U.S. Department of Justice

Criminal Division

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

February 27, 2023

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:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding Firearms Offenses, First Step Act—Drug Offenses, Circuit Conflicts, Crime Legislation, Career Offender, Criminal History, Alternatives to Incarceration Programs, Fake Pills, and Miscellaneous and Technical Matters. We submitted a letter on the remaining matters on February 15, 2023. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 7 and 8, 2023.

We look forward to the hearing and to working with you and the other commissioners during the remainder of the amendment year on all of the published amendment proposals.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts,* 88 Fed. Reg. 7180 (Feb. 2, 2023).

U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT APPROVED BY THE U.S. SENTENCING COMMISSION ON JANUARY 12, 2023, AND PUBLISHED IN THE FEDERAL REGISTER ON FEBRUARY 2, 2023.

1. Firearms Offenses

The Department appreciates and supports the Sentencing Commission's efforts to implement the Bipartisan Safer Communities Act ("BSCA"). During the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Department has instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and the Department also continues to urge the Commission to consider broader reforms to Section 2K2.1.

The Commission has proposed two options to implement the BSCA. Both options include a general one- or two-level increase to the offense level for straw purchasers and traffickers. Option 1 increases offense levels by adding an enhancement for trafficking and straw purchasing, while Option 2 increases base offense levels. Option 1 increases offense levels for all straw-purchasing-related offenses, including those that predate the BSCA, but does not include any increase for prohibited persons. Option 2, by contrast, includes an increase for prohibited persons and for some of the straw-purchasing-related offenses that predate the BSCA, but does not include increases for all straw-purchasing-related offenses. Both Options 1 and 2 also include a mitigating-conduct reduction to implement the BSCA.

The Department recommends that the Commission adopt Option 2 with two significant changes: the Commission should (1) include all straw-purchasing-related offenses in the offense-level increase; and (2) increase the base offense levels by three or four levels, not one or two levels. The Department also supports the Commission's mitigating-conduct proposal, but recommends that it be phrased in the conjunctive, requiring that a defendant meet all listed conditions (and not just any one listed condition).

A. Part A—The Bipartisan Safer Communities Act

1. The Commission Should Adopt Option 2 Because Prohibited Persons Should Receive the Same Increase as Straw Purchasers and Traffickers and Because it Provides More Clarity than Option 1

The Department believes that Option 2 is preferable to Option 1 for two primary reasons. First, increasing the penalties for straw purchasers and traffickers, but not for the prohibited persons who benefit from such straw purchasing and trafficking, is inconsistent with the core principles of the Sentencing Reform Act. The BSCA made "it a serious crime to buy a gun for someone else when you know that person will use the gun to commit a felony or that they are not allowed to buy a gun themselves. . . . The consequences of this simple change will be real. It will keep deadly weapons out of the hands of people who would use them to hurt others, and it will level serious consequences for those who break the law." 168 Cong. Rec. S3105–06 (statement of Senator Heinrich in support of the BSCA). In other words, when enacting the BSCA,

Congress was concerned about straw purchasing and trafficking precisely because these crimes are used to provide guns to prohibited persons. Thus, Congress did not stop at creating new straw-purchaser and trafficking offenses; Congress also increased the statutory maximum penalties for gun possession by prohibited persons from 10 to 15 years in prison.

Moreover, before the BSCA, the Sentencing Guidelines appropriately treated straw purchasers and prohibited persons as equally culpable; under current §2K2.1, both types of offenders are subject to a base offense level of 14. The current guideline thus recognizes that prohibited persons are at least as culpable as individuals who purchase weapons on their behalf. However, under Option 1, a felon who asks a confederate to purchase a gun on his behalf would face a lower Guidelines range than the confederate who purchased the gun. Congress cannot have intended such anomalous results when it instructed the Sentencing Commission to increase the applicable Guidelines range for straw purchasing offenses while at the same time raising the maximum penalty for possession of weapons by prohibited persons.

Option 2 is also preferable to Option 1 because it provides more clarity to all parties including defendants and their counsel.[2] As the Department has previously noted, §2K2.1 is a complicated Guidelines provision; base offense levels are determined by not just the type of offense, but also the characteristics of the defendant and of the offense. Because this complicated structure often leads to mistakes in the Guidelines' application, the Department proposed specific language to simplify the guideline. Option 1—which proposes an enhancement rather than an increase to the base offense level—would exacerbate the challenges resulting from §2K2.1's structure. The Department continues to urge the Commission to simplify the guideline but, failing that, supports Option 2 to avoid making the guideline more complex.

If the Commission does adopt Option 1, the Department recommends amending the enhancement for straw purchasing and trafficking so that it applies not just to those who purchase guns for, or transfer to guns to, prohibited persons, but also to the prohibited persons who receive any weapons through such a straw-purchasing or trafficking arrangement. This would ensure that the individuals on both sides of the arrangement face the same offense level. The Department thus recommends the following edits to Option 1's enhancement:

(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by [1][2] levels;

(B)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any

[2] Option 2, entitled "Increase Penalties for Offenses with Statutory Maximum of 15 years or more[,]" provides, at proposed §2K2.1(a)(7), for an offense level of 15 or 16 for all Section 922(g) offenses. Section 922(g), in turn, prohibits possession of weapons by certain persons, commonly referred to as "prohibited persons." But Option 2 also provides, at proposed §2K2.1(a)(8), for an offense level of 14 "if the defendant . . . was a prohibited person at the time the defendant committed the instant offense." The Department presumes that this reference to "prohibited persons" in §2K2.1(a)(8) is intended to apply only to individuals who cannot legally possess a weapon, but were not convicted under Section 922(g)—such as a prohibited person who is convicted under Section 922(a)(6) for lying on a gun application, but never possesses the weapon in question. We recommend making clear that proposed Section 2K2.1(a)(8) applies to "prohibited persons who are not convicted under Section 922(g)."

ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [1][2] levels; or (C)(i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of the conduct described in clause (i), increase by [5][6] levels.

2. Retaining the Existing Base Offense Level for Violations of Section 922(a)(6) and 924(a)(1)(A) is Inconsistent with Prior Commission Treatment of the Provisions and the BSCA

Before the BSCA, several statutory provisions were used to prosecute straw purchasers, including Section 922(d), which prohibits transfers to prohibited persons, and Sections 922(a)(6) and 924(a)(1)(A), which prohibit making false statements in connection with a firearm purchase. In 2011, the Commission amended §2K2.1 to provide the same base offense level for Section 922(d) and offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person." *See* Amendment 753 (effective Nov. 1, 2011). As the Commission explained at the time, "[t]he amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under a third statute used to prosecute straw purchasers, 18 U.S.C. § 922(d), when the conduct is similar." *Id.*

Section 922(d) and the new straw-purchasing and trafficking offenses carry a 15-year maximum term of imprisonment, while Sections 922(a)(6) and 924(a)(1)(A) carry only a 10-year and 5-year maximum term of imprisonment, respectively. But, under the current Guidelines, the increased base offense level does not apply to all offenses under Sections 922(a)(6) and 924(a)(1)(A), but only to those committed with the requisite heightened intent. Moreover, in the BSCA, Congress instructed the Commission to ensure increased penalties not only for the new straw-purchaser and trafficking offenses, but also "other offenses applicable to the straw purchases and trafficking of firearms"—a category that, as the Commission itself has repeatedly recognized, includes offenses under Sections 922(a)(6) and 924(a)(1)(A) when committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person." Although the BSCA created new straw-purchasing and trafficking offenses, prosecutors are still likely to use Sections 922(a)(6) and 924(a)(1)(A) to prosecute straw purchasing offenses. We thus recommend that the Commission adopt Option 2 but extend the base offense level increase to Section 922(a)(6) and 924(a)(1)(A) offenses

committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person."

3. The Department Does Not Believe that a 1 to 2 Level Increase is Sufficient to Comply with Congress's Directive in the BSCA

The Department believes that a greater increase of four levels is warranted for the amendment "to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities." See Pub. L. 117–159, §12004(a)(5) (2022). Because straw purchasers, by definition, have not been convicted of a felony, they generally fall within Criminal History Category I, and, with a two-point reduction for acceptance of responsibility and no other enhancements, would face a Guidelines range of 10 to 16 months based on a base offense level of 14. Because that range is in Zone C, the sentencing court can substitute half of the recommended prison time for house arrest. USSG §5C1.1(d)(2). Thus, a straw purchaser can face as little as 5 months of imprisonment under the current Guidelines. The Commission's proposal to raise the base offense levels by only one or two levels would lead to the same straw purchaser facing as little as six months in prison, after reductions for acceptance of responsibility.[3] A single additional month of imprisonment is not consistent with the congressional directive to ensure "that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities."

A four-level increase to the base offense level would be most consistent with Congress's directive. Both a three- and four-level increase would put the same straw purchaser at a total offense level within Zone D, which would ensure that they serve a sufficient amount of time in prison rather than on house arrest.

4. The Mitigating Reduction Should be Phrased in the Conjunctive

The BSCA directed the Sentencing Commission to consider "an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that . . . reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors." In both Options 1 and 2, the Commission has proposed a one- or two-level reduction where the offense involves a straw purchaser and "(i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity]." The Department supports this provision but recommends that the Commission adopt the conjunctive ("and") formulation.[4]

[3] For many defendants, a two-level increase in the base offense level would produce the same Guidelines range as a one-level increase; at an offense level 16, the defendant would be eligible for a three-point acceptance-of-responsibility reduction, instead of the two-point reduction available at an offense level 15.

[4] If the Commission agrees that the base offense level should be increased for all straw-purchasers, including those convicted under Section 922(a)(6) or 924(a)(1), where the offense was committed "with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person," those offenses should be included in the reduction for certain straw-purchasers.

First, if the Commission adopts the disjunctive approach, it is likely that the mitigating-role reduction will apply to the vast majority of straw-purchaser cases. Many people receive little to no monetary compensation for serving as straw purchasers, and most straw purchasers have either limited knowledge of the crimes in which the gun will be used or the criminal enterprise that is using the gun. In addition, because the proposed reduction is equivalent to the Commission's proposed increase for straw purchasers, the vast majority of straw purchasers would face the same offense level under the amended guideline that they face now, even though Congress expressly intended that straw purchasers be "subject to increased penalties in comparison to those currently provided by the guidelines."

Moreover, the disjunctive formulation leads to absurd results. A defendant would be eligible for a reduction, for example, if he provided a gun to a criminal gang, with full knowledge of the scope of the criminal enterprise or that the weapon would be used in connection with criminal activity, and even if he transferred the gun to obtain status in the organization, so long as he received only minimal financial compensation. Likewise, a defendant who was paid an exorbitant sum of money to provide a gun, knowing that it would be used in a felony, could argue that he is eligible for a reduction because the crime was "motivated by a . . . familial relationship," as evidenced by the fact that he used the money to help a family member. And a firearms trafficker who sells 10 semi-automatic firearms to a prohibited person for a substantial profit would be eligible for a reduction, so long as he was not aware that the gun would be used in a crime or just did not have knowledge of the full scope to the criminal enterprise. The Commission should adopt the conjunctive formulation to ensure that the proposed reduction is limited to less culpable defendants, as Congress intended.

B. Part B—Firearms not Marked with Serial Numbers ("Ghost Guns")

The Department supports the Commission's proposal to apply the Guideline's four-level enhancement for firearms with altered or obliterated serial numbers to "ghost guns"—guns that are missing a serial number—but recommends a rebuttable presumption for the *mens rea* requirement.

1. The Department Supports a Four-Level Enhancement for Ghost Guns

Section 2K2.1 currently provides a four-level enhancement where a firearm involved in the offense had an altered or obliterated serial number. As the Commission has previously explained, this enhancement "reflects both the increased likelihood that the firearm will be used in the commission of a crime and the difficulty in tracing firearms with altered or obliterated serial numbers." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?* (2022) at 12. Ghost guns are even more difficult to trace than guns with altered or obliterated serial numbers, because ATF firearm examiners can sometimes still detect altered or obliterated serial numbers using chemicals and microscopic analysis. The same is not true for ghost guns.

Ghost guns, moreover, present a significant and growing problem. As the White House recently indicated, "[l]ast year alone, there were approximately 20,000 suspected ghost guns

reported to ATF as having been recovered by law enforcement in criminal investigations—a ten-fold increase from 2016." White House Fact Sheet (2022).[5]

ATF recently issued a regulation—the "frame and receiver" rule—that was partially aimed at reducing the proliferation of ghost guns. The Department supports the Commission's efforts to deter the possession and use of these dangerous untraceable weapons by adding ghost guns to the four-level enhancement for guns with altered or obliterated serial numbers.

2. The Department Supports Adding a Rebuttable Presumption Mens Rea Requirement to §2K2.1(b)(4)

The Department understands the reasoning behind the proposal to add a *mens rea* requirement to the enhancement for untraceable guns, particularly for stolen guns. Although the fact that a gun has a missing, altered, or obliterated serial number is generally readily apparent from the gun itself, it may not be as readily apparent that a gun is stolen. And it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen, or that it had an accurate serial number. The defendant, however, is often in sole possession of evidence establishing his good faith belief that the gun in question was not stolen, or did not have an altered, obliterated, or missing serial number. The Department thus suggests that the Commission create a rebuttable presumption with regard to the *mens rea* element. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he or she lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. The Department would thus recommend the following language:

> Subsection (b)(4) applies unless the defendant establishes by a preponderance of the evidence that he or she did not know, and had no reason to believe, that the firearm was stolen, missing a serial number, or had an altered or obliterated serial number.

C. <u>Part C—Further Revisions</u>

1. Burglary from Federal Firearms Licensees

The Department supports an enhancement for offenses involving the burglary or robbery of firearms from Federal Firearms Licensees (FFLs). Section 922(u), which prohibits the unlawful taking of any firearm from an FFL, covers offenses of varying severity, ranging from simple theft to burglary to robbery. But, unless the defendant is a prohibited person, §2K2.1(a)(7) provides the same base offense level of 12 for a Section 922(u) conviction, regardless of the severity of the offense. Moreover, although §2K2.1 provides for a two-level increase for offenses that involve a stolen gun, that enhancement does not apply to any offense subject to §2K2.1(a)(7). *See* USSG §2K2.1 cmt n.8(A).

Burglaries and robberies—especially of firearms from an FFL—are particularly dangerous crimes. FFL burglaries and robberies often involve the theft of multiple weapons that

[5] Available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/.

are destined for the illegal market and for use in later crimes.[6] They thus endanger not only the licensees who are robbed or burglarized, bystanders to the crimes, and law enforcement personnel who respond, but also victims of all subsequent crimes involving the stolen firearms. Burglaries and robberies of FFLs are also a chronic problem. In 2020, more than 6,000 firearms were stolen in more than 500 burglaries and robberies of FFLs.[7] Given the prevalence and significance of the problem and the potential harm caused by these thefts, a six-level enhancement is warranted.

2. Predicate Convictions for Misdemeanor Crimes of Domestic Violence

The Department supports treating prior convictions for a misdemeanor crime of domestic violence as equivalent in seriousness to other prior violent crimes.

As the Commission has observed, "[a] majority (60.6%) of firearms offenders had at least one prior conviction for a violent offense, which is more than twice the rate of violent prior convictions for other offenders." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like* at 19. In determining how many firearms offenders had a violent prior conviction, the Commission identified offenses "that are generally accepted as having some level of violence," including aggravated and simple assault. *Id.* at 37 n.40. Indeed, the most common violent predicate was assault—almost half (49.4%) of all §2K2.1 offenders had a prior assault conviction. But even though §2K2.1 increases the base offense level for defendants with prior violent felony convictions, the "crime of violence" enhancement does not apply to many assault convictions. Most notably, misdemeanor assault of a family member is not a "crime of violence," even though Section 922(g)(9) prohibits gun possession by individuals with prior misdemeanor crimes of domestic violence.

Congress enacted Section 922(g)(9)—which treats misdemeanor crimes of domestic violence as equivalent in seriousness to felony offenses—precisely because "existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Senator Lautenberg)). As Senator Lautenberg explained, "most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors." 142 Cong. Rec. S10377-78; *see also id.* at S10378 ("In all too many cases unfortunately, if you beat up or batter your neighbor's wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor.") (statement of Senator Wellstone).

Under the current Guidelines, a defendant faces a significantly lower sentence if he possesses a gun after "brutaliz[ing his] own wife or [his] own child" than he does after "beat[ing]

[6] As but one example, on August 3, 2020, Shoot Point Blank FFL, in Memphis, TN, was burglarized and 32 firearms were stolen. *See* https://www.justice.gov/usao-wdtn/pr/three-men-charged-burglarizing-gun-range-and-theft-firearms.

