or serious bodily injury was charged and proved but provided for a lower base offense level for cases where the death or serious bodily injury was proved by a preponderance of evidence during a sentencing proceeding.
[130] *Lawler*, 818 F.3d at 282.

minimum sentence. Should the Commission adopt this portion of Option Two, the additional flexibility provided by this option is likely to be beneficial to defendants, attorneys, and judges and may limit the circumstances under which the Department pursues mandatory-minimum sentences in these cases.

Our concerns about the effect of the recidivism provisions in Option One also apply to Option Two, although the concerns are somewhat diminished. Even absent a death-resulting conviction, filing the § 851 notice will increase any applicable mandatory-minimum sentence, thus curtailing judicial discretion and likely resulting in longer sentences.

f. *Definition of "Sex Offense" in the New §4C1.1*

i. *Summary*

We support the Commission's proposed Option Two to correct the definition of "sex offense" in the newly-enacted §4C1.1(b)(2), to include all victims of sex offenses, not just minor victims. We view this change as necessary to effectuate the Commission's intent to exclude from eligibility for the two-level reduction under §4C1.1 defendants who perpetrate sex offenses. This change also addresses the common misconception that most sexual assaults involve violence or threats of violence. We further note that this change is necessary to make the definition of "sex offense" in §4C1.1(b)(2) consistent with the existing definition of "serious bodily injury" in Note M to §1B1.1.

The newly-promulgated §4C1.1 reduces by two offense levels the guideline range for defendants with zero criminal history points who satisfy all ten exclusionary criteria. The Commission noted in their "Reasons for Amendment" that the exclusionary criteria are meant to "appropriately exclude[]" certain defendants from receiving the reduction "in light of the seriousness of the instant offense of conviction or the existence of aggravating factors in the instant offense."[131] Despite specifically citing "where the instant offense of conviction was a 'sex offense'" as one of the examples for the exclusionary criteria in the "Reasons for Amendment,"[132] the new §4C1.1(b)(2) narrowly defines "sex offense" to exclude only defendants who victimize minors. This leaves substantial gaps, including offenses committed against adult victims that do not otherwise fit under other exclusions, like the use of violence or threats of violence. It fails to exclude defendants, such as federal law enforcement, corrections officers, and human traffickers, who do not need to employ violence or threats to gain their victims' submission. These defendants target vulnerable victims and exploit their authority over them. But because other exclusions do not cover such conduct, these defendants are currently still eligible for the reduction. Option Two thus aligns the definition with the Commission's actions last year raising the offense level for sexual abuse of a ward.[133] Moreover, the current definition fails to account for sexual assault involving groping, fondling, and touching.

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[131] U.S. SENT'G COMM'N, *Adopted Amendments*, 81 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.
[132] *Id.* at 82.
[133] U.S. SENT'G COMM'N, *Adopted Amendments*, 32 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf

We also note that Option Two resolves an embedded ambiguity. Under §4C1.1(a)(4), the Commission excluded offenses that result in "serious bodily injury" as defined by the commentary to §1B1.1. That commentary defines "serious bodily injury" to include violations of 18 U.S.C. § 2241 (Aggravated Sexual Abuse) and 18 U.S.C. § 2242 (Sexual Abuse).[134] Even though §1B1.1's definition of "serious bodily injury" arguably excludes defendants who violate §§ 2241 and 2242 from receiving the two-level reduction under §4C1.1 – whether their victims are adults or minors – this provision is in the commentary to §1B1.1, not the substantive text. Against the backdrop of the evolving case law questioning the validity of guideline commentary (*see* discussion of loss above), it is unclear whether §4C1.1(b)(2)'s substantive text or §1B1.1's commentary would control when the offense involves an adult victim.[135]

ii. *Option Two's More Appropriate Definition Reflects the Realities of Sexual Assault*

By deleting the phrase "perpetrated against a minor," Option Two would expand the definition to include all victims of the sex offenses currently listed in §4C1.1(b)(2) rather than just minor victims. Doing so recognizes that sexual assault of adult victims perpetrated without the use or threats of violence is serious and warrants exclusion. In addition, Option Two clarifies that violations of 18 U.S.C. §§ 2241 and 2242 – even those against adult victims – are excluded from receiving the reduction, and thus the Department supports its adoption.

Violent sexual assault is abhorrent and appropriately subject to a higher total offense level.[136] But just like the falsity that most sexual assaults are committed by strangers, so too is the falsity that most sexual assaults involve violence or threats of violence or that defendants are first-time offenders.[137] The starkest examples include law enforcement officers, human traffickers, and defendants who target vulnerable victims unable to fight back. Officers who target those in their custody do so by weaponizing their authority to obtain their victims' submission. The Commission recognized that last cycle by raising penalties for defendants convicted of 18 U.S.C. § 2243(b) (Sexual Abuse of a Ward) and § 2243(c) (Sexual Abuse of an Individual in Federal Custody).[138] Those defendants are typically federal law enforcement and corrections officers who often have zero criminal history points but have sexually assaulted

[134] Serious bodily injury "is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." Commentary to §1B1.1 (Application Instructions).