[7] See https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseefftheftlossreportjan2020-dec2020508pdf/download.

up or batter[ing his] neighbor's wife." The latter crime is more likely to result in a felony crime-of-violence conviction; a defendant who possesses a gun after such a crime would thus have a base offense level of 20. With a 3-level acceptance-of-responsibility reduction, and a Criminal History Category of I, the defendant would face a Guidelines range of at least 24-30 months. But the former crime—a domestic assault—is much more likely to be prosecuted as a misdemeanor. In that case, a defendant who subsequently possess a gun would face a base offense level of 14, and with a 2-level reduction for acceptance of responsibility, would face a Guidelines range of only 10-16 months in prison. Because that range is in Zone C, the Guidelines provide that the sentencing court can substitute half of the recommended prison time for house arrest. A Guidelines sentence requiring that the defendant serve only five months in prison does not provide adequate punishment or deterrence to those who abuse their family members and later illegally possess a gun.

Indeed, even though domestic violence crimes are frequently charged as misdemeanors, they are among the most dangerous of violent crimes, and are even more dangerous when a gun is present. According to CDC statistics, one of the leading causes of death of women aged 44 or younger is homicide, with intimate partner violence accounting for about half of those murders.[8] Moreover, research published in the American Journal of Public Health found that the presence of a gun in domestic violence situations significantly increases the risk of homicide.[9] Abusers with access to a gun are five times more likely to murder a domestic relation.[10] As Senator Lautenberg said nearly 30 years ago, "all too often, the only difference between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. S10377. Finally, the majority of intimate partner homicides involve prior physical abuse.[11] Indeed, more than three quarters of women who experience domestic violence were previously victimized by the same offender.[12] And there is evidence that a majority of individuals who commit mass shootings have a history of domestic violence. According to one peer-reviewed study, 59.1% of mass shootings between 2014 and 2019 were domestic violence-related, and in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of domestic violence. See Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019* (2021).[13] Despite all this, defendants with multiple convictions for misdemeanor crimes of domestic violence currently face the same offense level, under the Guidelines, as a defendant with only a single non-violent felony offense.

In the BSCA, Congress closed the so-called "boyfriend loophole" in the misdemeanor crime of domestic violence definition.[14] In doing so, and in reauthorizing the Violence Against Women Act in 2022, Congress demonstrated its ongoing commitment to protecting victims of domestic abuse from gun violence. The Commission should likewise seek to protect such victims from gun violence, by appropriately punishing those who possess weapons after domestic abuse

[8] https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.
[9] https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections.
[10] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.
[11] *Id.*
[12] https://nicic.gov/sites/default/files/031384_0.pdf.
[13] Available at https://injepijournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0.
[14] Sec. 12005, "Misdemeanor Crime of Domestic Violence," Bipartisan Safer Communities Act, Pl 117-159, June 25, 2022, 136 Stat 1313 (defining dating relationship).

convictions. Domestic abusers should face more serious consequences under the Guidelines than individuals with convictions only for non-violent or property offenses and should face consequences that are on par with other defendants with violent criminal histories. Section 922 treats misdemeanor crimes of domestic violence as seriously as it treats other violent crimes. The Guidelines should do the same, by providing that any offense that meets the statutory definition of "misdemeanor crime of domestic violence" results in the same enhancement, for the purposes of Section 2K2.1, as any other "crime of violence."

3. Predicate Convictions for Firearm Offenses not Constituting Crimes of Violence

The Department supports a recidivism enhancement for prior firearm convictions that are not otherwise considered crimes of violence. As the Commission itself has observed, recidivism of firearm offenders is a significant problem: "Firearms offenders recidivated at a higher rate than non-firearms offenders. Over two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%)." U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders* (2019), at 4. And "nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%)." U.S. Sentencing Commission, *What Do Federal Firearms Offenses Really Look Like?*, at 20. Firearms offenders are not only more likely to reoffend than other offenders, but they are also more likely to commit a future violent crime. As the Commission has previously observed, as compared to non-firearms offenders, "a greater percentage of firearms offenders were rearrested for a violent crime as the most serious new offense." U.S. Sentencing Commission, *Recidivism Among Federal Firearm Offenders*, at 19.

In short, the Commission's own findings demonstrate that firearms offenders—particularly those with prior firearms convictions—are more dangerous than other offenders. But because the Guidelines do not include felon-in-possession offenses (or other offenses involving a firearm) as "crimes of violence," a defendant with multiple firearm convictions may face the same offense level as a defendant with a single non-violent felony, such as a fraud conviction. Instead, the firearms guidelines should reflect the Commission's findings on the danger of repeat firearms offenders. While it may not be appropriate to treat prior firearms offenses as equivalent in seriousness to prior violent offenses, a 2-level enhancement for a prior firearms offense will help ensure that §2K2.1 more appropriately punishes and deters repeat firearm offenders.

4. Definition of Firearm in Application Note 1

The Department recommends amending the definition of "firearms" in Application Note 1 of §2K2.1 to include devices defined as "firearms" under both 26 U.S.C. § 5845(a) and 18 U.S.C. § 921.

As currently drafted, §2K2.1 contains inconsistent definitions of the term "firearm." Currently, §2K2.1(a)(1), (3), and (5) all provide for certain offense levels when an offense involved "a firearm described in 26 U.S.C. § 5845(a)." Application Note 1, meanwhile, defines the term "firearm" to have "the meaning given that term in 18 U.S.C. § 921(a)(3)." Section 921(a)(3), however, does not include all firearms "described in 26 U.S.C. § 5845(a)." In particular, Section 5845(a), but not Section 921(a), includes within its definition Machinegun

Conversion Devices—commonly referred to as "switches" or "Glock switches"—which are designed to convert semiautomatic firearms into machineguns. These "Glock switches" present an extraordinary threat to public safety, as they can be readily made using a 3D printer and will quickly turn a gun into a fully automatic weapon. Moreover, the Department has seen a sharp increase in the distribution of Glock switches, including cases involving the manufacture and distribution of numerous switches.[15]

Even though Glock switches are considered "firearms" under Section 5845(a), and even though they are one of the most dangerous "firearms" used by criminals, they do not trigger §2K2.1's enhancement for trafficking or number of firearms because of the incomplete definition of "firearm" in §2K2.1's application notes. The Department urges the Commission to amend the definition of "firearm" to include Glock switches and eliminate the inconsistency, as proposed below.

In addition, ATF recently amended the regulatory definition of "firearm" to provide that "[t]he term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such weapon is destroyed as described in the definition 'frame or receiver'." *See* 27 C.F.R. 478.11. As discussed above, this "frame and receiver" rule was designed to address the proliferation of ghost guns, which are often made from kits that consumers can readily assemble at home. Although such kits are now considered firearms under federal law, and although the guns made from such kits are particularly dangerous because they are untraceable, they do not trigger §2K2.1's enhancement for trafficking or number of firearms because of the incomplete definition of "firearm" in §2K2.1's application notes.

We thus recommend replacing the definition of "firearm" in Application Note 1 with the following definition:

> A "firearm" includes any device defined as a firearm in 18 U.S.C. § 921(a)(3), 26 U.S.C. § 5845(a), or 27 C.F.R. § 478.11.

5. Transfers to Minors

The Department supports a two-level increase for offenders who transfer firearms to minors. Although federal and state laws restrict the ability of minors to obtain and possess many types of firearms,[16] gun violence among youths is nonetheless increasing significantly. As the White House has observed, "[y]oung people are disproportionately likely to be involved in gun

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[15] *See, e.g.,,* https://www.atf.gov/news/pr/houston-area-residents-charged-unlawfully-possessing-full-auto-switches; https://www.atf.gov/news/pr/fort-worth-manufacturer-charged-glock-switch-case; https://www.atf.gov/news/pr/indictment-so-called-%E2%80%98glock-switches%E2%80%99-would-have-turned-pistols-machineguns.

[16] *See, e.g.*, 18 U.S.C. § 922(x)(1) (prohibiting the sale or transfer of a handgun or handgun ammunition to a juvenile); 18 U.S.C. § 922(x)(2) (prohibiting a juvenile from knowingly possessing a handgun or handgun ammunition); *see generally* https://www.kff.org/other/state-indicator/firearms-and-children-legislation/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D .

violence, either as perpetrators or victims." Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety.[17] In particular, in 2020, firearms were, for the first time, the leading cause of death among children.[18] And, according to the ATF, the agency recovered 9,677 firearms from juveniles in 2021 and 12,008 in 2022.

Moreover, illegal firearm possession by minors is particularly problematic because, as the Supreme Court has recognized, "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . These qualities often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation, alteration, and internal quotation marks omitted). Guns are simply more dangerous in the hands of minors.[19]

In the BSCA, Congress took action to curb youth violence, providing for an enhanced background check process for firearm purchases by individuals under the age of 21, and authorizing grants supporting mental health services for children. In so doing, Congress recognized the increased dangers associated with illegal gun possession by minors. The Commission should likewise act to curb the growing problem of youth gun violence by deterring offenders from transferring firearms connected to illegal activity to minors. The Department therefore supports a two-level increase for offenses that involve such transfers, taking care not to capture certain lawful activity by providing that the enhancement will not apply if the transfer is solely for a lawful sporting purpose or collection.

The Department thus suggests the following language:

> If the offense involved the defendant transferring a firearm to an individual under the age of 18 years, increase by 2 levels, unless the transfer was solely for lawful sporting purposes or collection.

2. <u>First Step Act—Drug Offenses</u>

The Commission requests comment on proposed amendments to §§5C1.2, 2D1.1, and 2D1.11 in connection with statutory amendments to the "safety valve" provision, 18 U.S.C. § 3553(f).

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[17] *Available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/.

[18] *See* https://www.nejm.org/doi/full/10.1056/NEJMc2201761.

[19] *See, e.g.*, https://www.justice.gov/usao-edtn/pr/knoxville-man-sentenced-10-months-federal-firearms-violation (firearm unlawfully transferred to juvenile and that firearm was later "recovered by law enforcement in connection with an officer-involved shooting of Thompson at Austin-East Magnet High School on April 12, 2021."); *United States v. Siri-Reynoso*, 17 Cr. 418 (S.D.N.Y.) (gang member provides gun to juvenile to shoot rival gang member resulting in the murder of a Bronx mother watching her kids on the playground); https://www.nytimes.com/2017/07/26/nyregion/after-yearlong-inquiry-2-are-charged-with-killing-bronx-mother.html (article about the killing).

A. Background

Under 18 U.S.C. § 3553(f), defendants convicted of specified drug offenses "may obtain 'safety valve' relief" if they satisfy certain requirements. *Dorsey v. United States*, 567 U.S. 260, 285 (2012). Such relief allows a district court to impose a sentence below the otherwise-applicable statutory minimum. 18 U.S.C. § 3553(f). Before 2018, safety-valve relief was available only if the court first found that "the defendant d[id] not have more than 1 criminal history point, as determined under the sentencing guidelines." 18 U.S.C. § 3553(f)(1) (2012 ed.). The statute set forth other eligibility requirements, all relating to the offense of conviction, in four additional paragraphs. *Id.* § 3553(f)(2)-(5).

Section 402 of the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, 132 Stat. 5221, amended Section 3553(f) in two ways. First, Section 3553(f) is now applicable to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, Section 3553(f)(1) now provides that a defendant is safety-valve eligible if "(1) the defendant does not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guideline." 18 U.S.C. § 3553(f)(1).

Since the First Step Act, four courts of appeals have agreed with the Department's position that a defendant is ineligible for the safety valve if he meets any one of the criminal-history factors listed in Section 3553(f)(1)'s subparagraphs.[20] The Ninth and the Eleventh Circuits, however, have adopted a contrary interpretation, holding that a defendant is eligible for safety-valve relief so long as he does not satisfy all three factors.[21] Under this approach, defendants remain eligible for the safety valve despite lengthy criminal histories, including defendants with over a dozen criminal convictions and over 30 criminal history points.[22] The conflict between the Fifth, Sixth, Seventh, and Eighth Circuits, on the one hand, and the Ninth and Eleventh Circuits, on the other hand, is entrenched. Thus, on January 12, 2023, the Department of Justice filed a brief advocating that the Supreme Court grant certiorari and resolve the issue. And today, the Supreme Court granted certiorari in that case.[23]

B. The Commission Proposal to Amend §5C1.2

The Department agrees with the Commission's proposal to amend §5C1.2 to reflect the current statutory language. Section 5C1.2 implements the safety-valve for the purposes of the Guidelines, and it should thus mirror the language of Section 3553(f). The Commission does not

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[20] *United States v. Pulsifer*, 39 F.4th 1018, 1019 (8th Cir. 2022), petition for cert. granted, No. 22-340 (Feb. 27, 2023); *United States v. Palomares*, 52 F.4th 640, 643-44 (5th Cir. 2022), petition for cert. pending, No. 22-6391 (filed Dec. 21, 2022); *United States v. Haynes*, 55 F.4th 1075, 1081 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022).

[21] *See United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), petition for reh'g denied, No. 19-50305, 2023 WL 501452 (9th Cir. Jan. 27, 2023); *United States v. Garcon*, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc).

[22] *See, e.g.*, *United States v. Jaime Paz*, 20-CR-2198 (S.D. Cal.) (defendant with 33 criminal history points deemed eligible for safety valve); *United States v. Inthavong*, 21-CR-1117 (S.D. Cal.) (defendant with 14 prior convictions and 23 criminal history points deemed eligible for the safety valve).

[23] *United States v. Pulsifer*, *supra* note 20 (https://www.supremecourt.gov/orders/courtorders/022723zor_6537.pdf).

have authority to either expand or contract the eligibility requirements under Section 3553(f), and courts must continue to follow the law of their circuit regarding safety-valve eligibility regardless of the language in §5C1.2. Although the disagreements among the circuits over the proper interpretation of Section 3553(f)(1) will lead to disparate application of mandatory terms of imprisonment, such disparities are inevitable until the Supreme Court resolves the issue, or Congress amends the statute.

The Department does not agree, however, with the Commission's proposal to revise the minimum offense level in §5C1.2(b). At present, §5C1.2(b) provides that "[i]n the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17." That provision, added in Amendment 624 (Nov. 1, 2001), implements Section 80001(b)(1)(B) of the Violent Crime Control and Law Enforcement Act of 1994, which directed the Commission to ensure that the range for a defendant who faces a mandatory minimum term of five years and meets the safety-valve criteria should not be less than 24 months. The Commission applied a minimum base offense level of 17 because an offender in Criminal History Category I at that offense level faces a range of 24 to 30 months.

The Commission's optional proposal would replace the level-17 floor with a statement that "the applicable guideline range shall not be less than 24 to 30 months of imprisonment." But that revision would not adequately account for a defendant with a more serious criminal history. By instead providing for a minimum base offense level, rather than a minimum Guidelines range, the current version of §5C1.2 appropriately recognizes that the Guidelines range for a safety-valve-eligible defendant should depend, at least in part, on the defendant's criminal history. A defendant who is safety-valve eligible because he has little or no criminal history should face a lower Guidelines range than a defendant who is safety-valve eligible despite an extensive criminal history, particularly given that the Guidelines already provide that "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." USSG §4A1.3(b)(1). To provide otherwise would not appropriately account for "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

C. Guidance on what Constitutes a "1-point," "2-point," or "3-point" offense, "as Determined Under the Sentencing Guidelines"

Circuit courts have reached different conclusions as what constitutes a "1-point," "2-point," or "3-point" offense under Section 3553(f)(1). *Compare Haynes*, 55 F.4th at 1080 ("[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means *all* the Guidelines, including §4A1.2(e)."") *with Garcon*, 54 F.4th at 1280-84 (11th Cir.) (en banc) (interpreting subsections 3553(f)(1)(B) and (C) to include offenses that do not contribute to the total criminal-history score). Criminal-history points are determined according to §§4A1.1 and 4A1.2, which—by the Guidelines' own directive—"must be read together." USSG §4A1.1 commentary. The Department believes that this reading of the statute is clear, and the Court in *Haynes* correctly

interpreted it. But in light of the Eleventh Circuit's decision in *Garcon*, the Department supports the Commission's proposal to align the Guidelines text more clearly with the Sixth Circuit's decision in *Haynes*.

D. §§2D1.1 and 2D1.11

The Department recommends that as to §§2D1.1 and 2D1.11, the Commission adopt Option 2, which provides for a two-level reduction in the base offense level for drug offenders only if the defendant does not have any of the criminal history factors listed in Section 3553(f)(1). Option 2 is consistent with the correct interpretation of Section 3553(f). The Department has successfully argued this position in four courts of appeals, *supra* n.20, and by adopting this interpretation in the Guidelines, the Commission would reduce sentencing disparities resulting from the extant conflict over that provision's interpretation. 28 U.S.C. § 911(b)(1)(B).

Moreover, the two-level reduction in §§2D1.1 and 2D1.11 need not depend on, or be coterminous with, Section 3553(f) or its implementing guideline, §5C1.2. Section 3553(f)(1) is fully implemented through §5C1.2, which was first adopted as an emergency amendment in September 1994.[24] The Commission did not adopt the two-level reduction in §2D1.1 until a year later, USSG App. C, Amendment 515 (effective November 1, 1995), and did not further incorporate a similar reduction into §2D1.11 until 2012. *See* USSG App. C, Amendment 763 (effective November 1, 2012). Nor has the two-level reduction's applicability ever been coterminous with the applicability of Section 3553(f)(1). Initially, the two-level reduction applied only to those defendants with an offense level of level 26 or higher. *See* USSG §2D1.1 (1996). The Commission later removed that restriction and subsequently explained that the two-level reduction is broader than Section 3553(f) because its application "does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment." USSG App. C, Amendment 640 (November 1, 2002). In short, the two-level reduction in §§2D1.1 and 2D1.11 need not depend entirely on Section 3553(f) or its implementing guideline, §5C1.2, but rather has been available in narcotics prosecutions whether the defendant faces a statutory mandatory minimum penalty or not.

Finally, Option 2 is more consistent with the underlying purposes of the two-level reduction. When expanding the two-level reduction in §2D1.1 to apply to offenders with an offense level lower than level 26, the Commission explained that the "general principle underlying this two-level reduction" is "to provide lesser punishment for first time, nonviolent offenders." *See* USSG App. C, Amendment 624 (effective November 1, 2001). But, as discussed above, the Ninth and Eleventh Circuits' interpretation of Section 3553(f)(1) has resulted in defendants with extensive criminal histories being deemed eligible for safety-valve relief under Section 3553(f)(1). It would be inconsistent with the purpose of the two-level reduction to reduce the offense level of defendants with such significant criminal histories.

[24] *See* USSG App. C, Amendment 509 (effective September 23, 1994); *see also id.* at Amendment 515 (effective November 1, 1995) (describing emergency amendment).

E. Recidivist Penalties for Drug Offenders

The Department does not believe that it is necessary to amend Section 2D1.1's penalties for offenders with prior similar convictions in order to implement the First Step Act. The recidivism enhancements in Section 2D1.1—which apply only in cases involving death or serious bodily injury, and thus apply relatively infrequently—have never precisely tracked the language of the statute, and the Department is not aware of any reason why the First Step Act requires that they do so now. Moreover, the proposed edits do not treat similarly situated defendants similarly, as they provide for enhancements based on different qualifying predicate convictions depending on whether a defendant was convicted under 21 U.S.C. § 841(b)(1)(A) or (B), on the one hand, and 21 U.S.C. § 841(b)(1)(C) or (E), on the other.

3. "Circuit Conflicts"

A. Part A—Acceptance of Responsibility (§3E1.1)

In response to a disagreement among the courts of appeals regarding the government's authority under §3E1.1(b) to withhold a third point for acceptance of responsibility, the Commission proposes to amend that section to define the term "preparing for trial."[25] Although the Department agrees that the Commission should resolve the issue by clarifying the circumstances in which the government can withhold a third point for acceptance of responsibility, the government does not support doing so through an attempt to define "preparing for trial."

1. The Department Supports Resolving the Disagreement Among the Circuits by Preserving the Government's Congressionally Afforded Discretion to Withhold a Third-point Reduction

Under §3E1.1, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level reduction in offense level. USSG §3E1.1(a). A defendant may receive an additional one-level reduction "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." *Id.* §3E1.1(b).

Although the Commission primarily proposes to define the term "preparing for trial," it requests comment on alternative solutions, such as by incorporating the framework from *Wade v. United States*, 504 U.S. 181 (1992). The Department supports this alternative proposal. In *Wade*, the Supreme Court held that the government may decline to move for a downward departure for substantial assistance to law enforcement under 18 U.S.C. § 3553(e) or §5K1.1—provisions that

[25] In a statement respecting denial of a petition for certiorari in a case in which the government withheld a third-level reduction in offense level for acceptance of responsibility because a defendant litigated a motion to suppress, two Supreme Court Justices stressed the "need for clarification from the Commission" concerning the application of §3E1.1(b). *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

similarly require a "motion of the government"—even if the defendant has in fact provided substantial assistance, so long as the government's decision "rationally related to [a] legitimate Government end," and not, for example "based on an unconstitutional motive" such as "the defendant's race or religion." *Id.* at 185-87. As the Department has explained in court filings, *see, e.g.*, Br. in Opp. 6-15, *Longoria v. United States*, No. 20-5715 (filed Jan. 29, 2021), §3E1.1(b) confers on the government discretion to move for an additional third-point reduction in the defendant's offense level if the stated criteria are satisfied, but it does not require the government to file such a motion. The requirement that the government file a motion before a defendant may receive the third-point reduction was inserted directly by Congress in 2003, and Congress used the same language interpreted in *Wade* to confer broad discretion on the government. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 671-672. Congress further emphasized the government's discretion by directly amending the application note to §3E1.1 to emphasize that "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." *Id*. § 401(g)(2)(B); *see* USSG §3E1.1, comment. (n.6). Accordingly, the standard articulated in *Wade* is the appropriate one, and the Department supports amending §3E1.1(b) to state that the government may not withhold a motion based on an unconstitutional motive or a reason not rationally related to any legitimate government end.

2. The Commission's Proposal to Define "Preparing for Trial" Would not Resolve the Disagreement Among the Circuits, Would be Unworkable, and may Lead to Arbitrary Results

The Commission's proposal to amend §3E1.1 to define "preparing for trial" would not fully resolve the existing disagreement among the circuits and, in any event, would likely prove unworkable.

As a threshold matter, nothing in §3E1.1 or its commentary suggests that Congress intended to permit the government to consider only certain trial-preparatory activities when determining whether to move for a third-level reduction. Section 3E1.1(b), as amended by the PROTECT Act, does not focus exclusively on the government's interest in avoiding "preparing for trial" but more generally recognizes the government's interest in "allocat[ing its] resources efficiently." Most circuits that have reached the question therefore have rejected the view that the interests encompassed by §3E1.1(b) are limited to those unique to trial preparation.[26] As a result,

[26] *See, e.g.*, *United States v. Jordan*, 877 F.3d 391, 396 (8th Cir. 2017) (a defendant's denial of relevant conduct at sentencing "did not allow the government and the court to allocate their resources efficiently" and thus was appropriate basis for government to decline to recommend the third point); *United States v. Collins*, 683 F.3d 697, 706 (6th Cir. 2012) (Section 3E1.1(b) is not limited solely to the "government interest in avoiding preparing for trial," but instead "explicitly identifies a broader government interest in allocating its resources efficiently"); *United States v. Sainz-Preciado*, 566 F.3d 708, 715 (7th Cir. 2009) (Section 3E1.1(b) reflects "Congress's intent to leave third-point reductions to the government's discretion"); *United States v. Beatty*, 538 F.3d 8, 16 (1st Cir. 2008) ("As amended, the touchstone of § 3E1.1 is no longer trial preparation, but rather the presence of a government motion for the third-level reduction."); *United States v. Drennon*, 516 F.3d 160, 163 (3d Cir. 2008) (upholding government's decision not to file a third-point reduction motion where the court found "no basis for concluding that

regardless of whether a defendant's challenge to a charging document, motion to suppress evidence, or challenge to sentencing issues could be described as falling within (or outside) a definition of "preparing for trial," under many circuits' governing law, the government could still appropriately withhold a motion if those activities prevented the government from allocating its resources efficiently.

In any event, it will be difficult in many cases to distinguish between the litigation of suppression motions (or various other pre- and post-trial challenges) and trial preparation. Indeed, the litigation of suppression or other motions quite often can be tantamount to trial—involving the same witnesses, evidence, and testimony. The Commission proposes to define "preparing for trial" as "ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists." In the Department's experience, however, the most significant amount of time spent preparing for trial typically involves witness preparation. And where the evidence in a case turns on items recovered as a result of a search or seizure, the trial evidence may overlap substantially with the evidence proffered during the litigation of a suppression hearing.[27] A defendant who elects to litigate a suppression motion before determining whether to plead guilty and accept responsibility therefore may not have "timely" notified authorities of his intention to plead guilty or have "permit[ed] the government to avoid preparing for trial" or "to allocate [its] resources effectively." USSG §3E1.1(b). The same may be true in cases where a defendant pleads guilty but challenges the factual basis for particular sentencing enhancements, which in effect may require litigating the factual basis for some of the conduct underlying his conviction.[28] At a minimum, should the Commission choose to define "preparing for trial," it should include efforts to prepare witnesses and evidence that would be presented at trial.[29]

The proposed definition of "preparing for trial"—particularly its focus on excluding "early pretrial proceedings"—also will create difficult line-drawing problems that may lead to

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[the decision] was motivated by anything other than a concern for the efficient allocation of the government's litigating resources"); *United States v. Blanco*, 466 F.3d 916, 918 (10th Cir. 2006) ("Ensuring efficient resource allocation is a legitimate government end and a stated purpose of §3E1.1(b).").

[27] *See, e.g.*, *United States v. Sanders*, 208 F. App'x 160, 163 (3d Cir. 2006) (explaining that although the defendant "allowed the government to avoid voir dire, jury instructions and jury selection" his suppression motion "forced the government to litigate the essential element of a § 922(g)(1) offense—[his] possession of a firearm—and his only arguable defense"; because the motion "compelled the government to prepare and examine [the arresting officer] and to cross-examine five defense witnesses," the government "essentially tried [the defendant] at the suppression hearing").

[28] *See, e.g.*, *Blanco*, 466 F.3d at 919 (defendant's request that cocaine base be reweighed at an independent testing facility before sentencing resulted in a "concomitant resource expenditure" of "governmental time, resources, and energy of agents to ensure that the evidentiary chain of custody remains unbroken"); *Jordan*, 877 F.3d at 395 (defendant's denial of relevant conduct at sentencing—that defendant possessed a firearm in connection with another felony—necessitated the government having "to subpoena and present testimony of six witnesses in a hearing lasting almost four hours").

[29] Many witnesses require preparation well in advance of trial. For example, Rule 16 of Federal Criminal Procedure requires that parties disclose, inter alia, the opinions of expert witness "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Fed. R. Crm. P. 16(a)(1)(G), (b)(1)(C). For some witnesses, the parties must retain interpreters to assist at preparation and at trial. Other witnesses require pre-trial travel for preparation. And for many witnesses, recorded calls must be transcribed and translated. In short, the government frequently incurs many expenses, and expends significant amounts of time, preparing witnesses well in advance of trial.

extensive ancillary litigation and arbitrary application of §3E1.1(b). Some courts permit suppression motions to be filed on the eve of trial, but even when a defendant files a motion early in the district court proceedings, the court may not resolve the motion until close to or on the eve of trial. The filing of an early motion thus may not relieve the government of its obligation to prepare for trial, and if a defendant decides to change his plea on the eve of trial after losing such a motion, the government will have substantially completed its trial preparation. This may be true even if a defendant indicates a willingness to enter a conditional guilty plea that would preserve his right to appeal the denial of a motion to suppress. If a court does not rule on the motion to suppress until the eve of trial, the government will have to prepare for trial in the event the motion to suppress is granted (particularly if there is other evidence in the case that would prove some or all of the charges). Nor, in all cases, can a defendant meaningfully be expected to evaluate whether to plead guilty without knowing what evidence the government will be permitted to offer at trial. In many circumstances, then, whether the government has been required to begin preparations for trial will depend substantially on the district court's own docket-management decisions, and not on circumstances within the defendant's control. The proposed definition of "preparing for trial" thus may have disparate outcomes, resulting in applications of §3E1.1(b) that might not correlate with each defendant's relevant level of cooperation.

For these reasons, and consistent with Congress's determination in the PROTECT ACT,[30] the government is best positioned to determine whether the defendant's assistance to authorities in any particular case—including by timely notifying authorities of his intention to enter a plea of guilty—in fact avoided the need to prepare for trial or assisted the government in allocating its resources efficiently. The Commission should decline to define "preparing for trial" and instead incorporate the *Wade* standard in §3E1.1(b).

3. Because the Guidelines are Advisory, Constraining the Government's Discretion in §3E1.1(b) is Unnecessary

Finally, and importantly, amending §3E1.1(b) to constrain the discretion Congress afforded to the government to recommend a third-point reduction is unnecessary to ensure that district courts are able to sentence a defendant commensurate with the court's evaluation of the defendant's acceptance of responsibility. Because the Guidelines are advisory, if a district court disagrees with the government's decision not to recommend a third-point reduction in a particular case, the court is free to vary downwards from the advisory Guidelines' range when imposing its sentence.[31]

[30] Pub. L. No. 108-21, § 401(g)(2)(B), 117 Stat. 672.

[31] *See, e.g.*, *Blanco*, 466 F.3d at 918 (varying downward after the government declined to recommend a third point, to a sentence "seven months shorter than what the low end of the Guidelines range would have been had the government moved for a § 3E1.1(b) departure").

B. Part B—Definition of "Controlled Substance Offense" (§4B1.2)

As the Commission has noted, two courts of appeals have concluded that the term "controlled substance" in §4B1.2(b) refers exclusively to a substance controlled by the federal Controlled Substances Act, while several others have interpreted the term to include substances that are either federally controlled or controlled under applicable state law. In a statement respecting the denial of a petition for certiorari, two Justices of the Supreme Court called for the Commission to "address this division" among the courts of appeals "to ensure fair and uniform application of the Guidelines." *Guerrant v. United States*, 142 S. Ct. 640, 640-41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari). In response to this issue, the Commission proposes to amend §4B1.2(b) to define "controlled substance," and the Commission has provided two options for that definition. The Department agrees that the Commission should resolve the issue by defining "controlled substance" in §4B1.2(b), and the Department supports the definition in Option 2, which would provide that the term "controlled substance" refers to substances that are either included in the federal Controlled Substances Act or otherwise controlled under appliable state law.

1. The Commission Should Adopt the Broader Definition of "Controlled Substance" set Forth in Option 2

Section 4B1.2(b) defines the term "controlled substance offense" to mean "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG §4B1.2(b). Two courts of appeals—the Second and Ninth Circuits—have concluded that the term "controlled substance" in §4B1.2(b) "refers exclusively to a substance controlled by the" federal Controlled Substances Act.[32] In contrast, at least five other courts of appeals—including, most recently, the Third Circuit—have issued decisions that decline "to engraft the federal Controlled Substances Act's definition of 'controlled substance'" onto §4B1.2(b).[33]

The Commission proposes adding a definition for the term "controlled substance" to §4B1.2(b) and has provided two options for that definition. Option 1 would define "controlled

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[32] *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018); *see United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021). Because New York controls several substances that are not scheduled under the Controlled Substances Act, almost no New York state drug trafficking offenses are considered "controlled substances offenses" in the Second Circuit, even though the additional substances (such as naloxegol and positional isomers of cocaine) are rarely if ever prosecuted in New York state. This has been a huge windfall for some recidivist drug traffickers. *See United States v. Swinton*, 495 F. Supp. 3d 197 (W.D.N.Y. 2020)(New York offense of Criminal Possession of a Controlled Substance in the Third Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes naloxegol, which is not federally scheduled); *United States v. Fernandez-Taveras*, No. 18-CR-455 (NGG), 2021 WL 66485, at *4-5 (E.D.N.Y. Jan. 7, 2021), appeal withdrawn sub nom. *United States v. Taveras*, No. 21-155, 2021 WL 1664107 (2d Cir. Apr. 5, 2021) (New York offense of Criminal Possession of a Controlled Substance in the Second Degree not a prior controlled substance offense because state's list of "narcotic drugs" includes positional isomers of cocaine that are not federally scheduled).

[33] *United States v. Ruth*, 966 F.3d 642, 652 (7th Cir. 2020); *see, e.g.*, *United States v. Lewis*, __ F.4th __, 2023 WL 411362 (3d Cir. Jan. 26, 2023); *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020); *United States v. Henderson*, 11 F.4th 713, 718-19 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1291-96 (10th Cir. 2021).

substance" to mean "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)." Option 2 would define "controlled substance" to mean "a drug or other substance, or immediate precursor, *either* included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) *or otherwise controlled under applicable state law*."

The Commission should adopt the broader definition set forth in Option 2. Option 2's definition of "controlled substance" is faithful to the current language of §4B1.2(b), which defines a "controlled substance offense" as an offense "under federal *or state law*" that prohibits the manufacture, import, export, distribution, or dispensing of a "controlled substance," or the possession of a "controlled substance" with intent to engage in one of those activities. USSG §4B1.2(b) (emphasis added). Because §4B1.2(b) specifically refers to state law in defining the offense, it follows that §4B1.2(b)'s definition of "controlled substance offense" covers offenses involving substances controlled under federal *or* relevant state law.[34]

Option 2 also avoids the substantial problems presented by Option 1, which is that Option 1 is unduly narrow and would lead to unnecessary complexities at sentencing. Because Option 1 defines "controlled substances" to mean only those substances listed in the federal drug schedules, a state drug offense would qualify as a "controlled substance offense" under Option 1 only if the state's definition of a particular controlled substance is no broader than the federal definition. If the state's definition of the controlled substance is even slightly broader than the federal definition, then every state conviction involving that substance would no longer qualify as a "controlled substance offense" under §4B1.2(b). Likewise, if a particular state drug offense is not divisible by drug type, and the relevant state drug schedules include any chemical compound that is not federally controlled, then every violation of that state statute would fail to qualify as a "controlled substance offense," even if a particular defendant's offense conduct indisputably involved a federally controlled substance.