[135] Even then, most sexual assaults do not result in "serious bodily injury" as defined in Chapter 109A by 18 U.S.C. §2246(4). In chapter 109A, "'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2246(4). As a result, §1B.1's differing and consequential definition of "serious bodily injury" is likely to be inadvertently overlooked.

[136] *See, e.g.,* §2A3.1(b)(1) ("If the offense involved conduct described in 18 U.S.C. § 2241(a) . . .increase by 4 levels.").

[137] Congress enacted Federal Rules of Evidence 413 (Similar Crimes in Sexual-Assault Cases) and 414 (Similar Crimes in Child Molestation Cases) with the understanding defendants commit sexual assaults multiple times and often their propensity to do so is the only way to corroborate the victim and hold offenders accountable.

[138] U.S. SENT'G COMM'N, *Adopted Amendments*, 32-34 (2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf

multiple victims.[139] Yet under the current §4C1.1, these defendants will almost always qualify for a two-level reduction, undermining the Commission's own amendment.

Similarly, sex traffickers who violate 18 U.S.C. § 1591 often do not employ violence. Their conduct is analogous to defendants who sexually abuse those in their custody. A trafficker (often repeatedly) sexually exploits emotional, mental, and physical control over an indentured victim in an inherently coercive setting. Although traffickers may use violence, often they do not.[140] Sometimes they employ "psychological harm" or "abuse or threatened abuse of law or the legal process," by, for example, withholding immigration documents to gain submission.[141] Other times they exploit drug addiction.[142]

As the various means set forth in the different provisions of 18 U.S.C. §§ 2241 and 2242 and their corollaries in § 2244 illustrate, defendants do not need to use violence to sexually assault victims who are disabled; who are asleep or unconscious;[143] who are voluntarily or involuntarily intoxicated; who do not consent or were coerced under threats of abhorrent but non-violent actions, such as of deportation, or threats of homelessness, job loss, or loss of their children. Defendants may isolate their victims, sometimes taking them to secluded places (or in the case of violations of Chapter 117 offenses, across state lines) and terrify them into submission, all without the use of violence or threats of violence. This often leads to a victim "freezing" during sexual assault where a defendant necessarily would not need to employ

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[139] *See, e.g. United States v. James Highhouse,* (N.D. Cal., August 31, 2022) (BOP chaplain repeatedly sexually assaulted the same victim for nine months; the investigation revealed that he sexually assaulted another inmate and engaged in sexually explicit conduct with several more); *United States v. Hosea Lee,* (E.D. Ky, August 1, 2022) (BOP corrections officer abused four victims while he also served as a drug treatment specialist); United States v. Ray Garcia, docket number (N.D. Cal., March 22, 2023) (BOP warden sexually assaulted three victims over the course of several years); *United States v. Andrew Jones*, (N.D. Cal., November 15, 2023) (BOP corrections officer sexually assaulted three victims during 2020 and 2021); *United States v. Robert Smith*, (N.D. Ala., January 11, 2024) (BOP corrections officer pleaded guilty and admitted to sexually assaulting two women in his custody).

[140] *See, e.g., United States v. Wysinger,* 64 F.4th 207, 213 (4th Cir.), cert. denied, 144 S. Ct. 175 (2023) (In §1591 prosecution, defendant, on appeal, claimed he "was not violent with the women, [but] the statute plainly condemns 'means of ... coercion' separate from and in addition to 'means of force [and] threats of force;' Nor is physical violence necessary to establish coercion under the statute.") (internal citations omitted).

[141] 18 U.S.C. §1591(e)(5); (e)(2)(C).

[142] *See, e.g. United States v. Mack*, 808 F.3d 1074, 1078, 1081–1082 (6th Cir. 2015) (upholding conviction for sex trafficking where defendant "recruit[ed] young female addicts" and exploited their addictions to coerce them "to prostitute themselves for his benefit"); *United States v. Fields*, 625 F. App'x. 949, 952 (11th Cir. 2015) (unpublished) (upholding sex trafficking conviction where defendant coerced his victims to engage in commercial sex acts by "causing them to experience withdrawal sickness if they did not engage in prostitution").