This concern is not merely speculative. In recent years, federal courts have grappled with slight differences between the federal and state definitions of cocaine, heroin, and methamphetamine, including in the context of §4B1.2(b), with some courts holding that the relevant state definitions are categorically broader than the federal definitions.[35] For example, in 2015, the federal definition of cocaine was amended to exclude ioflupane, a substance used in the diagnosis of Parkinson's disease that previously fell within the federal definition of cocaine.[36] As far as the government is aware, no one has ever been criminally prosecuted for a drug offense involving ioflupane. Nevertheless, because many state definitions of cocaine still encompass ioflupane, criminal defendants have argued—sometimes successfully—that *all* cocaine convictions under those states' laws fail to qualify as "controlled substance offenses"

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[34] *See* U.S. Br. in Opp., *Guerrant v. United States*, S. Ct. No. 21-5099, at 9 (filed Nov. 3, 2021).

[35] *See, e.g.*, *Ruth*, 966 F.3d at 645-51 (holding that Illinois's definition of cocaine is categorically broader than the federal definition because the relevant Illinois statute includes cocaine's positional isomers, while the federal definition covers only cocaine's optical and geometric isomers); *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022) (holding that Minnesota's definition of cocaine is categorically broader than the federal definition because Minnesota's statute bans all cocaine isomers); *United States v. Rodriguez-Gamboa*, 946 F.3d 548, 551-53 (9th Cir. 2019) (considering whether California's definition of methamphetamine, which includes its geometric and optical isomers, is categorically broader than the federal definition, which includes only its optical isomers.)

[36] *See* 80 Fed. Reg. 54715-01 (Sept. 11, 2015), available at 2015 WL 5265212; 21 C.F.R. § 1308.12(b)(4)(ii).

under §4B1.2(b) or "serious drug offenses" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).[37]

If the Commission were to adopt the "controlled substance" definition in Option 1, this kind of litigation would only increase, as would the associated burden on the sentencing courts. For example, in some cases, the United States might have to present scientific evidence to the sentencing court to demonstrate that a particular state's drug definition is not actually broader than the corresponding federal definition.[38]

2. The Commission Should Clarify that the Substance at Issue Must Have Been Controlled when the Defendant Committed the Predicate Offense

The Department also suggests that the Commission add language to the end of Option 2's definition to clarify that the substance at issue must have been controlled "at the time the defendant committed the predicate offense." Because the "controlled substance offense" definition applies to prior convictions, a federal sentencing court should look to the applicable drug schedules in effect at the time of the prior crime to determine whether the defendant engaged in conduct involving a "controlled substance." Without that clarification, the courts of appeals might continue to adopt different views about which version of the applicable drug schedules a sentencing court should consult when deciding whether a prior offense qualifies as a predicate "controlled substance offense."[39] Clarification would also preclude defendants who committed serious drug crimes from arguing that any subsequent narrowing of a particular drug definition—for example, the exclusion of ioflupane from a state's cocaine definition—renders all prior state convictions involving that drug categorically overbroad for purposes of §4B1.2(b).[40]

3. The Department Supports Adding Option 2's Definition to Application Note 2 to §2L1.2

The Commission has also requested comment on a possible amendment to Application Note 2 to §2L1.2, which contains a definition of "drug trafficking offense" that is similar to the definition of "controlled substance offense" in §4B1.2(b). If the Commission were to amend §4B1.2(b) to include the definition of "controlled substance" set forth in Option 2, the Department recommends that the Commission add the same definition to Application Note 2 to §2L1.2, without otherwise changing Application Note 2's definition of "drug trafficking offense," in order to promote consistency in the Guidelines Manual.

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[37] *See, e.g.*, *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022) (finding that defendant's prior Iowa cocaine offenses were not serious drug offenses under the ACCA because the relevant Iowa statute "included Ioflupane").
[38] *See, e.g.*, *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1155 (9th Cir. 2020) ("In this case, the district court held an evidentiary hearing, heard the testimony of expert witnesses, and concluded that geometric isomers of methamphetamine do not chemically exist.").
[39] *See, e.g.*, *United States v. Clark*, 46 F.4th 404, 408 (6th Cir. 2022) (concluding that a sentencing court should "consult[] the drug schedules in place at the time of the prior conviction" to determine whether the conviction is a controlled substance offense); *Bautista*, 989 F.3d at 704 (concluding that a sentencing court should consult "federal law at the time of [the] federal sentencing" to determine whether a prior state conviction qualifies as a controlled substance offense).
[40] *See Lewis*, __ F.4th __, 2023 WL 411362, at *6-*7.

4. Crime Legislation

A. Part A—FDA Reauthorization Act of 2017

In the FDA Reauthorization Act of 2017, Congress created a new offense for knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug, which is now punishable with up to 10 years of imprisonment. Pub. L. 115-52, Sec. 604(b) (2017); 21 U.S.C. § 333(b)(8). Before this change, the maximum penalty for all counterfeit drug offenses under the Federal Food, Drug, and Cosmetic Act ("FDCA"), including the manufacture, sale, or dispensing of a counterfeit drug, was three years in prison.

The Commission proposes to amend Appendix A to reference the new offense at 21 U.S.C. § 333(b)(8) to §2N2.1. We support this change. In our assessment, however, §2N2.1 as currently drafted does not adequately capture the gravity of an offense under Section 333(b)(8), and an additional specific offense characteristic and/or application note should be added for violations of Section 333(b)(8). Currently, §2N2.1 sets a base offense level of 6, which has been appropriate for FDCA misdemeanor violations (and felony violations not involving fraud). However, a base offense level of 6 is not appropriate for an offense under the new Section 333(b)(8). Congress more than tripled the statutory maximum penalty (from three years to 10) for a knowing violation of the FDCA "by knowingly making, selling or dispensing, or holding for sale or dispensing, a counterfeit drug." Section 604 of Pub. L. 115–52. In distinguishing that specific conduct from other forms of misbranding, Congress intended to strengthen the penalties far beyond those for both a misdemeanor and typical felony violation of the FDCA. Applying §2N2.1 to the new offense, without any other changes, risks sending a message contrary to that which Congress intended—that the knowing sale of counterfeit consumer drugs could start at a 0-6 month sentence and is conceptually no more culpable than a strict-liability FDCA misdemeanor offense. Moreover, the legislative history of the provision indicates the author of this provision intended it to protect "patient safety" from the "knockoffs that have infiltrated the U.S. supply chain." 163 Cong. Rec. H5454-02, H5480 (2017). We believe the Commission should implement the new offense in a manner reflecting Congress's intent that a more severe penalty applies to Section 333(b)(8) offenses. To account for Congress's decision to strengthen the penalty of counterfeit drugs, the Commission could proceed in several ways.

The concept of a counterfeit drug necessarily includes a fraudulent or misleading intent to pass off an illegitimate drug as a legitimate one (see 21 U.S.C. § 321(g)(2) defining "counterfeit drug" as a drug that falsely purports to be the product of a drug manufacturer, processor, packer, or distributor other than the one that actually manufactured, processed, packed or distributed it). Furthermore, the distribution of counterfeit drugs inherently carries the risk of serious bodily injury, because, by definition, the origin and contents of such drugs are unknown and could be dangerous.

The Commission could ensure that both the fraudulent nature of counterfeit drugs and the risk they carry are captured by the Guidelines by creating a cross reference or application note making clear that Section 333(b)(8) offenses are to be sentenced using §2B1.1's fraud table and related enhancements. Doing so would include the enhancement under §2B1.1(b)(16)(A) for the conscious or reckless risk of death or serious bodily injury and would track Congress's intent in

raising the statutory maximum for the offense conduct described in Section 333(b)(8). That enhancement directs that if a §2B1.1 offense level is otherwise computed as lower than 14, it should be increased to level 14. *See* §2B1.1(b)(16). Directing the application of §2B1.1 for violations of Section 333(b)(8) is also desirable because it would ensure that a low-level counterfeiting offense has an appropriately serious offense level, while allowing more sophisticated counterfeiting organizations to be subject to the fraud table and other related enhancements. The Commission, through a reference or note, should make clear that §2B1.1 and the enhancement in §2B1.1(b)(16) should be applied in Section 333(b)(8) cases.

Alternatively, the Commission could add a specific offense characteristic to §2N2.1 for violations under Section 333(b)(8). As discussed above, we recommend a minimum offense level of 14, so we would recommend the addition of 8 levels for a violation of Section 333(b)(8) sentenced under §2N2.1. However, such an approach could engender some confusion since the §2N2.1 cross-reference directs the application of §2B1.1 in all FDCA offenses "involving fraud."

B. Part J—Protecting Lawful Streaming Act of 2020

In Part J, the Commission proposes amendments to implement the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2021), which created a new commercial streaming piracy offense at 18 U.S.C. § 2319C. The Department agrees with the Commission's proposal to amend the statutory index of the Guidelines to reference this new offense to §2B5.3. Though the base offense level is only 8, cases under Section 2319C involving large-scale commercial infringement can be addressed through enhancements provided in §2B5.3 (with some small additional changes to those enhancements recommended below). We anticipate that, as in Section 2319 cases, the primary factor affecting the offense level in Section 2319C cases will be the enhancement in §2B5.3(b)(1) based on the infringement amount, which yields higher offense levels for larger-scale infringing operations. Further, because Section 2319C offenses involve the operation of a service that provides infringing internet streaming of content, and because doing so generally requires an operator to somehow gather or assemble copyrighted works on an internet-connected server to make it available for streaming to others, the two-level enhancement in §2B5.3(b)(3) for "uploading" will likely apply to a Section 2319C offense. Because Section 2319C requires a purpose of commercial advantage or private financial gain, the two-level reduction in §2B5.3(b)(4) will not apply.

The Department recommends that the Commission further clarify how the infringement amount should be calculated in cases involving infringing public performance by means of internet streaming and amend the application notes to invite consideration of additional or alternative methods for calculating the "infringement amount" for purposes of §2B5.3(b)(1), including the consideration of the defendant's profits. Specifically, the Department recommends that Application Note 2(A) be revised to clarify that in cases involving the infringing performance or display of a copyrighted work, the "retail value of the infringed item" is the price a consumer would have paid to lawfully view the performance or display, the "number of infringing items" is the number of individual performances or displays involved in the offense; and that both the value and number of items may be estimated using any relevant information, including financial records. The Department further recommends that Note 2(A) be revised to

permit courts to consider, as an alternative method of determining the infringement amount, the amount of profit or gain a defendant received or expected to receive, as a result of the offense.

The Commission also asks whether current §2B5.3(b)(2) adequately accounts for Section 2319C's offense conduct, noting that "the new offense at 18 U.S.C. § 2319C mainly addresses the streaming (*i.e.*, offering or providing "to the public a digital transmission service") of works "being prepared for commercial public performance." The term introduced in the Protecting Lawful Streaming Act, "work being prepared for commercial public performance," is similar to the term "work being prepared for commercial distribution" already defined in Section 2319 and §2B5.3. Both are intended to describe works that are infringed either before their legitimate public release (*e.g.*, through unauthorized leaks of review copies provided to select film/music/game reviewers) or after they have been made available to the public only in limited fashion (*i.e.*, for viewing in a movie theater, but not available for purchase). Both terms are also intended to help address the heightened economic damage to the copyright owner that can result from infringement committed before, or contemporaneous with, the official release of the copyrighted content to the public. These two categories will often overlap but are distinct from one another. The term "work being prepared for commercial public performance" is slightly more expansive, in that it includes not only works that have not yet been released to the public for viewing in theaters or via legitimate streaming channels, but also includes streamed works for the first 24 hours after their official legitimate streaming release. That is, if a defendant's illicit streaming service offered works that had only been available for streaming from legitimate sources for less than 24 hours before the defendant began to stream them (such as movies or television episodes that had premiered on television or legitimate streaming services the previous night), then Section 2319C(c)(2) provides a higher maximum statutory penalty (five years versus three years).

The Department recommends that §2B5.3(b)(2) be amended to provide the same two-level enhancement for offenses (whether under § 2319C or § 2319(a)) involving "work being prepared for commercial public performance" as for those involving "work being prepared for commercial distribution." Because the two terms describe largely overlapping categories of works, a separate enhancement for each category is not necessary and would probably not be appropriate. We suggest incorporating the new term in the existing (b)(2) as follows:

> (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution <u>or a work being prepared for commercial public performance</u>, increase by **2** levels.

C. <u>Part K—William M. (Mac) Thornberry National Defense Authorization Act</u>

The Commission proposes amendments to implement the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), which created several new offenses at 31 U.S.C. §§ 5335 and 5336. The Commission proposes amending Appendix A to reference Sections 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses

under 31 U.S.C. §§ 5313 and 5318(g)(2), are referenced to §2S1.3, and we agree that §2S1.3 is the appropriate Guidelines reference for the new offenses.

The Commission also seeks comment on whether §2B1.1 should be amended to address an enhanced penalty applicable to 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2) offenses. These enhancements increase the maximum fine and the maximum incarceration term for a Section 5336 offense based upon violation of the restrictions on the disclosure and use of information submitted to FinCEN where the Section 5336 offense was 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." We agree that §2B1.1 should be amended to address the new enhanced penalties under 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2), but do not recommend an adjustment to the base offense level or the addition of a specific offense characteristic. The enhancements themselves are very limited in scope as they apply only to the use and disclosure violations, and do not apply when the Section 5336 offense is based upon the obligation to submit beneficial ownership information to FinCEN.

The Department also encourages the Commission to contemporaneously remedy the drafting error in an analogous §2S1.3 enhancement (we brought this error to your attention in the Department's July 2016 letter to the Commission).[41] Similar to Section 5336(h)(2), Section 5322(b) provides for an enhancement if the pertinent reporting violation was 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." But §2S1.3(b)(2), which was added in 2002 in response to statutory amendments providing for the enhanced criminal penalty provisions under § 5322(b), omits the statutory language "while violating another law of the United States." If the Commission amends §2B1.1 to incorporate both bases of the §5336 enhancement, it should also amend §2S1.1 to also include both bases of the §5322 enhancement.

5. Career Offender

In its annual report, the Department encouraged the Commission to address the use of the "categorical approach," in the Guidelines, including as used for the career offender guideline. As the Department explained in that letter, "especially long sentences should be reserved for violent offenders and aggravated repeat offenders," but the Guidelines' current approach had led to odd and widely disparate Guidelines ranges for defendants depending on both the jurisdiction of their prior convictions and the jurisdiction in which the Guidelines are being calculated.

The Department therefore greatly appreciates and supports the Commission's efforts to address the definitions of "crime of violence" and "controlled substance offense" in the Guidelines. In particular, we support the Commission's proposals in Parts B-D (and in Part B of the proposals regarding Circuit Conflicts) to update specific aspects of those definitions. We are also grateful for the Commission's efforts to address the categorical approach. We have significant concerns, however, that the Listed Guidelines proposal—which would require courts

[41] *See,* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160725/priorities-comment.pdf#page=31.

to engage in a largely novel mode of analysis—will generate an enormous amount of litigation and disparate outcomes.

The Department has long maintained that the best way to address the categorical approach is to retain the current definitions (as amended in Parts B-D and in Part B regarding Circuit Conflicts) but permit courts to consider actual conduct. Alternatively, the Commission could retain the current definitions (again, as amended), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Both options would be preferable to the proposed Listed Guidelines approach. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options, including a conduct-based approach, including through hearings with testimony from judges and other stakeholders. If the Commission nonetheless proceeds with the Listed Guidelines approach, we offer some suggestions below for reducing the likely litigation burden on courts.

Finally, the Department recognizes the legitimate concerns about severity levels associated with many recidivist provisions, including in the Guidelines. As notions of fairness in federal sentencing have evolved over the last three decades, many stakeholders now recognize that some of the lengthy sentences previously called for by the Guidelines are not necessary or appropriate. The career offender guideline, in particular, has been the subject of considerable criticism for producing overly long sentences. Decades of research show that the career offender guideline produces a clear racial disparity in application.[42] District judges, recognizing that the resulting career offender guideline sentences are unjustifiably long, have routinely imposed below-guideline sentences in these cases—often at the government's request.[43] Likewise, the Sentencing Commission, as recently as 2016, urged Congress to amend the career offender directive to focus on the most dangerous and culpable defendants.[44] More recently, the Attorney General encouraged line prosecutors to recommend variances in certain career offender cases, acknowledging the increasing rate of below-guideline sentences in these cases. While the Commission's proposal today would not directly address those concerns, the Department, as it wrote in its annual report, would welcome the opportunity to work with the Commission to analyze severity levels for various recidivism provisions to determine which ought to be reformed, either by amending the Guidelines provisions directly or by recommending legislative changes to Congress.

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[42] *See*, U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (2004).

[43] In FY 2021, fewer than 20% of all defendants designated as career offenders received a sentence within guideline. Conversely, 54.8% of career offenders received a variance, almost all of them receiving a downward variance. The government, too, has increasingly asked courts to impose sentences below the Guidelines range: The rate of government sponsored below-range sentences has increased from 5.6% in FY 2005 to 21.0% in FY 2014. *See* U.S. Sentencing Commission, *Report to Congress: Career Offender Sentencing Enhancements* 22 (2016).

[44] *Id.* at 3.

A. Part A—Categorical Approach

Part A of the proposed amendments regarding the career offender guideline aims to eliminate application of the categorical approach by defining "crime of violence" and "controlled substance offense" based upon a list of guidelines, rather than offenses or elements of an offense. The Department appreciates this effort, as it is now widely recognized that the categorical approach generates extensive litigation, consumes vast amounts of court resources, and produces disparate sentencing outcomes. The Department has concerns, however, about the Commission's proposed amendment.

1. The Department's Concerns About the Categorical Approach

The categorical approach to determining what qualifies as a prior aggravating conviction focuses on the elements of an offense rather than on the defendant's culpable conduct. To wit, courts applying the categorical approach "identify the *least* culpable conduct" criminalized by the statute and compare that conduct against the relevant statutory definition.[45] Thus, many offenders who committed prototypically violent crimes are no longer held accountable for those offenses under the career offender provision (and various guidelines that incorporate the definitions from that provision). Some of the most violent crimes—murder, carjacking, rape, and more—no longer qualify as "crimes of violence."[46]

Moreover, sentencing outcomes based on the categorical approach vary widely across jurisdictions. For instance, while robbery remains a "crime of violence" under many state statutes, it no longer does in many others.[47] Thus, two defendants who committed the same forceful robbery in different states may well be treated very differently under the Guidelines. The problem has spilled into the definition of "controlled substance offense" as well. As addressed earlier, some courts employing the categorical approach have held that state offenses involving cocaine and heroin are not "controlled substances offenses." *See supra* at 20-22.

Likewise, courts and litigants must travel an arduous road to resolve these questions. To determine whether a prior offense is a categorical match to an enumerated offense, for example, courts must first determine the generic definition, "rely[ing] on various sources, such as state and federal statutes, state and federal common law, the Model Penal Code, criminal law treatises, the United States Code of Military Justice, and dictionaries." *United States v. Hernandez-Montes*, 831 F.3d 284, 292 (5th Cir. 2016). Courts must then engage in an "exhaustive review of state law

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[45] *United States v. Harris*, 844 F.3d 1260, 1268 n.9 (10th Cir. 2017) (emphasis added); *see also United States v. Torrez*, 869 F.3d 291, 319 (4th Cir. 2017) (noting that the "categorical approach . . . focuses on the least culpable act proscribed by statute rather than the particular culpability of a defendant"); *United States v. Verwiebe*, 874 F.3d 258, 260–61 (6th Cir. 2017); United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016); *United States v. Rodriguez-Negrete*, 772 F.3d 221, 225 (5th Cir. 2014).

[46] *See, e.g.*, *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape).

[47] *See, e.g.*, *United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018) (California); *United States v. Fluker*, 891 F.3d 541 (4th Cir. 2018) (Georgia); *United States v. Edling*, 895 F.3d 1153, 1156-58 (9th Cir. 2018) (Nevada); *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (Ohio); *United States v. Peterson*, 902 F.3d 1016 (9th Cir. 2018) (Washington); *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018) (Wisconsin).

as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic." *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring). And if the state crime is potentially overbroad, courts must pour through state law once more to determine whether the offense is "divisible," such that the "modified categorical approach" may apply.

Judicial criticism of these corollaries of the categorical approach, for the reasons stated here, has been sharp.[48] This mode of analysis is particularly anomalous with regard to application of the Sentencing Guidelines. The constitutional concern that first animated the categorical approach—that judges cannot make factual findings that increase the applicable statutory penalties—is not present when applying the advisory Guidelines. Thus, the Guidelines have never expressly required a categorical approach, and sentencing courts are permitted—indeed, required—to make all manner of factual conclusions regarding a defendant's biographical history so long as they turn on reliable evidence.

The Department has long maintained that the best approach to identifying qualifying state predicate offenses under the Guidelines is to retain the current "crime of violence" and "controlled substance offense" definitions (with the changes listed in Parts B-D, and in Part B regarding Circuit Conflicts, addressing the definition of "controlled substance offense"), but to allow courts to consider actual conduct if necessary to understand the specific basis of the conviction.[49] Such an approach would permit courts to rely on the extensive body of caselaw already interpreting those definitions. The only analytical difference would be that courts could look to reliable evidence to determine what conduct the defendant's prior offense involved—an assessment that sentencing courts are already required to perform, as they assess the conduct and characteristics of a defendant that go well beyond the elements of the offense of conviction. This approach also has the significant advantage of making sense to courts, litigants, and the public.

Alternatively, the Commission could retain the current definitions (again, with the Part B-D and Circuit Conflicts Part B changes we support), but adopt the part of the Listed Guidelines approach that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." Under this approach, courts would no longer need to consider whether an offense is divisible to rely on the information about the offense in the *Shepard* documents.

Both options would be preferable to the proposed Listed Guidelines approach, as each would both dramatically reduce the burden on courts and litigants. If the Commission is not inclined to adopt either option, we would encourage the Commission to postpone its decision for a year to permit publication and further consideration of the various options.

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[48] *See, e.g.*, *Mathis v. United States*, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring) ("Congress . . . could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions."); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., concurring) ("I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach.").

[49] *See* Department of Justice Letter to the Commission (October 30, 2015); Department of Justice Letter to the Commission 2-6 (February 19, 2019).

2. The Listed Guidelines Approach for State Offenses.

While we appreciate the intention behind the Commission's Listed Guidelines, the Department has concerns that this approach to state offenses will generate significant litigation, as courts must determine whether particular state offenses are analogous to those federal crimes addressed in the specified guidelines. The Listed Guidelines proposal includes dozens of different federal guidelines, which cover conduct addressed by thousands of state criminal provisions, with significant variations among the states in addressing the same types of crimes. And the language used in the proposal—calling for comparison to the guideline "that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted"—could cause considerable confusion. District courts and courts of appeals are thus likely to disagree on the mode of analysis required by the Listed Guidelines approach, the scope of the dozens of federal guidelines, the scope of the thousands of state statutes, and the comparison of all those state statues to the federal guidelines. The result will, once again, be different treatment of similarly situated defendants across jurisdictions.

If the Commission proceeds with the Listed Guidelines approach, the Department has several suggestions to help ameliorate these problems. First, as to the mode of analysis, the Commission should expressly state—as the Department understands to be the intent—that its "most appropriate guideline" proposal calls for an assessment similar to that under §2X5.1, which requires courts to determine the "most analogous guideline" when sentencing a defendant for an offense "for which no guideline expressly has been promulgated," such as convictions under state law pursuant to the Assimilative Crimes Act. The "most analogous guideline" assessment does not require a "perfect match of elements." *United States v. Jackson*, 862 F.3d 365, 376 (3d Cir. 2017). Rather, it requires only an assessment of whether the guideline in question "covers the 'type of criminal behavior' of which the defendant was convicted." *United States v. Calbat*, 266 F.3d 358, 363 (5th Cir. 2001).

Even with such clarification, however, courts and litigants must still engage in the difficult job of comparing each and every potentially relevant state offense to the Listed Guidelines to determine which guideline is "most analogous." Courts will inevitably disagree, resulting in disparate treatment of similarly situated defendants across jurisdictions. This problem extends not only to application of the "crime of violence" provision, but to the "controlled substance offense" provision as well, as courts will be compelled to address long-settled questions about the inclusion of scores of state statutes in order to compare those provisions anew to the relevant federal guidelines.

To help address these concerns, the Commission could retain the force clause from the current Guidelines that permits courts to consider both "the elements, and any means of committing such an element, that formed the basis of the defendant's conviction" and "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means." In other words, an offense would qualify if it satisfied either the Listed Guidelines approach, or the force clause as determined by means, elements, and conduct cited in the count of conviction. Such an approach would at least permit litigants and courts to avoid relitigating the modest number of statutes that courts have

previously found to be crimes of violence under the categorical approach, or that would have been crimes of violence if the relevant statute had been deemed divisible.[50]

There are also ways to improve the process for determining whether an offense satisfies the Listed Guidelines approach—in particular, to focus on actual conduct, not statutory provisions alone, when determining whether a listed analogous guideline applies. The Commission's proposal anticipates this problem and this solution, first by providing that "[t]he fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative," and second by inviting courts to consider "the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means."

While we laud these provisions, we are concerned that the body of information that courts may rely upon to determine "the offense conduct" may be too narrow to avoid the pitfalls inherent in the categorical approach. In particular, it is not necessary to limit courts to the documents identified in *Shepard v. United States*, 544 U.S. 13, 16 (2005). That case involved the application of a statutory penalty enhancement, and thus implicated constitutional concerns under current Supreme Court caselaw addressing the Sixth Amendment. *See id.* at 24-26. Those concerns are inapposite with respect to the advisory Sentencing Guidelines. Indeed, as stated above, courts routinely and necessarily resolve disputed facts at sentencing, including facts about a defendant's past conduct and history, using any reliable information. This authority should not extend to identifying career offender predicates as well.

For these reasons, the Department suggests that the Listed Guidelines approach should be based on consideration of the actual conduct underlying a prior conviction, as established by any reliable information, including judicial documents. This proposal is faithful to the purposes of sentencing to assess the individual offender before the court, and to the core goal of the Guidelines to treat similarly situated offenders alike based on their actual conduct. Most notably, allowing consideration of actual past criminal conduct is consistent with the manner in which courts assess all information about the offender's conduct and history, by consideration of "any information that has sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3. Pursuant to *Booker*, courts are permitted to determine pertinent sentencing facts by a preponderance of the evidence, and the determination of a defendant's criminal history should be treated the same as any other relevant fact about the defendant's conduct.

3. The Listed Guidelines Approach for Federal Offenses.

Although the Department continues to believe a conduct-based approach best resolves the problems associated with the categorical approach, the Listed Guidelines approach is a better fit for federal offenses than it is for state offenses. The Department believes that the best alternative to the conduct-based approach for prior conviction involving a federal crime is to simply list the federal crimes that qualify; for instance, with respect to a "crime of violence," there is no need to

[50] As noted below, the Department suggests one slight modification to the force clause, to refer to the use of force against the person "or property" of another. This modification would bring the provision in line with the clauses that appear in 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c).

expend resources debating whether Hobbs Act robbery, carjacking, or a host of other obviously violent crimes qualify. This may be accomplished by listing federal statutes, and we would be pleased to provide a suggested list at the Commission's request. The Commission's current proposal, in defining "crime of violence" and "controlled substance offense" in relation to specific guideline provisions, largely accomplishes the same purpose, particularly if adopted with the alterations we suggest.

The list of "crime of violence" guidelines in the proposed version of §4B1.2(a)(2) seems largely appropriate for this task. The Department suggests adding these additional guidelines to address additional violent crimes that are not currently included:

- §2B2.2 (burglary)
- §2E2.1 (collecting an extension of credit by extortionate means)
- §2G1.1(a)(1)(a) (commercial sex acts in violation of 18 USC 1591(b)(1): sex trafficking using force)
- §2L1.1 (illegal alien smuggling, with a limitation to if a firearm was used or the offense involved the intentional risk of death or severe bodily injury)
- §2M1.1 (treason)
- §2P1.1, 2, and 3 (escape from prison—with the limitation to using force, firearm possession in prison, and inciting prison riots)

The Department agrees that the list of "controlled substance offense" guidelines in §4B1.2(b)(2) should include §§2D1.1, 2D1.9, and 2D1.11. The Commission has also proposed the option of adding to the list: §§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items).

The Department supports adding §2D1.2, which exclusively applies to drug trafficking offenses. But the other provisions that are referenced in this possible addition—§§2D1.6, 2D1.8, 2D1.10, and 2D1.12—address offenses that fall outside the definition of "controlled substance offense" used by the Sentencing Commission for the past several decades. Thus, if the Commission proceeds—despite the Department's concerns—with the Listed Guidelines Proposal, the Department would have no objection to excluding specific references to §§2D1.6, 2D1.8, 2D1.10, and 2D1.12.

4. Recklessness.

If the Commission adopts the Listed Guidelines approach, it should not provide for a blanket exclusion of any offense that involves a finding of recklessness. Such a provision would exclude from the definition of "crime of violence" many robberies, aggravated assaults, and possibly even murders that involve bodily injury or death. Indeed, more than a third of the states permit conviction for aggravated assault based on ordinary recklessness. *See United States v. Schneider*, 905 F.3d 1088, 1094-95 (8th Cir. 2018) (citing statutes). Several states have robbery-

by-injury statutes, which prohibit robbery accomplished by the reckless causation of injury. *See e.g.*, Haw. Rev. Stat. § 708-841(c); Me. Rev. Stat. tit. 17-A, § 651(1)(A); *State v. Wright*, 608 S.W.3d 790, 796 (Mo. Ct. App. 2020). And many murder statutes permit conviction upon a finding of extreme recklessness, known as "depraved heart" murder. In order to establish that a defendant committed reckless serious bodily injury assault, the government must prove that the defendant knew that there was a risk that his actions would cause serious bodily injury, consciously disregarded that risk, and in fact caused that injury. Such a defendant has committed a crime of violence.

Moreover, excluding reckless crimes would cause anomalous results, as defendants who attempt or threaten to commit violent crimes would face longer Guidelines ranges than defendants who in fact complete those crimes. As but one example, an assault conviction in Tennessee for threatening a victim with a deadly weapon would constitute a crime of violence, *see* Tenn. Code § 39-13-101(a)(2), 39-13-102(a)(1)(B), but a conviction for recklessly causing serious bodily injury would not, *see* Tenn. Code § 39-13-101(a)(2), § 39-13-102(a)(1)(B). Likewise, an attempted assault would (presumably) still qualify as a crime of violence, as it would require a specific intent to injure or threaten, but a completed assault might not. Similarly, robbery by threat of bodily injury would be a violent felony, while robbery by causation of bodily injury would not. These distinctions defy common sense.

The inclusion of a recklessness exception also exacerbates the problems that result from limiting courts to the *Shepard* documents. As noted above, countless statutes prohibiting violent conduct include recklessness as a possible *mens rea*. Charging documents, however, often parrot the statutory language and list every possible *mens rea* element, even where the offense was in fact based on knowing or intentional conduct. In such states, the limited *Shepard* documents often will be insufficient to establish whether the defendant's assault or robbery offense qualifies. In addition, many statutory provisions require a different *mens rea* for different elements. For instance, a statute may require that the defendant act intentionally in the use of force but permit recklessness with regard to the extent of the resulting injury. The Commission's suggested language may wrongfully eliminate such violent crimes from qualifying.

If the Commission nonetheless adopts an exclusion for offenses that were committed recklessly, the Department recommends two changes. First, it should place the burden on the defense to show that the conviction was based on entirely reckless conduct. Second, it should make clear that offenses that are committed with a *mens rea* of "extreme recklessness" still qualify. In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court concluded that crimes that can be committed recklessly do not satisfy ACCA's force clause, but expressly stated that its holding did not apply to offenses involving "extreme recklessness." *Id.* at 1825 n.4. Every appellate court to address the issue agrees that such crimes still qualify as predicate offenses under ACCA.[51] Indeed, a contrary conclusion would jeopardize application of not only the majority of state aggravated assault provisions as predicates, but also most federal and state statutes addressing the most serious of crimes, murder.

[51] *See United States v. Baez-Martinez*, 950 F.3d 119, 127 (1st Cir. 2020); *United States v. Begay*, 33 F.4th 1081, 1096 (9th Cir. 2022) (en banc); *United States v. Manley*, 52 F.4th 143, 150-51 (4th Cir. 2022); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1344-45 (11th Cir. 2022).

5. Suggested Language

For all the reasons stated above, the Department continues to support retaining the current definitions (with the changes in Parts B-D below regarding the Career Offender guideline, and the changes in Part B of Circuit Conflicts regarding the definition of "controlled substance offense"), while permitting courts to consider actual conduct, or (as a less favored alternative) the elements, means, and conduct established by the *Shepard* documents. If the Commission adopts the Listed Guidelines approach, the Department suggests the revisions as discussed above. If the Commission does not agree with these suggested revisions, we request that the Commission make only the changes in Parts B-D, and in Circuit Conflicts Part B, and postpone any proposals to address the categorical approach until the next amendment cycle.