[143] In January 2022, in *United States v. Wagner*, No. 20-cr-3099, the defendant was sentenced in the District of Nebraska to 18 months in prison after pleading guilty to one count of 18 U.S.C. § 2244(a)(2), an offense punishable by up to three years in prison. Minute Entry, *United States v. Wagner*, No. 20-CR-3099 (D. Neb. Jan. 6, 2022), ECF No. 65. While on a commercial flight, the defendant, a 35-year-old male, rubbed the inner thigh of his sleeping seatmate, an 18-year-old female, who awoke to find him touching her for his own sexual gratification. She escaped to the bathroom but because it was a full flight, she was forced to return to her seat, where the defendant began masturbating while staring at the victim. The defendant's total offense level was 13, correlating to 12-18 months in prison. Prior to sentencing, the Department filed a memorandum outlining not only that the victim first awakened in a groggy state to see what she thought was the defendant's penis on her leg, but that there had been multiple prior instances of reported sexual misconduct where the defendant was caught masturbating toward women in public places. Yet because he had zero criminal history points, if the defendant was sentenced today, he would qualify for a two-level reduction under §4C1.1 and his guidelines range would be 6-12 months.

violence.[144] "Freezing" or "tonic immobility" is a common biological response to extreme fear, uncontrollable by a victim, that temporarily induces paralysis and muscle rigidity in response to real or perceived danger that sexual assault victims often describe, and is often accompanied by victims blaming themselves for their inability to fight back.[145]

Moreover, the restrictive definition of "sex offense" in §4C1.1 inadvertently infuses the provision with implicit gender bias because the resulting sentences will disproportionately affect women who are most often the victims of sexual assault. This is clear when juxtaposed against physical assault. If an offender punches his seatmate on an airplane in violation of 18 U.S.C. § 113, his offense is excluded under §4C1.1 because he used violence to commit the offense. If he fondles his seatmate's breasts or grabs her genital area, his offense is not excluded.

We ask the Commission to consider the egregious and predatory nature of sexual assault, whether it is committed via a knife to the throat, a drug in a drink, or under threat of being homeless on the street. Ruinous to a victim's life, its seriousness cannot be overstated on the continuum of federal crimes that one human can commit against another. It should therefore be subject to exclusion from §4C1.1's reduction.

VII. Technical

a. *Safety Valve and the Adjustment for Certain Zero-Point Offenders*

The Department agrees with the Commission's proposal to amend the two-level Adjustment for Certain Zero-Point Offenders in §4C1.1. Under §4C1.1, a defendant is eligible for the two-level adjustment only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) applies. Subsection (a)(10) requires that "the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848."[146] Subsection (a)(10) mirrors similar exclusionary language in Section 3553(f)(4), which provides that a defendant is eligible for relief under the safety valve only if "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act." 18 U.S.C. § 3553(f)(4). Courts have generally interpreted Section 3553(f)(4) as excluding a defendant from safety-valve eligibility if the defendant had *either* an aggravating role *or* was

[144] In *United States v. Sanchez-Azpeitia,* the defendant, an employee at Sequoia National Park, sexually assaulted the victim in a park cabin. Despite the victim saying "no," the defendant groped the victim's breasts, legs, and vaginal area, and then put his mouth on her nipple and then briefly on her vagina, telling her, "I just want a taste." During the assault, the victim explained that she "froze." The defendant pleaded guilty to one count of violating 18 U.S.C. § 2244(b), which carries a maximum sentence of two years in prison. Minute Entry, *United States v. Sanchez-Azpeitia*, No. 23-CR-161 (E.D. Cal. Oct. 23, 2023), ECF No. 29. The defendant is pending sentencing, and because he has zero criminal history points, he potentially meets the criteria for a two-level reduction under §4C1.1. Instead of a total offense level of 12 (10-16 months) in Zone C, it would be a level 10 (6-12 months) in Zone B, a forty percent decrease at the bottom of the guidelines range.

[145] Jen Percy, *What People Misunderstand About Rape*, N.Y.Times, Aug. 22, 2023, available at https://www.nytimes.com/2023/08/22/magazine/immobility-rape-trauma-freeze.html.

[146] USSG §4C1.1(a)(10).

engaged in a continuing criminal enterprise.[147] That interpretation makes sense both grammatically and practically. As the Commission recently noted, Section 3553(f)(4) has exclusionary language beginning each phrase (*i.e.*, "the defendant was not . . ." and ". . . was not engaged in"), implying that a defendant is ineligible if he satisfies either of the exclusionary criteria. Interpreting §4C1.1(a)(10) to exclude only those defendants who *both* had an aggravating role adjustment *and* were engaged in a continuing criminal enterprise is self-defeating. This is likely a null set. That is because Application Note 1 of §2D1.5 and Application Note 6 of §5C1.2 instruct that the aggravating role adjustment under §3B1.1 is unavailable to defendants engaged in a continuing criminal enterprise. This means that, in reality, a defendant may receive an aggravating role adjustment, or a continuing criminal enterprise application, but not both.

We agree with the Commission that §4C1.1 is best read to make the defendant "ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision." We also agree that, to avoid confusion caused by the word "and" in the current Guideline, it would be helpful to divide subsection (a)(10) into two separate provisions. This would reduce any possible litigation over the exclusionary criteria in subsection (a)(10). This amendment would also ensure that current subsection (a)(10) appropriately excludes from eligibility for the adjustments defendants who engaged in more serious conduct, either because they played an aggravating role in the offense, such as by managing or organizing the offense, or because they participated in a continuing criminal enterprise.

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[147] *See, e.g.*, *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020); *United States v. Bazel*, 80 F.3d 1140, 1143 (6th Cir. 1996).

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW
Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
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