In an Issue for Comment, the Commission also asks whether the definitions of "crime of violence" and "controlled substance offense" in § 2L1.2 should be amended to mirror any new definition in §4B1.2. The Department believes that the same definitions of these terms should apply throughout the Guidelines, for ease of application and to promote consistent results.

6. Departures or Variances

Finally, regardless of the approach that it takes, we encourage the Commission to add an application note explaining when variances should be considered for the career offender guidelines. On December 16, 2022, the Attorney General issued guidance to all federal prosecutors explaining that requests for departures or variances "may be particularly justified" for "[c]ertain cases in which the career offender guidelines range does not adequately reflect the defendant's crime and culpability." In particular, the Attorney General advised prosecutors to consider supporting a downward variance for certain nonviolent, low-level drug defendants, where the defendant's status as a career offender is predicated only on the current and previous commission of nonviolent controlled substance offenses.[52] Conversely, the Attorney General stated that "if the defendant's prior convictions involved the actual or threatened use of violence, but the crimes do not qualify as career offender predicates under the 'categorical approach,' if appropriate, prosecutors may consider advocating for an upward variance, including toward the career offender range."

The Commission should consider adopting similar guidance here. The Commission added a similar note in 2016, when it removed burglary as an enumerated offense; at that time, it added the current Application Note 4, suggesting the possibility of an upward variance where a burglary involved violence. Judges have recognized the propriety of variances in this situation.[53]

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[52] Indeed, the Commission itself has documented the increasing frequency of sentencing variances below a career offender range, particularly for those whose career offender status rested on drug offenses rather than violent crimes. By fiscal year 2014, judges imposed a sentence below the career offender range in roughly 75% of drug-based career offender cases, frequently choosing a sentence close to the non-career offender drug guideline. United States Sentencing Commission, Report to the Congress: Career Offender Enhancements 35 (2016).

[53] *See United States v. Carter*, 961 F.3d 953, 954 (7th Cir. 2020) ("As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant's criminal history even where strict categorical classification of a prior conviction might produce a different guideline sentencing range.").

The Commission should thus remind courts that such variances are appropriate. More broadly, and as explained in its annual report, the Department has concerns about the severity levels associated with recidivist provisions, and we believe that certain of these levels are not optimally set. The Department encourages the Commission to consider this issue in a future amendment cycle, and the Department would welcome the opportunity to assist the Commission in this work.

B. Part B: Career Offender—Robbery

Part B of the proposed Career Offender amendments would define the enumerated offense of robbery consistent with the Hobbs Act, 18 U.S.C. § 1951. This proposal would be unnecessary if the Commission adopts the Listed Guidelines approach for federal offenses, as addressed above. If the reference to "robbery" remains in §4B1.2, the Department supports the proposal in Part B.

As the Commission notes, many recent appellate decisions hold that Hobbs Act robbery—the foremost federal statute addressing a quintessential violent crime—does not qualify as a "crime of violence" under the Guidelines.[54] Before a recent amendment, courts consistently treated Hobbs Act robbery as a §4B1.2 crime of violence, as it satisfied a combination of the enumerated offenses of robbery and extortion, which itself could rest on threats of force against property. *See, e.g.*, *United States v. Becerril-Lopez*, 541 F.3d 881, 892 (9th Cir. 2008). In 2016, however, the Commission narrowed the enumerated definition of "extortion" by limiting the offense to those having an element of force or an element of fear or threats "of physical injury," as opposed to nonviolent threats such as injury to reputation. USSG, Suppl. to Appx. C, Amendment 798 (Nov. 1, 2016). Many courts, however, have determined that "physical injury" refers only to injury to a person, thus excluding from the definition of "extortion" crimes, such as Hobbs Act robbery, which may rest on force against property as well as a person. *See, e.g.*, *United States v. Scott*, 14 F.4th 190, 197 (3d Cir. 2021). It plainly was not the Commission's goal to delete Hobbs Act robbery as a "crime of violence." The government therefore supports the proposed amendment, which sensibly corrects this mistake by importing the language of the Hobbs Act into the §4B1.2 definition of "robbery."

Indeed, the Department suggests that the Commission go further to correct the unintended consequence of Amendment 798. By defining the enumerated offense of "extortion" to concern only the use of force or threats against a person, not property, the Commission may have also inadvertently eliminated nearly every extortion crime as well, as extortion has historically encompassed threats and damage to property as well as people. Indeed, federal law enforcement has long focused on extortionate threats against property as violent and dangerous crimes. Targeting extortion—defined as "the obtaining of money or property from another with his consent, induced by the wrongful use of force or fear . . . induced by oral or written threats to do an unlawful injury to the *property* of the threatened person . . ."—was a central focus of the Senate's "Copeland Committee," which proposed what became the Anti-Racketeering Act of

[54] *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 490 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176, 179-83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799-802 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020).

1934. *See* Crime and Criminal Practices," Report of the Senate Committee on Commerce, S. Rep. No. 1189, 75th Cong., 1st Sess. (1937). The adoption of the Hobbs Act in 1946, ch. 537, 60 Stat. 420, left the key provisions of the Anti-Racketeering Act unaltered, continuing to target violence directed against property as well as persons. *See Scheidler v. Nat'l Org. for Women, Inc*., 547 U.S. 9, 18-20 (2006) (discussing the legislative focus on physical violence through robbery and extortion). Congress has thus long recognized, and has never wavered in its conclusion, that extortion includes violent threats to property as well as persons. We doubt that the Commission in 2016 intended to alter, *sub silentio*, the long-accepted definition and narrow the meaning of extortion. If the term "extortion" remains in §4B1.2, the Commission therefore should issue a statement that "physical injury," as it appears in the application note, refers to injury to property as well as persons.

Finally, the Commission inquires whether it should adopt the definition of the level of force required for robbery stated in *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019) ("The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance."). That is a sensible proposal for purposes of completeness.

C. Part C: Career Offender—Inchoate Offenses

The Department supports Option 1 of the Part C proposal to define the terms "crime of violence" and "controlled substance offense" to include inchoate offenses in the textual definition of the terms, rather than through an application note. Option 1 would be unnecessary if the Listed Guidelines proposal in Part A were adopted; but if not, Option 1 would confirm the Commission's long-held position that the terms "crime of violence" and "controlled substance offense" include conspiracies to commit, attempts to commit, and aiding and abetting any qualifying substantive crime. In the wake of the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), some courts of appeals have disregarded the Guidelines commentary defining "crimes of violence" and "controlled substance offenses" to include inchoate offenses. The Department agrees with the courts of appeals that have followed the Guidelines' commentary, but moving the long-settled application note into the Guidelines text would resolve the matter.

Option 1 (like the Part A proposal) also appropriately provides that a conspiracy offense qualifies whether or not proof of an overt act is required. There are numerous conspiracy statutes that do not require proof of an overt act, including the principal federal drug conspiracy statute, 21 U.S.C. § 846. There is no rational basis for excluding these crimes from §4B1.2.

D. Part D: Career Offender—Offer to Sell

The Department supports Part D of the proposed amendments to the Career Offender guideline, which provides that an offense involving an "offer to sell" qualifies as a "controlled substance offense." Again, this proposed amendment is immaterial if the Commission adopts a Listed Guidelines approach in its entirety. But otherwise, the Commission should adopt this proposal. An "offer to sell" fits comfortably within the traditional definition of a drug trafficking crime. This amendment would also bring §4B1.2(b) explicitly into line with the definition of "drug trafficking offense" in the illegal reentry Guideline at § 2L1.2 cmt. n.2. There is no sensible reason that the definitions should differ.

Moreover, because of the categorical approach, many state offenses that involve actual trafficking of controlled substances do not constitute "controlled substance offenses" because they also cover an "offer to sell." *See, e.g.*, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); *United States v. Madkins*, 866 F.3d 1136, 1143-48 (10th Cir. 2017). This results in disparate treatment of defendants, depending on the breadth of the state statute under which they were prosecuted. These problems are eliminated by a sensible provision that a "controlled substance offense" includes an offer to sell.

6. Criminal History

A. Status Points

The Commission has proposed three options for reducing the effect of "status points" on the Guidelines criminal history score. Status points—adding two points to the criminal history score for offenses committed while under criminal justice sentence—have been part of the Guidelines since they were first issued in 1987, and over the past five years, the provision has applied to 37.5 percent of all offenders.

The Department appreciates the concerns underlying the Commission's proposal. Because we wish to further understand the Commission's analysis of status points' predictive value for recidivism to justify such a significant amendment, and because we are concerned that the proposal gives insufficient consideration to the just punishment goal of the criminal history score, we request that the Commission defer these changes at this stage.

1. The Proposed Amendment Lacks Sufficient Empirical Bases

The proposed amendment appears to be based on a June 2022 Commission study examining the relationship between status points and recidivism in which the Commission suggests that "status points add little to the overall predictive value associated with the criminal history score."[55] We request additional time to consider the methodology and conclusions of that study before the Commission makes the significant proposed changes based on it.

We note first that the data set used to conduct the study is not publicly available and there has been no independent analysis of the data. Given the study's importance for this significant policy shift, we believe some independent analysis is critical.

Second, we believe additional analysis is necessary before implementation of the proposed amendment. The synopsis for the proposed amendment notes that status points add "little to the overall predictive value" of recidivism; however, a model that predicts recidivism is methodologically very different from a model that seeks to analyze how status points causally *affect* recidivism. The latter requires experimental or quasi-experimental techniques that control for underlying differences between individuals, such as in the "doubly robust estimation"

[55] Proposed Amendment on Criminal History (citing United States Sentencing Commission, Revisiting Status Points (2022), *available at* https://www.ussc.gov/research/research-reports/revisiting-status-points).

analysis that the Commission conducted in a separate June 2022 study on the relationship between the length of incarceration and recidivism.[56] That recidivism study used propensity score matching, a widely-accepted technique that compares outcomes between similar individuals to make reliable causal inferences. By contrast, the study on status points did not use any quasi-experimental methods to identify underlying differences between those who received, and did not receive, status points. Nor does the study appear to have taken a standard recidivism approach (such as the survival analysis or time to failure model) to examine the hazards of failure or the likelihood and timing of recidivism—instead, it employs a simple binary yes/no analysis of recidivism. We believe that a more rigorous recidivism analysis which accounts for underlying differences between status and non-status offenders, and which considers the time to failure, demographic variables, offense levels, types of offenses, and other variables that may contribute to recidivism, would greatly enhance the reliability of the Commission's study and proposals.[57]

Third, we believe the recidivism rates of offenders released in 2010 warrant deeper scrutiny. *Revisiting Status Points* appears to analyze the recidivism data by individual criminal history score without further comparative analyses by total offense levels, Guidelines range, actual sentence imposed, nature of the offense, or the Criminal History Category that resulted from the application of status points.[58] Additionally, Figure 8 of the study shows that for offenders with Criminal History Scores of 1 through 4, the differences in rearrest rates between status and non-status offenders were statistically significant to some degree.[59] This group comprises a large portion of the offender pool. According to the Commission's 2021 data, 14,361 offenders had scores of 1 through 4, representing 27% of all offenders sentenced in 2021 and 40% of all offenders with at least one point.[60] In other words, the Commission's own analysis suggests that for 40% of all re-offenders, status points may have a meaningful relationship to recidivism.

For the above reasons, we recommend that the Commission conduct additional studies on how effectively the status points provision functions within §4A1.1 to advance the recidivism

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[56] United States Sentencing Commission, Length of Incarceration and Recidivism, at 16 (2022), *available at* https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism.

[57] For example, the Department of Justice's Bureau of Justice Statistics (BJS) has produced reports on recidivism of state offenders in 1983, 1994, 2005, 2008, and 2012. Also, in 2021, the BJS released ten-year (2008-2018) and five-year (2012-2017) follow-up studies of state prisoners released in 2008 and 2012. *See* Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018; Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017) (2021), *available at* https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-34-states-2012-5-year-follow-period-2012-2017. Both studies examined recidivism patterns by demographic characteristics, commitment offense, and prior criminal history. These studies have aided the public and state policy makers to understand reliably, among other things, the relationship between specific offender characteristics and recidivism. Additional evaluations of federal offenders' recidivism data in conjunction with the BJS's studies will enhance the Commission's and the public's understanding and deepen confidence in proposed policy changes.

[58] *See* Revisiting Status Points, Figure 8 and Appendix B.

[59] The differences in rearrest rates were evaluated at the 1% level of significance. Note that at the 5% level of significance differences in rearrest rates were also statistically significant between status and non-status offenders who had a criminal history score of 5. *See* Revisiting Status Points, Figure 8 & Appendix B (Table B-2).

[60] Revisiting Status Points, Figure 8.

reduction goal of sentencing. Such studies should be conducted with a rigorous methodology that investigates the causal, not just predictive, impact of status points on recidivism.

2. The Proposed Amendment Places a Disproportionate Emphasis on the Crime Control Goal of Sentencing

The Department also believes the proposal unduly minimizes other purposes of sentencing, especially the just punishment goal. Since the inaugural 1987 edition of the Guidelines Manual, the provisions in §4A1.1 shared the twin goals of recidivism reduction and just punishment for the committed crimes. In a report accompanying the 1987 Guidelines, the Commission declared, "[b]ecause the elements selected are compatible both with a just punishment and crime control approach, the conflict that otherwise might exist between these two purposes of sentencing is diminished."[61]

Any proposed amendment here should meaningfully address both goals, as an offender's continued engagement in crime is probative of the need for deterrence, protection of the public, and just punishment. Even if additional studies show that status points have little predictive value for recidivism, that conclusion should not necessarily lead to elimination or weakening of the status points provision. While further study may lend support to the Commission's proposal, the Commission should also consider whether the just punishment goal, as well as the other purposes of sentencing articulated in 18 U.S.C. § 3553(a), justifies retaining the status points provision in the Guidelines.

3. If the Commission Adopts One of the Proposed Options, the Commission Should Adopt Option 1—Retention of the Current Provision with a New Downward Departure Provision

Among the three options in the proposed amendment, the Department believes retention of the current status points provision along with a new downward departure provision in the application notes is the most appropriate. We view this option as an extension of the existing provision in §4A1.3(b) that a downward departure may be warranted after an individualized assessment of each case. If, however, the Commission adopts this proposal, we recommend that the first sentence of the proposed paragraph end with "or the likelihood that the defendant will commit other crimes," consistent with the language of the Guidelines primary criminal history downward departure provision in §4A1.3(b).

The proposed removal of status points in Option 3 stands in significant tension with the approach taken by Congress and other provisions of the Guidelines toward offenses committed while under criminal justice supervision and court order—18 U.S.C. § 3147 (offense committed while on release), §3C1.3 (commission of offense while on release), §4A1.3, cmt. n.2(A)(iv) (upward departure for offense committed while on bail or pretrial release for another serious offense), and §2B1.1(b)(9) (fraud in contravention of prior judicial order). As Application Note 8(C) to §2B1.1(b)(9) states, "[a] defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment." Indeed, § 3147, §3C1.3, §4A1.3, and §2B1.1(b)(9) embody Congress's

[61] Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987) at 41-42.

and the Commission's policy of heightening penalties for offenses committed while under court order and supervision and for offenses committed while under any criminal justice sentence, in disregard for judicial authority. The placement of the commission of the instant offense while under criminal justice sentence as a mere example in application notes will lessen accountability for such conduct.

At minimum, if Option 3 is adopted, the Commission should preserve status points at least for recent and violent prior offenses. The Commission's 2021 study on recidivism of federal offenders shows that nearly one-half (49.3%) were rearrested within eight years of release, and 35.4% recidivated within three years of release[62]—the typical length of time of supervised release for defendants released from prison. Thus, for specific deterrence purposes, the definition of "recent" for status points purposes should be at least three years. The 2021 recidivism study also shows that those sentenced for a federal firearms offense had the highest rearrest rate, at 70.6 percent, followed by those sentenced for robbery, 63.2%, and that those who were released following sentencing for a violent offense were more likely to be rearrested than non-violent offenders, at 59.9 percent compared to 48.2 percent.[63] [64]

B. Zero-Point Offenders

The Commission has proposed adding a new criminal history category for those offenders with no criminal history points. Since the Guidelines Manual was first issued in 1987, there have been six criminal history categories. The proposed amendment would provide for a one- or two-level reduction for offenders who fall within the new category. The Commission has proposed three options, under any of which, the number of cases affected would be significant and far-reaching. In Fiscal Year 2021, 17,491 federal offenders had zero criminal history points. This amounts to 32.6% of all federal offenders for that year. According to the Commission's own data, the proposed amendments would have affected between approximately 13,203 and 17,491 defendants, depending on the option ultimately selected. As a result, the proposed amendment is one of the most significant under consideration.

While the Department appreciates the Commission's interest in leniency for first-time offenders, the proposal would sweep in defendants who committed serious offenses, including hate-based or civil rights offenses, public corruption offenses, national security offenses, and serious economic and corporate crimes. The proposed amendment would also offset in part the Commission's proposed amendment to raise the base offense level for §2A2.3, which covers sexual abuse of a ward. As the Department has explained in previous submissions, defendants sentenced under these Guidelines—who are largely BOP employees or other federal law enforcement officers—typically do not have a prior criminal history, and the Commission's proposal targeting zero-point offenders would therefore cover them.

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[62] *Id.* at 4.

[63] *Id.* at 32.

[64] If the Commission adopts Option 3, it should make an additional conforming change to Application Note 8(C) of §2B1.1. That application note references the status points provision as follows: "This enhancement does not apply if the same conduct resulted in an enhancement pursuant to . . . a violation of probation addressed in §4A1.1 (Criminal History Category))."

District courts already can—and regularly do—vary downward for zero-point defendants, and the Department will continue to support such departures in appropriate cases. The proposed amendments would sweep too broadly and introduce unnecessary complexity and litigation. The Department therefore opposes the proposed amendment under any of the proposed options.

1. The Proposed Amendment Would Add Unnecessary Complexity and Litigation

The proposed amendment appears to be based on a concern that the Guidelines' range for offenders with limited or no criminal history is too high *and* that these offenders are being sentenced to terms of imprisonment greater than necessary. An examination of the Commission's data shows otherwise. The current Guidelines and statutory sentencing law already provide mechanisms—downward departures and variances—that sentencing courts regularly use to provide the reductions intended by the proposed amendment.

The Commission's data shows that in Fiscal Year 2021, the average low end of the Guidelines range for defendants with zero criminal history points and zero prior convictions called for 40 months of imprisonment.[65] The Commission's data also shows that the actual average sentence imposed on these same offenders is 29 months,[66] which equates to an offense level of 18. Thus, district courts are, on average, effectively already departing three levels for the zero-point offenders. This equates to an eleven-month reduction or roughly 27%. In fact, according to the Commission's data for Fiscal Year 2021, only 38% of offenders with zero prior convictions were sentenced within the recommended Guidelines range. Moreover, many of these within-Guidelines range zero-point offenders are in Zones A and B and thus are already eligible for a probationary sentence. Thus, the vast majority of the offenders targeted by the proposal are already receiving below Guidelines sentences or are already eligible for probation.

All of the options under consideration, by contrast, would add a significant layer of complexity and litigation to the sentencing process. Under all options, the Commission would adopt up to six different exclusionary criteria for the parties to debate whenever a defendant has zero criminal history points. Each would lead to litigation based on both legal issues and factual challenges. For example, one of the proposed exclusionary criteria relates to the financial hardship caused by the offense. In 2015, §2B1.1(b)(2)(A)(iii) was amended to include, for the first time, the same language: "caused substantial financial hardship." Since then—just over seven years—there have been over 400 published appellate opinions that discuss or address this language. Similarly, objections to and litigation surrounding the application of leadership role enhancements are everyday occurrences in federal courts. The same is true for use of a dangerous weapon when, for example, a firearm is present with or possessed by the offender but not fired. In short, given the other avenues courts can use—and are using—to account for offender characteristics, the costs of this proposed amendment will outweigh any sentencing benefit.

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[65] U.S. Sentencing Commission, Public Data Presentation for Proposed Criminal History Amendment, at 41, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230112/20230120_DB_Criminal-History.pdf (document accompanying the Commission's video presentation of proposed 2023 criminal history amendments).

[66] *Id.*

2. The Proposed Amendments Will Adversely Affect Prosecution of Crimes for Which General Deterrence is a Primary Factor

An across-the-board departure for those with zero criminal history points may reduce general deterrence in certain kinds of prosecutions in which general deterrence is a primary factor, including economic crimes. The Commission has previously recognized that "the definite prospect of prison, even though the term may be short, will serve as a significant deterrent in economic crime cases, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences). Courts have agreed. *See United States v. Engle*, 592 F.3d 495, 502 (4th Cir. 2010) ("Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission's focus on incarceration as a means of third-party deterrence is wise.").

History shows that those convicted of economic crimes tend to have little to no criminal history. Thus, the proposed amendments will result in lower Guidelines ranges and thus potentially lower sentences for those offenders by disregarding the size or scope of the crime—thus jettisoning the Commission's decades-long determination that certain fraud crimes warrant serious treatment and its recognition that general deterrence is critical given the sheer breadth of the potential crime problem.

3. A Two-Level Reduction Conflicts with the Structure of the Guidelines.

The Commission's proposal for a two-level decrease is particularly problematic, given the structure of the Guidelines and the Sentencing Table. As currently constructed, the Sentencing Table typically equates an increase in a criminal history category (such as from Criminal History Category I to II) with a one-level increase in the Guidelines' range. For example, if an offender has a Total Offense Level of 30 and a Criminal History Category of I, the Guidelines' range is 97-121 months. With the same Total Offense Level, but a Criminal History Category of II, the Guidelines range bumps up to 108-135 months. Equally, if the Total Offense Level is increased by one level to 31, with a Criminal History Category of I, the Guidelines range is 108-135 months. In short, a one-level increase in the Total Offense Level is designed to have the same impact as a one category jump in the Criminal History Category. Providing for a two-level decrease if an offender falls within a newly created Criminal History Category 0 is inconsistent with the Sentencing Table design. A one-level decrease is the only structurally sound one if the proposed new category is adopted.

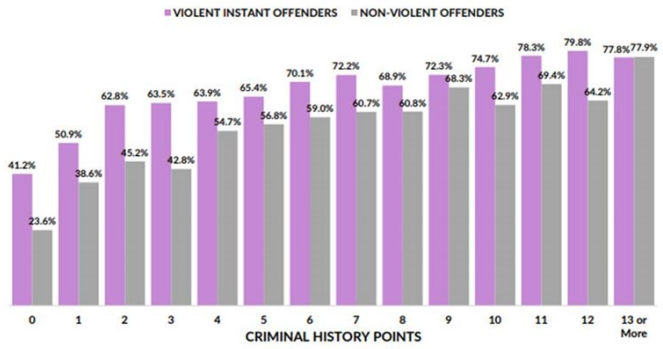
4. If a Decrease is to be Granted, it Should be Limited to "True Zeros" with an Expanded Set of Exclusionary Criteria

As the Commission's own proposal (under any option) acknowledges, and as judges across the country have shown, a departure is not warranted for every offender who has a zero criminal history score. Instead, if the Commission is to enact any of the options, it should do so for a smaller subset of offenders with zero criminal history points.

If the Commission seeks to enact the proposed amendment, the Department recommends limiting application to those who are "true zeros" in terms of criminal history scores (as proposed in Option 1) and using an expanded set of exclusionary criteria. If the Commission uses an approach that awards the reduction to anyone with zero points, regardless of the number of prior convictions, hundreds of convicted violent criminals will benefit. For example, according to the Commission's own data, in 2021, of those with zero criminal history points, there were 11 convicted murderers, 119 offenders with sexual assault convictions, 53 offenders convicted of robberies, and 454 offenders with convictions for assault. But, because of the timing of these convictions, those prior convictions did not "score" for purposes of criminal history calculations.

Similarly, the Department recommends expanding the exclusionary criteria to include those who have committed violent crimes not captured under the existing proposals—such as federal assault and civil rights offenses, which may be committed through intimidation that does not involve the use of violence or a credible threat of violence; arson, which may be committed without a dangerous weapon; and conspiracy, attempt, and solicitation of homicide and other violent crimes, which are not covered by the proposed criteria—whether as their instant offense of conviction or through prior uncounted criminal history. The Commission's chart below shows a vast disparity in recidivism rates for those who engage in violent crimes, as opposed to non-violent offenders, even for zero-point defendants. Over 41% of those with zero points who commit a violent crime are rearrested within eight years of release from custody.

Figure 28. Rearrest Rates by Criminal History Points for Violent Instant and Non-Violent Federal Offenders Released in 2010



The Department also proposes additional exclusionary criteria based on the type of offense of conviction. This includes terrorism offenses, civil rights offenses, hate offenses, and all child sex offenses, including possession of receipt of child pornography and child sexual abuse material trafficking that would not be included in the definition of "covered sex crime." This also includes economic offenses, for which general deterrence is a primary factor.

Finally, the Department urges the Commission to include, in the exclusionary criteria, cases involving vulnerable victims, as defined in §3A1.1(b), and cases involving loss amounts beyond a certain threshold, as determined under §2B1.1 or §2T4.1. There are many cases involving an egregious amount of loss that the offender caused, where the victim is the government alone (*i.e.,* health care fraud cases), meaning that the already proposed exclusionary

criteria regarding the number of victims and the substantial hardship placed upon the victims would not apply. In such cases, given the nature of the offenses—which typically occur over a substantial period of time and cause a significant loss to the U.S. taxpayer—an award of a one-or-two level reduction would be inappropriate.

Alternatively, any case where the total offense level exceeds 30 should be excluded from the reduction.

C. Incorporating 28 U.S.C. § 994(j)

The Commission has also proposed adding new commentary regarding the appropriateness of a non-incarceration sentence for certain zero-point offenders. This proposal is based on language taken from 28 U.S.C. § 994(j), which directs the Commission to "[e]nsure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." The Department opposes this proposed amendment because the Guidelines already reflect the appropriateness of a non-incarceration sentence for non-serious offenses through the operation of the sentencing table, particularly with respect to sentencing zones and the total offense levels.

Sections 5B1.1 and 5C1.1 already make clear when a non-incarceration sentence is authorized and appropriate. This is done through reference to the zones set forth in the sentencing table (Zones A, B, C, and D). For example, §5C1.1(b) states that "if the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required." Similarly, Guidelines exist for the very purpose of determining an offense level that reflects the overall seriousness of the offense. As the Supreme Court and numerous other courts have stated "[g]uideline offense levels are designed to reflect the seriousness of the offense for which a convicted criminal is being sentenced." *United States v. Savin*, 349 F.3d 27, 37 (2d Cir. 2003); *see also Nichols v. United States*, 511 U.S. 738, 740 n.3 (1994). Higher offense levels equate with more serious offenses, while lower scores equate with less serious offenses. The total offense level, when combined with a criminal history category, provides for placement on the sentencing table within one of the zones.

The proposal also does not specify how to discern which offenses are "otherwise serious."[67] Without clearer guidance, this provision could be misconstrued as a generally applicable override of the Guidelines. Some judges may use the total offense level as a guide. Others will use their own methodology. This will increase disparity and undermine the very purposes of the Commission, as articulated in the Sentencing Reform Act.

The proposed amendment is also at odds with the Guidelines Manual's ordinary approach. The Guidelines generally do not dictate the type of sentence that should be imposed. Instead, they provide the court with the appropriate considerations and suggested parameters. One of the Commission's proposed options, however, explicitly instructs the court when a

[67] Notably, the Commission has previously recognized that certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, are and, thus should be considered, "otherwise serious offense[s] under Section 994(j)." USSG Ch. 1 Pt. A(4)(d) (Probation and Split Sentences).

sentence of non-incarceration is appropriate. We do not believe this is what § 994(j) intended. Section 994(j) instructs the Commission to "[e]nsure that the guidelines *reflect*" the appropriateness of such a sentence (emphasis added). The Commission can achieve this end through appropriate construction and application of the guidelines leading to a recommended Guidelines range.

Even if the Commission adopts the "generally appropriate" language for zero-point offenders in Zones A and B, the Department opposes the "generally appropriate" or "may be considered" language for zero-point offenders who are in Zones C and D. The Department would be happy to provide the Commission with the many examples of zero-point defendants in Zones C and D who meet the more restrictive eligibility criteria under Option 1 but have committed significant economic, public corruption, drug trafficking, racketeering, firearms, national security, and other serious offenses rendering a non-incarceration sentence inappropriate.

D. Impact of Simple Possession of Marijuana Offenses

The Department supports the proposed amendment to insert, in Application Note 3 to §4A1.3, "criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person," as an additional example when a downward departure may be warranted. The President has made clear his views that "no one should be in jail just for using or possessing marijuana," and on October 6, 2022, he issued a pardon proclamation meant to "help relieve the collateral consequences arising from these convictions."[68] The Commission's proposal would accord with that sentiment, and also account for the twenty-one states and territories that have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities of marijuana for recreational use.

The Commission has requested comments about whether it should provide more guidance on this proposed departure. To provide guidance on determining "personal use, without an intent to sell or distribute it to another person," we recommend adding the following sentence to proposed Application Note 3(A)(ii) (similar to Application Note 2(C)'s guidance for determining upward departures for tribal convictions): "In determining whether, or to what extent, a downward departure based on a possession of marihuana for personal use is appropriate, the court shall consider the factors set forth in §4A1.3(a) and, in addition, may consider relevant factors such as the following: the nature of the original charges, the facts surrounding the offense (including the quantity of marihuana possessed, the manner in which the marihuana was packaged, the presence of large quantities of cash, the presence of drug ledgers, the possession of firearms, and other evidence of drug trafficking activity), whether the defendant's conviction was the result of a plea agreement that involved the dismissal of drug trafficking charges, and whether the offense was subsequently pardoned."

[68] Statement from President Biden on Marijuana Reform (October 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/.

7. Alternatives to Incarceration Programs

The Commission published two issues for comment relating to alternatives-to-incarceration (ATI) programs. First, it invited comment on how to approach any study relating to this priority.[69] Second, it invited comment on whether the Guidelines should be amended "to address court-sponsored diversion and alternatives-to-incarceration programs."[70] Relatedly, the Commission asked whether such amendments should be considered "during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs."[71]

The Department strongly supports the use of ATI programs, including pretrial diversion programs and problem-solving courts. Indeed, the Department has taken steps to encourage U.S. Attorneys' Offices to consider pretrial diversion programs. In his December 16, 2022, memorandum regarding charging, pleas, and sentencing, the Attorney General stated that every U.S. Attorney's Office "should develop an appropriate pretrial diversion policy."[72] And on February 10, 2023, the Department updated the Justice Manual to reflect that pretrial diversion programs "provide prosecutors with another tool – in addition to the traditional criminal justice process – to ensure accountability for criminal conduct, protect the public by reducing rates of recidivism, conserve prosecutive and judicial resources, and provide opportunities for treatment, rehabilitation, and community correction." JM 9-22.010. The Justice Manual now reflects that "[e]ach U.S. Attorney's Office shall develop and implement a policy on the use of pretrial diversion appropriate for the Office's district." *Id.*

Consistent with those directives, U.S. Attorneys' Offices are supporting and participating in specialty and diversion courts across the country. These courts vary by district in terms of their focus (for example, the types of cases and characteristics of defendants) and at what point in the criminal justice process they occur (whether before charging, after charging, or after pleading guilty). To use one example, since 2012, more than 300 defendants have successfully completed the Central District of California's Conviction and Sentence Alternatives (CASA) program—a post-guilty plea diversion program that provides intensive rehabilitative services to selected defendants who meet a set of admissions criteria. CASA is a 12- to 24-month program designed primarily for low-level, nonviolent offenders who have substance use and/or mental health disorders and relatively modest criminal histories. Successful completion of the program results either in dismissal of all charges or in a noncustodial sentence for more serious offenders.

Additionally, on November 18, 2022, the Associate Attorney General emphasized[73] the importance of these types of courts, highlighting the following examples:

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[69] U.S.Sentencing Commission, Issues for Comment: Alternatives-to-Incarceration Programs, 1, *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf.
[70] *Id.*
[71] *Id.*
[72] *General Department Policies Regarding Charging, Pleas, and Sentencing*, Memorandum of the Attorney General, 2 (Dec. 16, 2022), *available at* https://www.justice.gov/media/1265326/dl?inline.
[73] Associate Attorney General Vanita Gupta Delivers Remarks at ABA Criminal Justice Section Awards Luncheon (Nov. 18, 2022), *available at* https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-aba-criminal-justice-section.

> In the Eastern District of Pennsylvania, the Strategies that Result in Developing Emotional Stability program, known as "STRIDES," started as a pilot project over a decade ago. Now permanent, STRIDES is an alternative or "problem-solving" court designed to address the needs of individuals diagnosed with severe and persistent mental illness. The STRIDES case team is comprised of two Magistrate Judges who oversee the program, representatives from the U.S. Attorney's Office, the Federal Community Defenders, private defense counsel, U.S. Pretrial Services, and U.S. Probation. Here, again, are the partnerships necessary for equal justice—folks from different parts of the system working together towards better outcomes for individuals and ultimately, for communities.
>
> The District of Utah is home to the nation's first federal mental health court—Reentry Independence through Sustainable Efforts, or "RISE." And there too, it is stakeholders across the system that make it work, from different parts of the Justice Department, including the U.S. Attorney's Office and Bureau of Prisons, to judges, defense attorneys, and community partners who provide classes and supports to participants and their families. The District of Utah is also home to the first federal veterans court in the nation, a well-regarded drug court, and a tribal court . . . .

The Department also supports programs that are designed to address the needs of veterans, and will support a cross-site evaluation of veterans treatment courts to identify best practices, standards, and opportunities to increase the efficacy of these models across the country.[74] The Department's Office for Access to Justice participates in quarterly meetings with the Servicemembers and Veterans Initiative focused on policy and targeted outreach, such as medical-legal partnerships and diversion programs, for underserved populations of veterans.

Currently, the Department, through the Office of Justice Programs, invests in a number of state and local diversion models that connect individuals with behavioral health disorders to community-based resources and alternatives to arrest or incarceration through grants.[75] In addition to providing ongoing support for these programs, the Department is initiating support for evaluations of other models that divert individuals with mental health disorders away from the justice system and toward community-based resources, including 911 dispatch diversion models and co-responder models.[76]

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[74] U.S. Dep't of Justice, Nat'l Inst. of Justice, *NIJ Multisite Impact and Cost-Efficiency Evaluation of Veterans Treatment Courts* (Jul. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gk-00035-vtcx.

[75] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Comprehensive Opioid, Stimulant, and Substance Abuse Program (COSSAP)* (Sep. 2020), https://bja.ojp.gov/program/cossap/overview; *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Justice and Mental Health Collaboration Program (JMHCP)* (May 2022), https://bja.ojp.gov/program/justice-and-mental-health-collaboration-program-jmhcp/overview.

[76] *See, e.g.,* U.S. Dep't of Justice, Nat'l Inst. of Justice, *Evaluation of Harris Center Crisis Call Diversion Program* (Sep. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gg-03575-ress; U.S. Dept' of Justice, Nat'l Inst. of Justice, *Integrated Law Enforcement and Mental Health Responses in Tucson: An Impact and Cost Benefit Analysis* (Sep. 2022), *at* https://nij.ojp.gov/funding/awards/15pnij-22-gg-03580-ress; U.S. Dept' of Justice, Nat'l Inst. of Justice, *An evaluation of the SEPTA police SAVE initiative* (Sep. 2022), at https://nij.ojp.gov/funding/awards/15pnij-21-gg-02717-ress.

We agree that further study is necessary to build on the work of the 2017 Commission report,[77] and continue to evaluate the effects of ATI programs. In the 2017 report, the Commission noted that its "study has been qualitative rather than quantitative at this juncture because of a lack of available empirical data about the programs."[78] Such a qualitative focus made sense in light of the "emerging" nature of the federal programs at the time.[79] As noted on the Sentencing Commission's webpage[80] on ATI and diversion programs (summarizing information from the Federal Judicial Center), the number of these programs has increased significantly since 2008:

> The number of federal problem-solving courts began expanding in the late 2000s. In 2008, 18 federal problem-solving courts were operating. Three years later, the number had tripled to 54 in 2011. The number more than doubled (to 110) by 2016. The largest single-year of expansion was in 2015 when 21 programs began operating . . . . In October 2022, the FJC directory reported 147 federal problem-solving courts operating in 64 federal judicial districts.

With respect to the first issue on which the Commission invited comment, we have four recommendations regarding the study of ATI programs. First, we recommend that the Commission study the characteristics, practices, and objectives of programs so as to categorize and compare the different programs that currently exist in the federal criminal justice program. Programs differ widely in their focus, selection criteria, duration, degrees of supervision, oversight, operating authority, resource commitment (including staff size and budgets), and internal measures of success. A clear and detailed identification of the nature of the existing programs will assist in the understanding of the effects of these programs and identification of the key drivers of positive outcomes that contribute toward addressing root causes of criminal conduct and reducing recidivism. As a 2019 study on federal ATI programs recommended, "more research is needed to understand what factors influence the likelihood that an individual will complete an ATI program successfully, thus providing the greatest cost-benefit."[81]

Second, we recommend a longitudinal study on the recidivism outcomes of existing programs. The 2019 study on federal ATI programs (which examined the performance of 534 participants in seven districts), as well as its follow-up 2021 study (with 1,000 participants in thirteen districts), focused on short-term outcomes only. As the 2019 study recommended:[82]

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[77] U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Court Programs* (September 2017), *at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.
[78] *Id.* at 2.
[79] *Id.*
[80] U.S. Sentencing Commission, *Alternatives to Incarceration and Diversion Programs*, *at* https://www.ussc.gov/guidelines/primers/alternatives-incarceration-and-diversion-programs (footnote omitted).
[81] Kevin T. Wolff, et al., *Pretrial Services, U.S. Courts, A Viable Alternative? Alternatives to Incarceration across Seven Federal Districts* 11 (2019), *available at* https://www.nyept.uscourts.gov/sites/nyept/files/QL%20-%20ATIStudyFullReport%282019%29.pdf; *see also* Laura Baber et al., *Expanding the Analysis: Alternatives to Incarceration across 13 Federal Districts* 4, 11-12 (2021) at https://www.uscourts.gov/sites/default/files/85_3_1_0.pdf ("[T]here remains limited evidence of long-term efficacy of federal ATI programs.").
[82] Wolff, *supra* n.82, at 59.

> More research is needed on the impact of ATI programs and its longer-term effect on recidivism, especially recidivism by those whose cases were dismissed or who served a term of incarceration, with or without supervised release. More elusive, but important to understand are the more qualitative indications of long-term positive changes in defendants' lives, such as relationships, employment, education, access to healthcare, and financial independence.

Third, we recommend that the Commission conduct in-depth studies of representative ATI programs to understand and evaluate those programs' strengths and weaknesses. In addition to any national study that may be conducted, a study of historical data and defined prospective data will help better understand the effectiveness of these programs and identify features that contribute toward successful reentry and recidivism reduction. For example, the CASA program in the Central District of California has secured a research proposal for development of a standardized database system that will enable collection and analysis of information about program participants in ways that are specific to CASA and allow for comparison with reliable control groups. The proposed database and accompanying study remain undeveloped due to funding issues. Studies using such a database may be conducted in major federal ATI programs.

Finally, we recommend a comprehensive study of the data regularly captured by the Commission on the offenders who are admitted into federal ATI programs—*e.g.*, demographic data, offense types, offense levels, criminal histories, and procedural postures. Such a study will identify key trends, areas of emphases and neglect, and any recognizable biases at work, while promoting greater procedural fairness and transparency.

As for the second issue, we believe that the Commission should defer a decision to amend the Guidelines until the results of the study contemplated in the first issue are available. Given the relatively limited information available at this stage regarding federal ATI programs, it may be premature to make changes to the Guidelines. Indeed, as the Commission's first issue illustrates, many questions remain about how to structure such a needed study. In the meantime, district courts can and should consider on a case-by-case basis the appropriate treatment of individuals who successfully complete court-sponsored diversion programs.

8. Fake Pills

Currently, §2D1.1(b)(13) provides for a four-level enhancement if "the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue." The Commission proposes to amend §2D1.1(b)(13) to add an alternative two-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission also published issues for comment, asking whether the proposed *mens rea* requirement is appropriate; whether the Commission should instead make §2D1.1(b)(13)(B) an offense-based enhancement (as opposed to exclusively defendant-based); whether the Commission should make the enhancement applicable to other synthetic opioids; and whether there is an alternative approach that the Commission should consider.

We thank the Commission for working with the Department, including the Drug Enforcement Administration (DEA), to address the ongoing crisis of overdose deaths due to fentanyl. In April 2018, the Commission adopted §2D1.1(b)(13) in response to the growing crisis of overdose deaths from synthetic opioids, noting that in 2015—the most recent year for which data were available—there were 9,580 deaths overdose deaths from synthetic opioids, including fentanyl.[83] The problem is significantly worse now; in the twelve months leading up to August 2022, there were 73,102 such deaths—an increase of 663 percent.[84] Indeed, in his State of the Union Address, President Biden noted that "fentanyl is killing more than 70,000 Americans a year," requested a surge to "stop pills and powder at the border," and asked for "strong penalties to crack down on fentanyl trafficking."[85]

The President specifically mentioned "pills" in his State of the Union address because of the acute threat posed by fake pills laced with fentanyl. The DEA reports that it seized more than 50 million fake pills during the 2022 fiscal year and that 6 out of 10 fentanyl-laced fake pills now contain a potentially lethal dose.[86] Nearly every government agency can and should play a role in addressing the current crisis. The Commission can help by putting traffickers on notice that they are risking increased punishment by selling fake pills.

The Department urges the Commission to alter the *mens rea* requirement applicable to these offenses, which will help better deter the distribution of fake pills likely to be deadly. Further, the Department suggests that the enhancement be applicable to all synthetic opioids, in addition to fentanyl and fentanyl analogues.

A. The Enhancement Should Adopt a Rebuttable Presumption for the *Mens Rea* Requirement

The Department believes the Commission should consider amending the *mens rea* requirement. Although most pills sold on the black market are laced with fentanyl, the current four-level enhancement applies infrequently: of 5,711 defendants who were sentenced for trafficking in fentanyl or fentanyl analogues between fiscal years 2019 and 2021, only 57

[83] USSG Appendix C, Amendment 807 ("the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014").

[84] Neeraj Gandotra, M.D., Chief Medical Officer, SAMSA, testimony House Committee on Energy and Commerce Subcommittee on Health Hearing titled "Lives Worth Living, Addressing the Fentanyl Crisis," February 1, 2023 (reporting 73,102 overdose deaths attributable to fentanyl and other synthetic opioids during the 12-month period ending in August 2022). The Commission's own data also reflect these trends in cases sentenced. In July of 2022, the Commission reported that fentanyl trafficking offenders have increased by 950.0% since the 2017 Fiscal Year. Quick Facts on Fentanyl Trafficking Offenses, FY 2021.

[85] Remarks by President Biden, State of the Union Address (Feb. 7, 2023), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-by-president-biden-in-state-of-the-union-address-2/ ("So let's launch a major surge to stop fentanyl production and the sale and trafficking. With more drug detection machines, inspection cargo, stop pills and powder at the border. …Working with couriers, like FedEx, to inspect more packages for drugs. Strong penalties to crack down on fentanyl trafficking.").

[86] Statement of Anne Milgram, Administrator, DEA, Before the Senate Committee on Foreign Relations, February 15, 2023; *see also* DEA, One Pill Can Kill..

received the four-level increase at (b)(13) for misrepresenting fentanyl as another substance.[87] In our experience, subsection (b)(13) is applied so infrequently in part because the current enhancement requires the government to demonstrate actual knowledge that the substance contains fentanyl or a fentanyl analogue. *See United States v. Allen*, 2022 WL 7980905 (6th Cir. Oct. 14, 2022). Although it is common knowledge among drug traffickers that most fake pills contain fentanyl, in practice, Department prosecutors have reported that it is difficult to prove that the defendant knew that the specific pills that they trafficked contained fentanyl, as required for the enhancement, because defendants often claim that they do not know that the pills contain fentanyl, and because traffickers use vague, coded language that makes it difficult to establish that the defendant was discussing fentanyl.

To reflect that reality, the Department recommends that the *mens rea* requirement take the form of a rebuttable presumption. That is, the enhancement would apply presumptively, but a defendant would be permitted to prove that he lacked actual or constructive knowledge, with the defendant bearing the burden of such proof. Such a rebuttable presumption would properly reflect the fact that illegal drug traffickers should know that there is an extremely high probability that the black-market pills they are selling contain deadly fentanyl, and that any proof that the defendant was not (and could not have been) aware of the fact that the pill contains fentanyl lies primarily with the defendant. We thus suggest that any enhancement apply "unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl or a fentanyl analogue."

B. If the Commission Proceeds With a "Reason to Believe" Standard, it Should Define the Term in the Guidelines

If the Commission does adopt a "reason to believe" standard, it would be helpful to define the term. Although the phrase "[r]eason to believe" appears elsewhere in the Guidelines, for example in §2K2.1, it is not defined, and it has arguably been interpreted differently in different contexts. *See United States v. McKenzie*, 33 F.4th 343, 345 (6th Cir. 2022) (discussing meaning of phrase "reason to believe" in the context of the straw-purchaser enhancement). Thus, to avoid inconsistent interpretations, it would be helpful for the Commission to define the term.

One option would be to define the term to require specific and articulable facts, combined with reasonable and common-sense inferences from those facts, that provide an objective basis for believing that the pills are not legitimately manufactured. The Commission could articulate some specific factors that courts should consider when making this evaluation, including the facts and circumstances surrounding the transaction, the price of the pills, the quantity involved, the involvement (or not) of a physician or pharmacist in the transaction, the existence of a written prescription, standard dosage amounts, and other factors that would suggest that the pills were not actually a legitimately manufactured drug. The Commission could also make clear that "reason to believe" standard is not higher than probable cause.

[87] U.S. Dept. of Just., Criminal Division, Office of Policy and Legislation, analysis of USSC Data file.

C. Misrepresentation

The Department also recommends that the Commission consider amending the marketing requirement of both the current enhancement and the newly proposed enhancement. Both require proof related to the defendant's marketing of or representations about the drug involved in the offense. Unfortunately, this formulation does not reflect the reality of the synthetic opioid crisis. As noted above, it is "fake pills" that are driving overdose deaths in America. The market is flooded with pills that appear to be legitimate prescription drugs, either because they have markings that are extremely similar to the markings of a legitimate prescription drug, or—more commonly—because they have markings that are similar enough to legitimate markings to confuse consumers, but do not perfectly match the legitimate pills. Thus, for example, legitimate 30 milligram oxycodone pills are generally blue, with the marking "M 30"; counterfeit pills might have the same "M 30" marking but be rainbow in color. A defendant selling such rainbow-colored pills might not be considered to be "represent[ing] or market[ing]" the pills "as a legitimately manufactured drug." But consumers purchasing the rainbow-colored pills (or even pills without specific markings) might nonetheless reasonably believe that they are purchasing a relatively safe substance produced in a quality-controlled environment, when in fact they are buying fake pills that are very likely to be laced with fentanyl and may contain a lethal dose.

Moreover, as written, the enhancement might apply more regularly to a street-level dealer who dupes a customer about the identity of the drug, rather than to the high-level traffickers who distribute fake pills without making any representations about their content. In the Department's view, the higher-level traffickers who distribute these deadly pills are equally if not more culpable than the street-level dealer and should be subject to the same enhancement. Finally, a defendant convicted of possessing a large quantity of fake pills, with intent to distribute, may not be subject to any enhancement if the government cannot establish that the defendant has yet affirmatively marketed or misrepresented the drugs.

To address those concerns, we recommend that, instead of applying only when the defendant "represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue," the enhancement apply when "the offense involved a substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact another mixture or substance containing fentanyl or a fentanyl analogue."

D. Section 2D1.1(b)(13) Should be Broadened

Finally, the Commission asks whether (b)(13) should be broadened beyond fentanyl and fentanyl analogues to include synthetic opioids. Although the vast majority of fake pills encountered by the DEA contain fentanyl, the DEA has seen an increasing number of fake Xanax pills (3,000 in the last three years) containing Protonitazene and Metonitazene, both of which are nitazenes, a class of synthetic opioids (benzimidazole-opioids) which may be more potent than fentanyl. The DEA has encountered other synthetic opioids (besides fentanyl and fentanyl analogues) in pills, including Isotonitazene, N-Pyrrolidino Etonitazene, Tapentadol, Etodesnitazene, U-47700, and Flunitazene. The DEA has also encountered fake pills containing xylazine, a non-opioid sedative commonly used in veterinary medicine, and for which overdose

is usually fatal in humans. And the DEA regularly encounters fake pills containing methamphetamine, usually marked AD 10, for Adderall.

But the most critical data point on which the Commission should base its decision is the CDC estimate that during the 12 months ending in August of 2022, there were 73,102 fatal overdoses due to synthetic opioids.[88] To address this crisis head-on, we urge the Commission to expand (b)(13) to include all synthetic opioids. If, however, the Commission elects to focus on fentanyl and fentanyl analogues for the time being, we ask that the Commission monitor the situation during the next amendment cycle, and propose additional changes if appropriate, given updated and available scientific data on overdose deaths and synthetic opioids, and possibly other substances found in pills associated with deadly overdoses.

Below we have provided recommended Guidelines language (new language in underline) consistent with the discussion and our recommendations above. Once again, we welcome the opportunity to continue engaging with the Commission as it considers appropriate changes to the Guidelines.

> (13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels<u>; or (B) If the offense involved an illicitly-manufactured substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide), a fentanyl analogue, or a synthetic opioid, increase by 2 levels, unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl, a fentanyl analogue, or a synthetic opioid.</u>

The commentary could also make clear that in assessing whether a mixture or substance would appear to a reasonable person to be legitimately manufactured, the court may consider any relevant evidence, including but not limited to the form of the mixture/substance (such as a tablet or capsule), the manner in which the drug was marked, labelled or packaged, or any statements or representations made by the defendant or others about the mixture or substance. The commentary could also make clear that the lack of markings or poor-quality markings would not preclude the applicability of this enhancement.

[88] SAMSA, *supra*.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together.

Sincerely,

Jonathan J. Wroblewski

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel